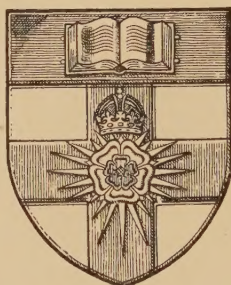


**THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY**

UNIVERSITY OF LONDON LIBRARY



UNIVERSITY OF LONDON
LIBRARY

15 MAY 1991

WITH A VIEW TO THE
PRESERVATION OF THE
LIBRARY OF THE
UNIVERSITY OF LONDON



Digitized by the Internet Archive
in 2026

THE ALL ENGLAND LAW REPORTS

Incorporating the

LAW TIMES
REPORTS

LAW JOURNAL
REPORTS

1959
VOLUME 3

Consulting Editor
for Chancery Cases

HAROLD CHRISTIE, Q.C.

Bencher of Lincoln's Inn

Consulting Editor
for Taxation Cases

CYRIL KING, Q.C.

Bencher of the Middle Temple

Editor

J. T. EDGERLEY

of the Inner Temple and Lincoln's Inn, Barrister-at-Law

LONDON

BUTTERWORTH & CO. (PUBLISHERS) LTD.



©

Butterworths Publications Ltd.

1959

Printed in Great Britain by R. J. ACFORD LTD., Industrial Estate, Chichester, Sussex.

HOUSE OF LORDS

THE LORD HIGH CHANCELLOR OF GREAT BRITAIN: THE RT. HON. VISCOUNT KILMUIR

LORDS OF APPEAL IN ORDINARY

THE RT. HON. VISCOUNT SIMONDS

THE RT. HON. LORD KEITH OF

THE RT. HON. LORD REID

AVONHOLM

THE RT. HON. LORD RADCLIFFE

THE RT. HON. LORD SOMERVELL

THE RT. HON. LORD TUCKER

OF HARROW

THE RT. HON. LORD COHEN

THE RT. HON. LORD DENNING

THE RT. HON. LORD JENKINS

COURT OF APPEAL

THE LORD HIGH CHANCELLOR OF GREAT BRITAIN

LORD CHIEF JUSTICE OF ENGLAND: THE RT. HON. LORD PARKER

MASTER OF THE ROLLS: THE RT. HON. LORD EVERSHERD

PRESIDENT OF THE PROBATE, DIVORCE AND ADMIRALTY DIVISION: THE RT. HON.

LORD MERRIMAN

THE RT. HON. LORD JUSTICE HODSON

THE RT. HON. LORD JUSTICE ORMEROD

THE RT. HON. LORD JUSTICE MORRIS

THE RT. HON. LORD JUSTICE PEARCE

THE RT. HON. LORD JUSTICE ROMER

THE RT. HON. LORD JUSTICE WILLMER

THE RT. HON. LORD JUSTICE SELLERS

THE RT. HON. LORD JUSTICE HARMAN

CHANCERY DIVISION

THE LORD HIGH CHANCELLOR OF GREAT BRITAIN

THE HON. MR. JUSTICE VAISEY

THE HON. MR. JUSTICE DANCKWERTS

THE HON. MR. JUSTICE ROXBURGH

THE HON. MR. JUSTICE LLOYD-JACOB

THE HON. MR. JUSTICE WYNN-PARRY

THE HON. MR. JUSTICE UPJOHN

QUEEN'S BENCH DIVISION

LORD CHIEF JUSTICE OF ENGLAND: THE RT. HON. LORD PARKER

THE HON. MR. JUSTICE HILBERY

THE HON. MR. JUSTICE McNAIR

THE HON. MR. JUSTICE STABLE

THE HON. MR. JUSTICE HAVERS

THE HON. MR. JUSTICE CASSELS

THE HON. MR. JUSTICE PEARSON

THE HON. MR. JUSTICE PILCHER

THE HON. MR. JUSTICE DAVIES

THE HON. MR. JUSTICE JONES

THE HON. MR. JUSTICE GLYN-JONES

THE HON. MR. JUSTICE BYRNE

THE HON. MR. JUSTICE ASHWORTH

THE HON. MR. JUSTICE FINNEMORE

THE HON. MR. JUSTICE DIPLOCK

THE HON. MR. JUSTICE STREATFEILD

THE HON. MR. JUSTICE HINCHCLIFFE

THE HON. MR. JUSTICE SLADE

THE HON. MR. JUSTICE PAULL

THE HON. MR. JUSTICE DEVLIN

THE HON. MR. JUSTICE SALMON

THE HON. MR. JUSTICE GORMAN

THE HON. MR. JUSTICE EDMUND DAVIES

THE HON. MR. JUSTICE BARRY

THE HON. MR. JUSTICE ELWES

THE HON. MR. JUSTICE DONOVAN

THE HON. MR. JUSTICE THESIGER

THE HON. MR. JUSTICE WINN

PROBATE, DIVORCE AND ADMIRALTY DIVISION

PRESIDENT: THE RT. HON. LORD MERRIMAN

THE HON. MR. JUSTICE WALLINGTON

THE HON. MR. JUSTICE STEVENSON

THE HON. MR. JUSTICE COLLINGWOOD

THE HON. MR. JUSTICE WRANGHAM

THE HON. MR. JUSTICE KARMINSKI

THE HON. MR. JUSTICE HEWSON

THE HON. MR. JUSTICE SACHS

THE HON. MR. JUSTICE MARSHALL

THE HON. MR. JUSTICE PHILLIMORE

REPORTERS

HOUSE OF LORDS	G. A. KIDNER, Esq.	Barrister-at-Law
PRIVY COUNCIL	G. A. KIDNER, Esq.	Barrister-at-Law
COURT OF APPEAL, No. 1	F. GUTTMAN, Esq.	Barrister-at-Law
COURT OF APPEAL, No. 2	HENRY SUMMERFIELD, Esq.	Barrister-at-Law
COURT OF APPEAL, No. 3	F. A. AMIES, Esq.	Barrister-at-Law
COURT OF APPEAL, No. 4	F. GUTTMAN, Esq.	Barrister-at-Law
COURT OF CRIMINAL APPEAL	{ N. P. METCALFE, Esq. KEVIN WINSTAIN, Esq. }	Barristers-at-Law
COURTS-MARTIAL APPEALS	KEVIN WINSTAIN, Esq.	Barrister-at-Law
CHANCERY DIVISION	{ R. D. H. OSBORNE, Esq. E. COCKBURN MILLAR }	Barristers-at-Law
QUEEN'S BENCH DIVISION and COURTS OF ASSIZE	{ M. DENISE CHORLTON K. B. EDWARDS, Esq. F. GUTTMAN, Esq. D. M. HUGHES, Esq. G. A. KIDNER, Esq. GWYNEDD LEWIS DEIRDRE MCKINNEY E. COCKBURN MILLAR WENDY SHOCKETT G. M. SMAILES, Esq. HENRY SUMMERFIELD, Esq. }	Barristers-at-Law
REVENUE CASES	F. A. AMIES, Esq.	Barrister-at-Law
PROBATE, DIVORCE AND ADMIRALTY	{ A. T. HOOLAHAN, Esq. N. P. METCALFE, Esq. }	Barristers-at-Law
RESTRICTIVE PRACTICES COURT	G. A. KIDNER, Esq.	Barrister-at-Law
ECCLESIASTICAL CASES	A. T. HOOLAHAN, Esq.	Barrister-at-Law

CITATION

These reports are cited thus:

[1959] 3 All E.R.

REFERENCES

These reports contain references, which follow after the headnotes, to the following major works of legal reference described in the manner indicated below—

HALSBURY'S LAWS OF ENGLAND, SIMONDS EDITION

The reference 2 HALSBURY'S LAWS (3rd Edn.) 20, para. 48, refers to paragraph 48 on page 20 of Volume 2 of the third edition of Halsbury's Laws of England, of which Viscount Simonds is Editor-in-Chief.

HALSBURY'S LAWS OF ENGLAND, HAILSHAM EDITION

The reference 34 HALSBURY'S LAWS (2nd Edn.) 30, para. 26, refers to paragraph 26 on page 30 of Volume 34 of the second edition of Halsbury's Laws of England, of which Viscount Hailsham was Editor-in-Chief.

HALSBURY'S STATUTES OF ENGLAND, SECOND EDITION

The reference 26 HALSBURY'S STATUTES (2nd Edn.) 138, refers to page 138 of Volume 26 of the second edition of Halsbury's Statutes.

ENGLISH AND EMPIRE DIGEST

The reference 24 DIGEST 602, 6028, refers to case No. 6028 on page 602 of Volume 24 of the Digest.

There are three cumulative supplements to the Digest, described as Digest Supp., 2nd Digest Supp. and 3rd Digest Supp.; of these the first two include cases up to December 31, 1939, and December 31, 1951, respectively.

The reference 31 DIGEST (Repl.) 244, 3794, refers to case No. 3794 on page 244 of Digest Replacement Volume 31.

HALSBURY'S STATUTORY INSTRUMENTS

The reference 12 HALSBURY'S STATUTORY INSTRUMENTS 124, refers to page 124 of Volume 12 of Halsbury's Statutory Instruments, first edition.

A reference to a volume as "1st Re-issue" refers to the first re-issue of the appropriate volume of Halsbury's Statutory Instruments.

ENCYCLOPAEDIA OF FORMS AND PRECEDENTS, THIRD EDITION

The reference 15 ENCY. FORMS & PRECEDENTS (3rd Edn.) 938, Form 231, refers to Form 231 on page 938 of Volume 15 of the third edition of the Encyclopaedia of Forms and Precedents.

CASES REPORTED IN VOLUME 3

	PAGE		PAGE
ABBOTT v. PHILBIN (INSPECTOR OF TAXES) [C.A.]	590	DEVENISH v. P.D.I. HOMES (HYTHE), LTD. [C.A.]	843
ABERFOYLE PLANTATIONS, LTD. v. CHENG [P.C.]	910	DOUGLAS'S WILL TRUSTS, Re [C.A.]	785
ALLEN'S SETTLEMENT, Re [CH.D.]	673	EAGLE STAR INSURANCE CO., LTD., BARNET GROUP HOSPITAL MANAGEMENT COMMITTEE v. [Q.B.D.]	210
ANSORGE, <i>Ex parte</i> , R. v. BURNHAM JUSTICES [Q.B.D. DIVL. CT.]	505	EAST HAM CORPN. v. MINISTRY OF HOUSING AND LOCAL GOVERNMENT [CH.D.]	508
ASSOCIATED NEWSPAPERS, LTD., <i>Ex parte</i> [C.A.]	378	EDGERLEY, NEWTON v. [MANCHESTER ASSIZES]	337
ATTORNEY-GENERAL (ON THE RELATION OF THOMAS BROWNLEE FAISLEY) v. ST. IVES RURAL DISTRICT COUNCIL [Q.B.D.]	371	ELECTRIX, LTD. v. ELECTROLUX, LTD. [H.L.]	170
AUSTRALIAN MUTUAL PROVIDENT SOCIETY, OSTIME (INSPECTOR OF TAXES) v. [H.L.]	245	ELECTROLUX, LTD., ELECTRIX, LTD. v. [H.L.]	170
BAINBRIDGE, R. v. [C.C.A.]	200	ELLIOTT, FRENCH v. [Q.B.D.]	866
BAKER v. HOPKINS (T. E.) & SON, LTD. [C.A.]	225	ELLIOTT v. GREY [Q.B.D. DIVL. CT.]	733
BARBEY, CONTRACT & TRADING CO. (SOUTHERN), LTD., v. [H.L.]	846	ENDACOTT (<i>decd.</i>), Re [C.A.]	562
BARCLAYS BANK, LTD. v. INLAND REVENUE COMRS. [C.A.]	140	F. v. F. [Div.]	180
BARNET GROUP HOSPITAL MANAGEMENT COMMITTEE v. EAGLE STAR INSURANCE CO., LTD. [Q.B.D.]	210	FELL, WILTSHIRE v. [C.A.]	862
BENNETT (<i>decd.</i>), Re [CH.D.]	295	FILDES (FORMERLY SIMKIN) v. SIMKIN [Div.]	697
BHARAT, SON OF DORSAMY v. R. [P.C.]	292	FISHER v. FISHER [C.A.]	131
BOANGE, UDALAGAMA v. [P.C.]	403	FRANCIS v. FRANCIS [Div.]	206
BOLLINGER (J.) v. COSTA BRAVA WINE COMPANY, LTD. [CH.D.]	800	FREEMAN HARDY & WILLIS, LTD., LAWRENCE (FREDERICK), LTD. v. [C.A.]	77
BOLTON'S (HOUSE FURNISHERS) LTD. v. OPPENHEIM [C.A.]	90	FRENCH v. ELLIOTT [Q.B.D.]	866
BOOT (HENRY) & SONS, LTD., LONDON COUNTY COUNCIL v. [H.L.]	636	GARIBALDI SOCIETA CO-OPERATIVA DI NAVIGAZIONE A.R.L. v. PRESIDENT OF INDIA [Q.B.D.]	434
BOWER, GLADSTONE v. [Q.B.D.]	475	GHOSE, HIGH COMMISSIONER FOR INDIA v. [C.A.]	659
BRANCEPETH COAL CO., LTD. (IN LIQUIDATION) v. INLAND REVENUE COMRS. [H.L.]	703	GLADSTONE v. BOWER [Q.B.D.]	475
BULLOCK (INSPECTOR OF TAXES), UNIT CONSTRUCTION CO., LTD. v. [H.L.]	831	GRAHAM, KEATS v. [C.A.]	919
BURNHAM JUSTICES, R. v., <i>Ex parte</i> ANSORGE [Q.B.D. DIVL. CT.]	505	GRAINGER v. GRAINGER AND CLARK [Div. & C.A.]	51
CADDY, R. v. [C.-M.A.C.]	138	GREY, ELLIOTT v. [Q.B.D. DIVL. CT.]	733
CANE (VALUATION OFFICER), LONDON LIBRARY v. [C.A.]	726	GREY v. INLAND REVENUE COMRS. [H.L.]	603
CAPE OF GOOD HOPE MOTORSHIP CO., LTD. v. MINISTRY OF AGRICULTURE, FISHERIES AND FOOD [Q.B.D.]	434	H. (an infant), Re [CH.D.]	746
CARLTON STEAMSHIP CO., LTD. v. MINISTRY OF AGRICULTURE, FISHERIES AND FOOD [Q.B.D.]	434	HANCOCK v. PRISON COMMISSIONERS (VACATION COURT)	513
CARO (INSPECTOR OF TAXES), IMPERIAL CHEMICAL INDUSTRIES, LTD. v. [CH.D.]	750	HANOVER v. HANOVER [Div.]	854
CASSIDY v. CASSIDY [Div.]	187	HARRIS v. YARM [CH.D.]	618
CAUTER'S CHARGE, Re [CH.D.]	669	HASTINGS (No. 3), Re [C.A.]	221
CENTRAL ELECTRICITY GENERATING BOARD v. JENNAWAY [CH.D.]	409	HAZELDINE v. MINISTER OF HOUSING AND LOCAL GOVERNMENT [C.A.]	693
CEYLON (GOVERNMENT OF), SOCIÉTÉ FRANCO-TUNISIENNE D'ARMEMENT-TUNIS v. [C.A.]	25	HEBRIDEAN COAST, THE [ADM.]	126
CHENG, ABERFOYLE PLANTATIONS, LTD. v. [P.C.]	910	HENNING (VALUATION OFFICER), SOLE v. [C.A.]	398
CHESTER RURAL DISTRICT COUNCIL, NORTH OF ENGLAND ZOOLOGICAL SOCIETY v. [C.A.]	116	HIGH COMMISSIONER FOR INDIA v. GHOSH [C.A.]	659
CHING GARAGE, LTD. v. CHINGFORD CORPN. [Q.B.D.]	175	HILL (OTHERWISE PETCHY) v. HILL [Div.]	754
CHINGFORD CORPN., CHING GARAGE, LTD. v. [Q.B.D.]	175	HINCHLIFE, SALES-MATIC, LTD. v. [Q.B.D. DIVL. CT.]	401
CLARK, GRAINGER AND, GRAINGER v. [Div. & C.A.]	51	HINTON (INSPECTOR OF TAXES) v. MADEN & IRELAND, LTD. [H.L.]	356
CLITHEROE'S SETTLEMENT TRUSTS, Re [CH.D.]	789	HIRTENSTEIN, MITCHELL (INSPECTOR OF TAXES) v. [CH.D.]	341
COHEN (<i>decd.</i>), Re [CH.D.]	740	HOBBS v. HOBBS AND COUSENS [Div.]	827
COHEN'S WILL TRUSTS, Re [CH.D.]	523	HOCSTRASSER (INSPECTOR OF TAXES) v. MAYES [H.L.]	817
COLCO DEALINGS, LTD., INLAND REVENUE COMRS. v. [CH.D.]	351	HOPKINS (T. E.) & SON, LTD., BAKER v. [C.A.]	225
CONTRACT & TRADING CO. (SOUTHERN), LTD. v. BARBEY [H.L.]	846	HOPKINS (T. E.) & SON, LTD., WARD v. [C.A.]	225
COOK v. "X" CHAIR PATENTS CO., LTD. [CH.D.]	906	HOURY v. COMMISSIONER OF INCOME TAX [P.C.]	781
COSTA BRAVA WINE COMPANY, LTD., BOLLINGER (J.) v. [CH.D.]	800	HUBBLE, <i>Ex parte</i> , R. v. MEDICAL APPEAL TRIBUNAL (NORTH MIDLAND REGION) [C.A.]	40
COUSENS, HOBBS AND, HOBBS v. [Div.]	827	HUDSON'S BAY CO. v. THOMPSON (VALUATION OFFICER) [H.L.]	150
CRESTA HOLDINGS, LTD. v. KARLIN [C.A.]	656	IMPERIAL CHEMICAL INDUSTRIES, LTD. v. CARO (INSPECTOR OF TAXES) [CH.D.]	750
DAINGERFIELD, R. v. [C.C.A.]	88	IMPERIAL TOBACCO CO. (OF GREAT BRITAIN AND IRELAND), LTD. v. PIERSON (VALUATION OFFICER) [C.A.]	313
DAVIS, SHARMA AND, SHARMA v. [C.A.]	321	INCOME TAX COMMISSIONER, HOURY v. [P.C.]	781
DAWSON, SCHNEIDER v. [Q.B.D. DIVL. CT.]	583	INDIA (PRESIDENT OF), GARIBALDI SOCIETA CO-OPERATIVA DI NAVIGAZIONE A.R.L. v. [Q.B.D.]	434
DE MARE, AKERHIELM v. [P.C.]	485	INDIA (HIGH COMMISSIONER FOR) v. GHOSH [C.A.]	659

	PAGE		PAGE
INLAND REVENUE COMRS., OUGHTRED <i>v.</i> [H.L.]	623	PATCH <i>v.</i> UNITED BRISTOL HOSPITALS BOARD [BRISTOL ASSIZES]	876
INLAND REVENUE COMRS., PHILIPSON-STOW <i>v.</i> [C.A.]	879	PHILBIN (INSPECTOR OF TAXES), ABBOTT <i>v.</i> [C.A.]	590
INLAND REVENUE COMRS., RACECOURSE BETTING CONTROL BOARD <i>v.</i> [H.L.]	215	PHILIPSON-STOW <i>v.</i> INLAND REVENUE COMRS. [C.A.]	879
INLAND REVENUE COMRS., RAMSHAW COAL CO., LTD. (IN LIQUIDATION) <i>v.</i> [H.L.]	703	PIERSON (VALUATION OFFICER), IMPERIAL TOBACCO CO. (OF GREAT BRITAIN AND IRELAND), LTD. <i>v.</i> [C.A.]	313
INLAND REVENUE COMRS., WHITWORTH PARK COAL CO., LTD. (IN LIQUIDATION) <i>v.</i> [H.L.]	703	PODOLA, R. <i>v.</i> [C.C.C. & C.C.A.]	418
J.S. (AN INFANT), Re [Ch.D.]	856	PONOKA-CALMAR OILS, LTD. <i>v.</i> WAKEFIELD (EARL F.) CO. [P.C.]	571
JAY & JAY (PROVISIONS) CO., LTD., MOUNT (D. F.), LTD. <i>v.</i> [Q.B.D.]	307	PRACTICE DIRECTION (CHILDREN: JUDGE NOT SATISFIED AT HEARING AS TO ARRANGEMENTS) [Div.]	862
JENNAPAW, CENTRAL ELECTRICITY GENERATING BOARD <i>v.</i> [Ch.D.]	409	PRACTICE DIRECTION (COSTS: ACQUITTAL: DISCRETION) [C.A.]	471
JOSEPH'S WILL TRUSTS, Re [Ch.D.]	474	PRACTICE DIRECTION (LISTS: APPLICATIONS TO JUDGE IN CHAMBERS) [Q.B.D.]	97
KARLIN, CRESTA HOLDINGS, LTD. <i>v.</i> [C.A.]	656	PRACTICE NOTE (CUSTODY: REFERENCE TO WELFARE OFFICER) [Div.]	780
KEATS <i>v.</i> GRAHAM [C.A.]	919	PRACTICE NOTE (TITLE OF PROCEEDINGS UNDER TRUSTEE ACT, 1925) [CT. OF PROTECTION]	320
KENSINGTON BOROUGH COUNCIL <i>v.</i> WALTERS (Q.B.D. DIVL. CT.)	652	PRACTICE NOTE (VARIATION OF TRUSTS BY THE COURT) [Ch.D.]	673
KRAWITZ'S WILL TRUSTS, Re [Ch.D.]	793	PRACTICE NOTE (VARIATION OF TRUSTS BY THE COURT: PERSON OF UNSOUND MIND) [CT. OF PROTECTION]	897
LAMBETH METROPOLITAN BOROUGH COUNCIL, SLEAFER <i>v.</i> [C.A.]	378	PRICES TAILORS, LTD., STYLO SHOES, LTD. <i>v.</i> [Ch.D.]	901
LANG <i>v.</i> LONDON TRANSPORT EXECUTIVE [Q.B.D.]	609	PRISON COMMISSIONERS, HANCOCK <i>v.</i> [VACATION COURT]	513
LAWRENCE (FREDERICK) LTD. <i>v.</i> FREEMAN HARDY & WILLIS, LTD. [C.A.]	77	PYX GRANITE CO., LTD. <i>v.</i> MINISTRY OF HOUSING AND LOCAL GOVERNMENT [H.L.]	1
LAYTON <i>v.</i> SHIRES (Q.B.D. DIVL. CT.)	587	R. <i>v.</i> BAINBRIDGE [C.A.]	200
LESLIE <i>v.</i> LIVERPOOL CORPN. [C.A.]	898	R., BHARAT, SON OF DORSAMY, <i>v.</i> [P.C.]	292
LILLEY <i>v.</i> LILLEY [C.A.]	283	R. <i>v.</i> BURNHAM JUSTICES. <i>Ex parte</i> ANSORGE (Q.B.D. DIVL. CT.)	505
LILLEY (TRADING AS G. & L. MOTORS), MORRIS MOTORS, LTD. <i>v.</i> [Ch.D.]	737	R. <i>v.</i> CADDY (C.-M.A.C.)	138
LIVERPOOL CORPN., LESLIE <i>v.</i> [C.A.]	898	R. <i>v.</i> DANGERFIELD [C.C.A.]	88
LONDON COUNTY COUNCIL <i>v.</i> BOOT (HENRY) & SONS, LTD. [H.L.]	636	R. <i>v.</i> LONG [C.C.A.]	559
LONDON LIBRARY <i>v.</i> CANE (VALUATION OFFICER) [C.A.]	726	R. <i>v.</i> MEDICAL APPEAL TRIBUNAL (NORTH MIDLAND REGION), <i>Ex parte</i> HUBBLE [C.A.]	40
LONDON TRANSPORT EXECUTIVE, LANG <i>v.</i> [Q.B.D.]	609	R. <i>v.</i> MORDANAM [C.C.A.]	875
LONG, R. <i>v.</i> [C.C.A.]	559	R. <i>v.</i> PODOLA [C.C.C. & C.C.A.]	418
LONSDALE'S WILL TRUSTS, Re [C.A.]	679	R. <i>v.</i> SANSBURY [SOMERSET ASSIZES]	472
MCCLELLAND, SPYROPOULOS <i>v.</i> [C.A.]	319	R. <i>v.</i> STALLY [C.C.A.]	814
MADEN & IRELAND, LTD., HINTON (INSPECTOR OF TAXES) <i>v.</i> [H.L.]	356	R. <i>v.</i> THOMAS [C.C.A.]	522
MARSHALL, MITCHELL (INSPECTOR OF TAXES) <i>v.</i> [Ch.D.]	341	R. <i>v.</i> WALDEN [C.C.A.]	203
MAYES, HOCHSTRASSER (INSPECTOR OF TAXES) <i>v.</i> [H.L.]	817	RACECOURSE BETTING CONTROL BOARD <i>v.</i> INLAND REVENUE COMRS. [H.L.]	215
MEDICAL APPEAL TRIBUNAL (NORTH MIDLAND REGION), R. <i>v.</i> <i>Ex parte</i> HUBBLE [C.A.]	40	RACECOURSE BETTING CONTROL BOARD <i>v.</i> YOUNG (INSPECTOR OF TAXES) [H.L.]	215
MINISTER OF HOUSING AND LOCAL GOVERNMENT, HAZELDINE <i>v.</i> [C.A.]	693	RAMBLER CYCLE CO., LTD., SZE HAI TONG BANK, LTD. <i>v.</i> [P.C.]	182
MINISTRY OF AGRICULTURE, FISHERIES AND FOOD, CAPE OF GOOD HOPE MOTORSHIP CO., LTD. <i>v.</i> [Q.B.D.]	434	RAMSHAW COAL CO., LTD. (IN LIQUIDATION) <i>v.</i> INLAND REVENUE COMRS. [H.L.]	703
MINISTRY OF AGRICULTURE, FISHERIES AND FOOD, CARLTON STEAMSHIP CO., LTD. <i>v.</i> [Q.B.D.]	434	REARDON SMITH LINE, LTD. <i>v.</i> MINISTRY OF AGRICULTURE, FISHERIES AND FOOD [Q.B.D.]	434
MINISTRY OF AGRICULTURE FISHERIES AND FOOD, REARDON SMITH LINE, LTD. <i>v.</i> [Q.B.D.]	434	RIORDAN <i>v.</i> WAR OFFICE [Q.B.D.]	552
MINISTRY OF HOUSING AND LOCAL GOVERNMENT, EAST HAM CORPN. <i>v.</i> [Ch.D.]	508	ROSS, MITCHELL (INSPECTOR OF TAXES) <i>v.</i> [Ch.D.]	341
MINISTRY OF HOUSING AND LOCAL GOVERNMENT, PYX GRANITE CO., LTD. <i>v.</i> [H.L.]	1	ROYAL COLLEGE OF NURSING <i>v.</i> ST. MARYLEBONE CORPN. [C.A.]	663
MIRAMAR COMPANIA NAVIERA S.A. <i>v.</i> GOVERNMENT OF THE UNION OF SOUTH AFRICA [Q.B.D.]	434	ROYCE'S WILL TRUSTS, Re [C.A.]	278
MITCHELL (INSPECTOR OF TAXES) <i>v.</i> HIRTENSTEIN [Ch.D.]	341	RUSHTON <i>v.</i> TURNER BROTHERS ASBESTOS CO., LTD. [MANCHESTER ASSIZES]	517
MITCHELL (INSPECTOR OF TAXES) <i>v.</i> MARSHALL [Ch.D.]	341	ST. IVES RURAL DISTRICT COUNCIL, ATTORNEY-GENERAL (ON THE RELATION OF THOMAS BROWNLEE PAISLEY) <i>v.</i> [Q.B.D.]	371
MITCHELL (INSPECTOR OF TAXES) <i>v.</i> ROSS [Ch.D.]	341	ST. MARTIN'S THEATRE, Re [Ch.D.]	298
MORDANAM, R. <i>v.</i> [C.C.A.]	875	ST. MARYLEBONE CORPN., ROYAL COLLEGE OF NURSING <i>v.</i> [C.A.]	663
MORITZ (<i>dec'd.</i>), Re [Ch.D.]	767	ST. SWITHIN'S PARISH, NORWICH, Re [NORWICH CONSISTORY COURT]	301
MORRIS MOTORS, LTD. <i>v.</i> LILLEY (TRADING AS G. & L. MOTORS) [Ch.D.]	737	SALES-MATIC, LTD. <i>v.</i> HINCHLIFFE [Q.B.D. DIVL. CT.]	401
MOUNT (D. F.) LTD. <i>v.</i> JAY & JAY (PROVISIONS) CO., LTD. [Q.B.D.]	307	SANSBURY, R. <i>v.</i> [SOMERSET ASSIZES]	472
MUSIAL, SCOTT <i>v.</i> [C.A.]	193	SCHNEIDER <i>v.</i> DAWSON [Q.B.D. DIVL. CT.]	583
MWENYA, Re [C.A. & Q.B.D.]	525	SCOTT <i>v.</i> MUSIAL [C.A.]	193
NARCISSI <i>v.</i> WOLFE [Ch.D.]	71	SCOTTISH ASSOCIATION OF MASTER BAKERS' AGREEMENT, Re [R.P.C.]	98
NATIONAL COAL BOARD, Re AN APPLICATION OF [Ch.D.]	58	SEARS, SUTTON <i>v.</i> [Q.B.D.]	545
NEWTON <i>v.</i> EDGERLEY [MANCHESTER ASSIZES]	337	SHARMA <i>v.</i> SHARMA AND DAVIS [C.A.]	321
NORTH OF ENGLAND ZOOLOGICAL SOCIETY <i>v.</i> CHESTER RURAL DISTRICT COUNCIL [C.A.]	116	SHIRES, LAYTON <i>v.</i> [Q.B.D. DIVL. CT.]	587
OPPENHEIM, BOLTON'S (HOUSE FURNISHERS), LTD. <i>v.</i> [C.A.]	90	SHUTER (No. 2), Re [Q.B.D. DIVL. CT.]	481
OSTREE (INSPECTOR OF TAXES) <i>v.</i> AUSTRALIAN MUTUAL PROVIDENT SOCIETY [H.L.]	245	SILVESTER <i>v.</i> OSTROWSKA [Q.B.D.]	642
OSTROWSKA, SILVESTER <i>v.</i> [Q.B.D.]	642	SLEAFER <i>v.</i> LAMBETH METROPOLITAN BOROUGH COUNCIL [C.A.]	378
OUGHTRED <i>v.</i> INLAND REVENUE COMRS. [H.L.]	623	SOCIÉTÉ FRANCO-TUNISIENNE D'ARMEMENT-TUNIS <i>v.</i> GOVERNMENT OF CEYLON [C.A.]	25
P.D.I. HOMES (HYTHE), LTD., DEVENISH <i>v.</i> [C.A.]	843	SOLE <i>v.</i> HENNING (VALUATION OFFICER) [C.A.]	398
		SOUTH AFRICA (GOVERNMENT OF THE UNION OF), MIRAMAR COMPANIA NAVIERA S.A. <i>v.</i> [Q.B.D.]	434

	PAGE		PAGE
SPYROPOULOS v. McCLELLAND [C.A.] ..	319	WAKEFIELD (EARL F.) Co., PONOKA-CALMAR	
STALLY, R. v. [C.C.A.] ..	814	OILS, LTD. v. [P.C.] ..	571
STIRLAND v. STIRLAND [Div.] ..	891	WALDEN, R. v. [C.C.A.] ..	203
STYLO SHOES, LTD. v. PRICES TAILORS, LTD.		WALKDEN SHEET METAL Co., LTD., Re [CH.D.]	333
[CH.D.] ..	901	WALTERS, KENSINGTON BOROUGH COUNCIL v.	
SUTTON v. SEARS [Q.B.D.] ..	545	[Q.B.D. DIVL. CT.] ..	652
SWANSEA CORPN., WORKING MEN'S CLUB AND		WAR OFFICE, RIORDAN v. [Q.B.D.] ..	552
INSTITUTE UNION, LTD. v. [C.A.] ..	769	WARD v. HOPKINS (T. E.) & SON, LTD. [C.A.]..	225
SZE HAI TONG BANK, LTD. v. RAMBLER CYCLE		WATER-TUBE BOILERMAKERS' ASSOCIATION'S	
Co., LTD. [P.C.] ..	182	AGREEMENT, Re [R.P.C.] ..	257
TARNESBY, TAYLOR-GOOPY (INSPECTOR OF		WHITWORTH PARK COAL Co., LTD. (IN LIQUID-	
TAXES) v. [CH.D.] ..	341	ATION) v. INLAND REVENUE COMRS. [H.L.]..	703
TAYLOR-GOOPY (INSPECTOR OF TAXES) v. DREW		WHOLESALE AND RETAIL BAKERS OF SCOTLAND	
[CH.D.] ..	341	ASSOCIATION'S AGREEMENT, Re [R.P.C.] ..	98
TAYLOR-GOOPY (INSPECTOR OF TAXES) v. TAR-		WHYSALL v. WHYSALL (BY HER GUARDIAN)	
NESBY [CH.D.] ..	341	[Div.] ..	389
THOMAS, R. v. [C.C.A.] ..	522	WILSON v. WREXHAM CORPN. [Q.B.D. DIVL.	
THOMPSON (VALUATION OFFICER), HUDSON'S		CT.] ..	674
BAY Co. v. [H.L.] ..	150	WILTSHIRE v. FELL [C.A.] ..	862
TREPCA MINES, LTD., Re [CH.D.] ..	798	WINSTONE v. WINSTONE [VACATION COURT] ..	580
TURNER BROTHERS ASBESTOS Co., LTD., RUSH-		WOLFE, NARCISSI v. [CH.D.] ..	71
TON v. [MANCHESTER ASSIZES] ..	517	WORKING MEN'S CLUB AND INSTITUTE UNION,	
UDALAGAMA v. BOANGE [P.C.] ..	403	LTD. v. SWANSEA CORPN. [C.A.] ..	769
UNITED BRISTOL HOSPITALS BOARD, PATCH v.		WREXHAM CORPN., WILSON v. [Q.B.D. DIVL.	
[BRISTOL ASSIZES] ..	876	CT.] ..	674
UNIT CONSTRUCTION Co., LTD. v. BULLOCK		"X" CHAIR PATENTS Co., LTD., COOK v. [CH.D.]	906
(INSPECTOR OF TAXES) [H.L.]..	831	YARM, HARRIS v. [CH.D.]..	618
VARE MOTORS, LTD., WAGMAN v. [C.A.] ..	326	YOUNG (INSPECTOR OF TAXES), RACECOURSE	
WAGMAN v. VARE MOTORS, LTD. [C.A.] ..	326	BETTING CONTROL BOARD v. [H.L.] ..	215

INDEX

	PAGE
ABANDONMENT	
Criminal appeal, of. <i>See</i> COURT-MARTIAL (Appeal).	
Resolution, of. <i>See</i> HIGHWAY (Street—Private street works—Resolution of local authority).	
ACCESSORY	
<i>See</i> CRIMINAL LAW.	
ADMINISTRATION OF ESTATES	
Abatement. <i>See</i> Devise, <i>post</i> .	
Devise—Abatement—Sale of certain properties specifically devised to meet liabilities of estate—Whether liabilities should be borne rateably by all specific devisees—Value for purposes of abatement [Re COHEN (dec'd.)]	740
Liability for discharge of mortgage. <i>See</i> Gift cum onere, <i>post</i>	
Gift cum onere—Real property mortgaged—Specific devise of part—Rest of mortgaged property forming part of residuary estate—Liability of devisee or residuary estate for mortgage moneys—Administration of Estates Act, 1925 (c. 23), s. 35 [Re COHEN (dec'd.)]	740
Mortgaged property. <i>See</i> Gift cum onere, <i>ante</i> .	
Specific devise. <i>See</i> Devise, <i>ante</i> .	
ADOPTION	
Appeal—Appeal from juvenile court—Practice—Note of evidence—Confidential reports to be supplied to judge—Adoption Act, 1958 (c. 5), s. 10—Adoption (Juvenile Court) Rules, 1959 (S.I. 1959 No. 504), r. 9 (2) [Re J.S. (AN INFANT)]	856
Court—Juvenile court—Constitution—Notice to justice to attend insufficient of itself to amount to ensuring attendance within Juvenile Courts (Constitution) Rules, 1954 (S.I. 1954 No. 1711), r. 11, cf. r. 12 (1), (3) [Re J.S. (AN INFANT)]	856
Reports—Disclosure of confidential reports—Parties not entitled to see reports save so far as court allowed—Adoption (Juvenile Courts) Rules, 1959 (S.I. 1959 No. 504), r. 9 (2) [Re J.S. (AN INFANT)]	856
ADVERTISEMENT	
Rating. <i>See</i> RATES (Advertising stations).	
AFFIDAVIT	
Exhibit. <i>See</i> DISCOVERY (Production of documents).	
AFFILIATION	
Order—Remission of arrears. <i>See</i> MAGISTRATES (Husband and wife—Maintenance order—Discharge—Date—Re-marriage of wife, after divorce, prior to date of complaint for discharge).	
AGRICULTURAL HOLDING	
<i>See</i> AGRICULTURE.	
AGRICULTURE	
Agricultural holding—Agreement to let land for fixed period of eighteen months—Whether land let for an interest less than a "tenancy from year to year"—Whether tenant entitled to benefit—Agricultural Holdings Act, 1948 (c. 63), s. 2 (1) [GLADSTONE v. BOWER]	475
Notice to quit—Notice stating reasons—Two notices—Second notice stating same reason as first and a new reason—Arbitration application by tenant in regard to first notice before delivery of second notice—Arbitration not yet determined—Whether second notice to quit was good as one reason was good and the other was bad—Whether operation of second notice was suspended pending determination of arbitration under the first—Agricultural Holdings Act, 1948 (c. 63), s. 24 (2) (d)—Agriculture (Control of Notices to Quit) Regulations, 1948 (S.I. 1948 No. 190), reg. 7 [FRENCH v. ELLIOTT]	866
Drainage. <i>See</i> LAND DRAINAGE (Repair of drains).	
ALBERTA	
<i>See</i> PRIVY COUNCIL (Canada).	
AMNESIA	
<i>See</i> CRIMINAL LAW (Trial—Plea—Fitness to plead).	
APPEAL	
County court, from. <i>See</i> COUNTY COURT.	
Court-martial, from. <i>See</i> COURT-MARTIAL.	
Criminal appeal. <i>See</i> CRIMINAL LAW.	
Jurisdiction of court—Habeas corpus—Appeal to Court of Appeal. <i>See</i> HABEAS CORPUS (Appeal).	
Juvenile court, from. <i>See</i> ADOPTION.	
ARBITRATION	
Award—Remission—Arbitrator's jurisdiction—Natural justice—New point taken by umpire but not made clear to parties—Power to determine point of law otherwise than as agreed by parties—Demurrage—Computation under charterparty [SOCIÉTÉ FRANCO-TUNISIENNE D'ARMEMENT-TUNIS v. GOVERNMENT OF CEYLON]	25
ASSAULT	
Aggravated—Husband and wife. <i>See</i> MAGISTRATES (Husband and wife).	
ASSESSMENT	
Rates, to. <i>See</i> RATES.	
ASSESSOR	
Criminal trial. <i>See</i> PRIVY COUNCIL (Fiji—Criminal law).	
ATTESTATION	
Will. <i>See</i> WILL.	
AWARD	
<i>See</i> ARBITRATION.	

- BENEFIT TO COMMUNITY**
Charitable object. *See* CHARITY.
- BILL OF EXCHANGE**
Exchange control. *See* CURRENCY CONTROL.
- BORSTAL TRAINING**
See QUARTER SESSIONS (Committal of offender to quarter sessions with view to borstal sentence).
- BREACH OF DUTY**
Statutory. *See* STATUTORY DUTY.
- BREAD**
Price restriction. *See* RESTRICTIVE TRADE PRACTICES (Reference).
- BUILDING CONTRACT**
Wages—*Rise and fall clause*—"Wage"—"Rates of wages"—*Weekly sums credited to each employee each week, payable as lump sum holiday money* [LONDON COUNTY COUNCIL *v.* HENRY BOOT & SONS, LTD.] 636
- BUSINESS PREMISES**
New tenancy. *See* LANDLORD AND TENANT (New tenancy).
- CANADA**
See PRIVY COUNCIL.
- CAPITAL MURDER**
See CRIMINAL LAW.
- CAUSATION**
See FACTORY (Dangerous machinery—Contributory negligence).
- CENTRAL OFFICE**
Inspection of filed documents. *See* INSPECTION (Document filed at central office).
- CERTIORARI**
Conviction—*Quashing*—*Plea of guilty*—*Two informations relating to same circumstances*—*Notice of plea of guilty referring to one information*—*Conviction on both informations*—*Magistrates' Courts Act, 1957 (c. 29), s. 1 (1)* [R. *v.* BURNHAM JUSTICES, *Ex parte* ANSORGE] 505
- CEYLON**
See PRIVY COUNCIL.
- CHAMBERS**
Queen's Bench Division. *See* PRACTICE.
- CHARGING ORDER**
Solicitor's costs, for. *See* SOLICITOR.
- CHARITY**
Benefit to community—*Nursing*—*Promotion of the "advance of nursing as a profession"*—*Incidental benefits to individuals*—*Objects of Royal College of Nursing*—*Rating and Valuation (Miscellaneous Provisions) Act, 1955 (c. 9), s. 8 (1) (a)* [ROYAL COLLEGE OF NURSING *v.* ST. MARYLEBONE CORPN.] 663
Ecclesiastical land—*Church and consecrated land*—*Whether rector held land on trusts within Settled Land Act, 1925 (c. 18), s. 29* [Re PARISH OF ST. SWITHIN, NORWICH] 301
Education—*Zoo*—*Zoological gardens* [NORTH OF ENGLAND ZOOLOGICAL SOCIETY *v.* CHESTER RURAL DISTRICT COUNCIL] 116
Parish council—*Whether activities charitable* [Re ENDACOTT (*dec.*)] 562
Scheme—*Investment*—*Extension of powers of investment*—*Evidence of stockbroker or expert* [Re ALLEN'S SETTLEMENT] 673
Jurisdiction—*Direct gift without any trust*—*Residuary gift to non-existent body*—*General charitable intention*—*Valid bequest to be applied in accordance with directions to be given under royal prerogative* [Re BENNETT (*dec.*)] 295
Uncertainty—*Memorial*—*Gift to parish council for purpose of providing some useful memorial to testator*—*Validity* [Re ENDACOTT (*dec.*)] 562
- CHARTERPARTY**
See SHIPPING.
- CHILD**
Care—*Divorce*—*Child committed to care of local authority*. *See* DIVORCE (Custody—Local authority).
Negligence—*Parent's liability*—*Firearms*—*Child allowed to have .410 gun* [NEWTON *v.* EDGERLEY] 337
- CHURCH**
Lease—*Whether rector has powers of tenant for life*. *See* ECCLESIASTICAL LAW (Lease).
- COAL MINING**
Nationalisation of industry—*Colliery company*—*Interim income*—*Income tax*—*Coal Industry Nationalisation Act, 1946 (c. 59), s. 22 (2), (3)*—*Coal Industry (No. 2) Act, 1949 (c. 79), s. 1 (2)* [WHITWORTH PARK COAL CO., LTD. (IN LIQUIDATION) *v.* INLAND REVENUE COMRS., RAMSHAW COAL CO., LTD. (IN LIQUIDATION) *v.* SAME, BRANCEPETH COAL CO., LTD. (IN LIQUIDATION) *v.* SAME] 703
Working facilities—*Subsidence*—*Application to work and to let down surface*—*Deep mining*—*Basis of compensation to surface owners*—*Compensation for consequential damage*—*Costs*—*Mines (Working Facilities and Support) Act, 1923 (c. 20), s. 6 (1), (5)*—*R.S.C., Ord. 54.0, r. 12* [Re AN APPLICATION OF THE NATIONAL COAL BOARD] 58
- COLLISION**
At sea. *See* SHIPPING.
- COMMITTAL**
Debt, for. *See* DEBT.
- COMPANY**
Execution against. *See* EXECUTION.
Foreign creditor—*Conduct of proceedings in person*. *See* PRACTICE (Conduct of proceedings).
Memorandum of association—*Object clauses*—*Distinction between objects and powers*—*Numerous objects set out*—*Determination of main objects by reference to evidence of company's activities* [NORTH OF ENGLAND ZOOLOGICAL SOCIETY *v.* CHESTER RURAL DISTRICT COUNCIL] 116

	PAGE
COMPANY—continued.	
Prospectus—Misrepresentation—Fraud—Belief in truth of representation as understood by representor [AKERHIELM v. DE MARE]	485
Shares—Valuation for estate duty. See ESTATE DUTY.	
Winding-up—Proof—Damages for wrongful dismissal—Whether claimant can elect to proceed by action [COOK v. "X" CHAIR PATENTS CO., LTD.]	906
Voluntary winding-up—Members' voluntary winding-up—Damages for wrongful dismissal claimed by employee—Whether action by employee stayed. See Winding-up—Proof, ante.	
COMPENSATION	
Requisitioned property. See REQUISITION.	
COMPETITION	
Unlawful competition. See PASSING OFF (Geographical name descriptive of particular district of France—Plaintiffs a class of producers within that district—"Spanish Champagne" used to describe wine produced in Spain).	
COMPULSORY PURCHASE	
Implied grant—Acquisition of right analogous to easement—Implied grant of additional right necessary for the enjoyment of the right acquired—Wayleave for electric transmission lines carrying right to erect supporting towers—Electricity (Supply) Act, 1919 (c. 100), s. 22 (1), as amended by Electricity Act, 1947 (c. 54), s. 57, Sch. 4, Part 1 [CENTRAL ELECTRICITY GENERATING BOARD v. JENNAWAY]	409
Police purposes—Housing for police—Whether land required for the "purpose of any of the functions of the police authority"—Police Act, 1946 (c. 46), s. 15, s. 5 (3) [HAZELDINE v. MINISTER OF HOUSING AND LOCAL GOVERNMENT]	693
CONDITION	
Contract—Conditional contract. See SALE OF LAND (Contract).	
Will, in. See WILL.	
CONFLICT OF LAWS	
Will—Proper law—Estate duty. See ESTATE DUTY (Passing of property—Foreign property).	
CONSISTORY COURT	
See ECCLESIASTICAL LAW.	
CONSTITUTIONAL LAW	
Foreign sovereign state—Immunity from suit—Counterclaim—Extent of waiver of immunity by sovereign state suing in High Court—Action for money lent—Counterclaim for damages for slander—Whether counterclaim maintainable [HIGH COMR. FOR INDIA v. GHOSH]	659
CONSULTANT	
Hospital—Income tax. See INCOME TAX (Deduction in computing profits—Expenses).	
CONTRACT	
Building. See BUILDING CONTRACT.	
Conditional contract. See SALE OF LAND.	
Exception clause—Charterparty. See SHIPPING (Charterparty—Construction—Exception).	
Shipping—Exemption of carriers from liability on goods being discharged from ship—Obligation for proper delivery—Construction of general exemption clauses [SZE HAI TONG BANK, LTD. v. RAMBLER CYCLE CO., LTD.]	182
Statute—Agreement confirmed by statute. See STATUTE.	
CONTRIBUTORY NEGLIGENCE	
See FACTORY (Dangerous machinery).	
CONVICTION	
See CERTIORARI.	
COSTS	
Charging order. See SOLICITOR (Charging order).	
Criminal cases. See CRIMINAL LAW.	
Divorce. See DIVORCE.	
Legal aid. See LEGAL AID.	
Mines—Working facilities—Application for rights including right to let down surface—Compensation for subsidence in future years—Mines (Working Facilities and Support) Act, 1923 (c. 20), s. 6 (1), (5)—R.S.C., Ord. 54.0, r. 12 [Re AN APPLICATION BY THE NATIONAL COAL BOARD]	58
Payment into court—Admission of liability—Sum awarded equalling sum paid in—Defendants' right to costs subsequent to payment in—Review by Court of Appeal—No materials for exercise of discretion—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 31 (1) (h)—R.S.C., Ord. 22, r. 6 [WAGMAN v. VARE MOTORS, LTD.]	326
Rent restriction—Decontrol—Suspension. See RENT RESTRICTION (Decontrol—Possession).	
Taxation—Instructions for brief—Whether respondent to party and party taxation entitled to see brief [HOBBS v. HOBBS AND COUSENS]	827
Review by court—Legal aid. See LEGAL AID.	
Solicitor and own client costs—Special circumstances [HARRIS v. YARM]	618
COUNTY COURT	
Appeal—Fact—Appeal on question of fact. See Practice—Particulars of claim—Stating whether amount of claim exceeds £200, post.	
New trial—Discretion of county court judge to allow—Fresh evidence—Principle on which discretion must be exercised—County Court Rules, Ord. 37, r. 5 (1) [DEVENISH v. P.D.I. HOMES (HYTE), LTD.]	843
Claim—Amount—Stating. See Practice—Particulars of claim, post.	
Jurisdiction—Committal order for debt—Revocation of order—Debtors Act, 1869 (c. 62), s. 5 [WILTSHIRE v. FELL]	862
Practice—Particulars of claim—Stating whether amount of claim exceeds £200—Whether claim should be expressly limited to £400—Whether claim for damages limited to £400 was claim in excess of £200 for purposes of appeal on fact—County Courts Act, 1955 (c. 8), s. 12 (2) (a) (i) [LESLIE v. LIVERPOOL CORPN.]	898
COURT	
Language—Proceedings to be conducted in English language. See PRACTICE (Conduct of proceedings).	

COURT OF APPEAL

Costs. *See* COSTS.

Damages—Assessment by jury—*Test for intervention of appellate court—Whether comparable awards in trials by judges alone may establish a level against which to test jury's award* [SCOTT v. MUSIAL] .. 193

Ex parte application. *See* Jurisdiction, *post*.

Jurisdiction—*Ex parte* application—No proceedings—Application to inspect document filed in central office—R.S.C., Ord. 61, r. 17 [*Ex parte* ASSOCIATED NEWSPAPERS, LTD.] .. 878

Habeas corpus. *See* HABEAS CORPUS (Appeal).

COURT OF PROTECTION

See PERSON OF UNSOUND MIND.

COURT-MARTIAL

Appeal—Abandonment of appeal—Withdrawal of notice of abandonment—Application for such withdrawal not allowable unless notice of abandonment a nullity, as through mistake or fraud—Criminal Appeal Rules, 1908 (S.R. & O. 1908 No. 227), r. 23—Courts-Martial Appeal Rules, 1952 (S.I. 1952 No. 194), r. 5 (1) [R. v. CADDY] .. 138

COVENANT

Lease, in. *See* LANDLORD AND TENANT (Repair).

CRIMINAL LAW

Accessory before the fact—Direction to jury—Whether knowledge of type of crime or of precise crime essential [R. v. BAINBRIDGE] .. 200

Appeal—Abandonment of appeal. *See* COURT-MARTIAL (Appeal).

Evidence—Evidence of matters occurring after trial—Procedure—Criminal Appeal Act, 1907 (c. 23), s. 9, s. 19 [R. v. THOMAS] .. 522

Reference by Secretary of State—Whether court has jurisdiction to determine question of onus of proof on issue of unfitness to plead—Criminal Appeal Act, 1907 (c. 23), s. 19 (a) [R. v. PODOLA] .. 418

Sentence—Quashed on appeal—Substitution of a shorter term of imprisonment—Original sentence rendered null only for the future—Criminal Appeal Act, 1907 (c. 23), s. 4 (3) [HANCOCK v. PRISON COMRS.] .. 513

Capital murder—Diminished responsibility—Direction to jury—Whether direction to jury may include illustration of what can constitute abnormality of mind—Homicide Act, 1957 (c. 11), s. 2 (1) [R. v. WALDEN] .. 203

Costs—Acquittal—Discretion [PRACTICE DIRECTION] .. 471

[R. v. SANSBURY] .. 472

Insanity—Amnesia—Whether hysterical amnesia can amount to such insanity as renders an accused unfit to stand trial [R. v. PODOLA] .. 418

Unfitness to plead. *See* Trial—Plea—Fitness to plead, *post*.

Practice—Previous convictions—Notice. *See* Sentence—Preventive detention, *post*.

Probation order—Breach—Procedure—Admission of breach [R. v. LONG] .. 559

Preventive detention. *See* Sentence, *post*.

Probation. *See* Practice, *ante*.

Remission. *See* PRISON (Discharge).

Sentence—Appeal. *See* Appeal—Sentence, *ante*.

Preventive detention—Notice of previous convictions—Three clear days' notice—Criminal Justice Act, 1948 (c. 58), s. 23 (1) [R. v. LONG] .. 559

Supervision order. *See* QUARTER SESSIONS (Commitment of offender to, for sentence).

Trial—Plea—Fitness to plead—Burden of proof—Amnesia [R. v. PODOLA] .. 418

Unfitness to plead. *See* Trial—Plea, *ante*.

CROWN

Crown servant—Dismissal—Dismissal at pleasure by Crown—Whether regulations made by Army Council under letters patent excluded Crown's right to dismiss employee at pleasure—Whether employee determined own employment under regulations—War Department (Outstations) Civilian Staff Regulations, 1950, reg. 437, reg. 438 [RIORDAN v. THE WAR OFFICE] .. 552

CURRENCY CONTROL

Bill of exchange—Holder in due course—Resident outside scheduled territory—No Treasury permission obtained—Claim for recovery of amount due—Exchange Control Act, 1947 (c. 14), s. 33 (1), Sch. 4, para. 4 [CONTRACT & TRADING CO. (SOUTHERN), LTD. v. BARBEY] .. 846

CUSTODY

Child. *See* DIVORCE.

CUSTOMS

Fraudulent evasion of duty—"Dealing with" uncustomed goods—Keeping uncustomed goods—Misuse of goods imported duty free for American troops—Forfeiture—Time at which duty becomes payable—Customs and Excise Act, 1952 (c. 44), s. 304, s. 257 [SCHNEIDER v. DAWSON] .. 583

DAMAGE

Accidental, without negligence—Recovery under statute. *See* LONDON (Damage to property vested in local authority).

DAMAGES

Assessment—Appeal or new trial. *See* COURT OF APPEAL.

Repairing covenant in lease. *See* LANDLORD AND TENANT (Repair).

Shipping. *See* Shipping (Collision).

DANGEROUS MACHINERY

See FACTORY.

DEBT

Committal—Revocation of order—County court order—Whether county court judge has jurisdiction to revoke order—Debtors Act, 1869 (c. 62), s. 5 [WILTSHIRE v. FELL] .. 862

DECLARATION

Jurisdiction—Exclusion of jurisdiction by statute—Necessity for clear exclusion—Discretionary statutory power to impose conditions on grant of permission—Whether jurisdiction excluded by provision of distinct statutory procedure or by discretionary nature of statutory power—Town and Country Planning Act, 1947 (c. 51), s. 14 (2), s. 17 (1) [PYX GRANITE CO., LTD. v. MINISTRY OF HOUSING AND LOCAL GOVERNMENT] .. 1

DECONTROL

See RENT RESTRICTION.

DEMURRAGE

See ARBITRATION (Award—Remission); SHIPPING.

DEPOSIT

Contract for sale of land. See SALE OF LAND (Contract—Conditional contract).

DE-RATING

See RATES.

DESERTION

See DIVORCE.

DEVELOPMENT

See TOWN AND COUNTRY PLANNING.

DEVISE

See ADMINISTRATION OF ESTATES.

DIMINISHED RESPONSIBILITY

Defence. See CRIMINAL LAW (Capital murder).

DIPLOMATIC PRIVILEGE

See CONSTITUTIONAL LAW (Foreign sovereign state—Immunity from suit).

DISCOVERY

Originating summons—Landlord and tenant—New tenancy [Re ST. MARTIN'S THEATRE] . . . 298

Production of documents—Exhibit—Trustee applying for directions whether to institute action against two respondent beneficiaries—Whether the two beneficiaries entitled to production and inspection of exhibits to affidavits in support of summons—Exhibits relating to evidence supporting action [Re MORITZ (decd.)] . . . 767

Privilege—Medical reports concerning hospital treatment resulting in injury—Written statements made by medical staff pursuant to administrative memorandum—Statements made before litigation pending—Whether statements privileged [PATCH v. UNITED BRISTOL HOSPITALS BOARD] . . . 876

Taxation of costs—Instructions for brief—Whether respondent to party and party taxation (co-respondent in divorce suit) entitled to inspect brief delivered to petitioner's counsel [HOBBS v. HOBBS AND COUSENS] . . . 827

DISCRETION

Exercise by court. See DIVORCE.

DIVORCE

Costs—Taxation—Instructions for brief—Respondent (co-respondent in suit) seeking inspection of petitioner's counsel's brief—Privilege [HOBBS v. HOBBS AND COUSENS] . . . 827

Custody—Jurisdiction—Re-marriage of parties—Discretion not to make order—Matrimonial Causes Act, 1950 (c. 25), s. 26 (1) [GRAINGER v. GRAINGER AND CLARK] . . . 51

Local authority—Child committed to care of local authority—Exceptional circumstances—Matrimonial Proceedings (Children) Act, 1958 (c. 40), s. 5 (1) [F. v. F.] . . . 180

Reference to welfare officer [PRACTICE NOTE] . . . 780

Desertion—Intention—Capability of respondent spouse to have animus deserendi—Wife suffering from neurosis—Danger to wife's mental health if she returned to husband [LILLEY v. LILLEY] . . . 283

Discretion—Exercise on evidence in existing suit—Previous suit between same parties—Subsequent undefended suit—Suspicion of petitioner's evidence—Suspicion due to view formed of petitioner by judge in previous defended suit—Duty of court [SHARMA v. SHARMA AND DAVIS] . . . 321

Judicial separation. See Judicial separation, post.

Estoppel—Desertion—Constructive desertion—Previous suit charging cruelty against husband dismissed—Wife's evidence accepted but husband's conduct held not to amount to cruelty—Evidence of same matters tendered by wife in second suit—Evidence of other expulsive conduct also tendered by wife in second suit—Admissibility [FISHER v. FISHER] . . . 131

Evidence—Judgment in previous suit—Discretion [SHARMA v. SHARMA AND DAVIS] . . . 321

Injunction. See INJUNCTION (Husband and wife).

Insanity—Incurable unsoundness of mind—Incurability—Some prospect of partial recovery by paranoid schizophrenic—Matrimonial Causes Act, 1950 (c. 25), s. 1 (1) (d) [WHYSALL v. WHYSALL (BY HIS GUARDIAN)] . . . 389

Judicial separation—Discretion—Whether the petition need include a prayer for the court's discretion—Whether a discretion statement need be lodged [HANIVER v. HANIVER] . . . 854

Petition—Petition within three years of marriage—Leave to present—Injunction to restrain husband from molesting wife—Jurisdiction of court in proceedings begun by originating summons for leave to present petition [WINSTONE v. WINSTONE] . . . 580

Practice—Children—Judge not satisfied at hearing as to arrangements—Judge's summons to be issued by party in whose favour decree nisi pronounced [PRACTICE DIRECTION] . . . 862

DOCUMENT

Central office—Inspection of documents filed at. See INSPECTION (Document filed at central office).

Production of. See DISCOVERY (Production of documents).

DOUBLE TAXATION

See INCOME TAX.

DOUBLE VALUE

See LANDLORD AND TENANT.

EASTERN AFRICA

See PRIVY COUNCIL.

ECCLESIASTICAL LAW

Consistory court—Jurisdiction—Whether Consistory Court is a court for the purposes of Charitable Trusts Amendment Act, 1855 (c. 124), s. 29 [Re PARISH OF ST. SWITHIN, NORWICH] . . . 301

Lease—Church—Option to take lease—Whether rector in whom freehold was vested had powers of tenant for life to grant option and lease—Settled Land Act, 1925 (c. 18), s. 29 (1) [Re PARISH OF ST. SWITHIN, NORWICH] . . . 301

ELECTRICITY

- Supply—*Wayleave*—Consent of Minister of Power to acquisition of wayleave in default of consent of landowner—Deviation of position of proposed lines from position for which planning permission given by Minister—Right to erect supporting towers—Functions of Central Electricity Authority transferred to Central Electricity Generating Board—Transfer of benefit of consent—*Electric Lighting Act, 1882* (c. 56), s. 32—*Electric Lighting (Clauses) Act, 1899* (c. 19), Schedule, s. 10 (b), as amended by *Electricity Act, 1947* (c. 54), s. 57, Sch. 4, Part 3—*Electricity Supply Act, 1919* (c. 100), s. 22 (1), as amended by *Electricity Act, 1947* (c. 54), s. 57, Sch. 4, Part 1—*Electricity Act, 1957* (c. 48), s. 26 (1) (b), (2) [CENTRAL ELECTRICITY GENERATING BOARD v. JENNAWAY] 409

ESTATE DUTY

Apportionment of duty. *See* Incidence, *post*.

- Company—Shares—Valuation—Control of company—Shares held by deceased in fiduciary capacity—Whether permissible to look beyond company's articles and register—*Finance Act, 1940* (c. 29), s. 55 (1) (a), (3) (a) [BARCLAYS BANK, LTD. v. INLAND REVENUE COMRS.] 140

- Incidence—Property not passing to executor as such—Recovery of duty from person entitled to sum charged on property—Jointure—Appointment of jointure to be paid without any deduction—Whether a disposition containing a provision to the contrary within *Finance Act, 1894* (c. 30), s. 14 (1) [Re LONSDALE'S WILL TRUSTS] 679

- Passing of property—Foreign property—Immovable property—English will—Trust for sale—Death of life tenant—Proper law of disposition—*Finance Act, 1949* (c. 47), s. 28 (2) [PHILIPSON-STOW v. INLAND REVENUE COMRS.] 879

ESTOPPEL

Divorce. *See* DIVORCE.

EVIDENCE

Criminal proceedings, in. *See* CRIMINAL LAW (Appeal).

Variation of trusts. *See* TRUST AND TRUSTEE (Variation of trusts by the court—Investment).

EXCHANGE CONTROL

See CURRENCY CONTROL.

EXECUTION

- Company—Execution not completed before winding-up—Creditor's rights—Money paid to avoid sale—Money remaining in hands of sheriff's officer—Notice of winding-up resolution given more than fourteen days after payment—*Companies Act, 1948* (c. 38), s. 325 (1), s. 326 (1), (2) [Re WALKDEN SHEET METAL CO., LTD.] 333

EXECUTOR AND ADMINISTRATOR

Trusteeship—Charging clause—New trustee an attesting witness. *See* WILL (Attestation—Solicitor attesting).

EXHIBIT

See DISCOVERY (Production of documents).

EXTRADITION

- Discharge of fugitive—Not returned within one month after committal—"May", unless "sufficient cause" is shown to the contrary, order the fugitive to be discharged—"May", construed to mean "shall"—What amounts to "sufficient cause"—*Fugitive Offenders Act, 1881* (c. 69), s. 7 [Re SHUTER (No. 2)] 481

FACTORY

- Dangerous machinery—Contributory negligence—Workman deliberately inserting hand into moving machine in order to clean groove—Operative cause of accident—*Factories Act, 1937* (c. 67), s. 14 (1) [RUSHTON v. TURNER BROS. ASBESTOS CO., LTD.] 517

FALSE TRADE DESCRIPTION

See TRADE MARK.

FIJI

See PRIVY COUNCIL.

FIREARMS

Child. *See* CHILD (Negligence—Parent's liability).

FLAT

Repair. *See* LANDLORD AND TENANT (Repair—Dwelling-house).

FORCE MAJEURE

Charterparty. *See* SHIPPING (Charterparty—Construction—Exception).

FOREIGN SOVEREIGN

Impleading. *See* CONSTITUTIONAL LAW (Foreign sovereign state—Immunity from suit).

FRAUD

Misrepresentation. *See* MISREPRESENTATION.

GAMING

- Lottery—Whether any substantive offence created by *Betting and Lotteries Act, 1934* (c. 58), s. 21 [SALES-MATIC, LTD. v. HINCHLIFFE] 401

GUARDIAN

See INFANT (Guardianship of Infants Acts).

HABEAS CORPUS

- Appeal—Criminal cause or matter—Second application for habeas corpus to different court rejected on ground that dismissal of first application was a decision for whole High Court—Appeal against second rejection—No jurisdiction—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 31 (1) (a) [Re HASTINGS (No. 3)] 221

- Jurisdiction—Foreign territory—Arrest and detention in protectorate [Re MWENYA] 525

- To whom writ will issue—Constructive custodian—Detention in protectorate—Whether writ will issue to Secretary of State [Re MWENYA] 525

HIGHWAY

- Access—Refuge proposed to be erected by highway authority on access from garage to road—Erection proposed without compensation—Erection on soil of highway but not on carriageway—Obstruction of access from garage to road—*Public Health Act, 1875* (c. 55), s. 149—*Public Health Acts Amendment Act, 1907* (c. 53), s. 18 (c)—*Road Traffic Act, 1956* (c. 67), s. 45 (1) [CHING GARAGE, LTD. v. CHINGFORD CORPN.] 175

HIGHWAY—continued.

- Highway authority—Drains—Non-repair of drains used for agricultural land drainage—Maintenance of drains awarded to surveyor of highways under Inclosure Act of 1800—Whether county council under duty to maintain and repair drains in rural district for which rural district council formerly liable as successors of highway board—Local Government Act, 1929 (c. 17), s. 30 (1), proviso [ATTORNEY-GENERAL (ON THE RELATION OF THOMAS BROWNLEE PAISLEY) v. ST. IVES RURAL DISTRICT COUNCIL] 371
- London—Damage to street refuge by motor car—No negligence on part of driver of car—Liability to local authority for cost of repairs—London Government Act, 1939 (c. 40), s. 181 (3) [KENSINGTON BOROUGH COUNCIL v. WALTERS] 652
- Obstruction—Motor vehicle. See ROAD TRAFFIC (Obstruction).
- Street—Private street works—Resolution of local authority—Abandonment—Resolution that apportionment be based on degree of benefit—Subsequent resolution that apportionment be based on frontage—Whether prior resolution amended or abandoned—Scope of power of amendment—Validity of later resolution—Jurisdiction of justices to quash resolution for invalidity—Private Street Works Act, 1892 (c. 57), s. 6 (1), s. 8 (1), (2), s. 11 [WILSON v. WREXHAM CORPN.] 674
- Street refuge. See Access, ante.

HOSPITAL

- Motor accident—Expenses incurred by hospital in treating person injured in accident—Insurance against third-party risks, covering voluntary passengers—Insurers not aware of hospital treatment at time when they made payment to person injured—Whether hospital entitled to recover expenses from insurers—Road Traffic Act, 1930 (c. 43), s. 36 (2), as substituted by Road and Rail Traffic Act, 1933 (c. 53), s. 33—National Health Service Act, 1946 (c. 81), s. 76, Sch. 10 [BARNET GROUP HOSPITAL MANAGEMENT COMMITTEE v. EAGLE STAR INSURANCE CO., LTD.] 210

HOUSE

- Employers' house assistance scheme—Income tax. See INCOME TAX (Income—Indemnity to employee against loss on house purchase).

HOUSING

- Police. See COMPULSORY PURCHASE (Police purposes).
- Requisitioned premises—Release from requisition—Contribution towards local authority's expenses by way of compensation—Rate of contribution by Ministry of Housing and Local Government—Requisitioned Houses and Housing (Amendment) Act, 1955 (c. 24), s. 10 (1) [EAST HAM CORPN. v. MINISTRY OF HOUSING AND LOCAL GOVERNMENT] 508
- Small dwellings—Money advanced by local authority for purchase of small house—Sale by local authority—Second mortgage—Whether local authority must pay surplus on sale to second mortgagee—Small Dwellings Acquisition Act, 1899 (c. 44), s. 6 (2) [Re CAUNTER'S CHARGE] 669

HUSBAND AND WIFE

- Injunction. See INJUNCTION.
- Maintenance—Aggravated assault. See MAGISTRATES.
- Discharge of order. See MAGISTRATES (Husband and wife—Maintenance order—Discharge).
- Justices—Jurisdiction. See MAGISTRATES.
- See also MAGISTRATES.
- Nullity of marriage. See NULLITY.

INCOME TAX

- Allowance—Investment allowance—"Plant"—Knives and lasts used in manufacture of shoes replaced every three years or less—Capital or income expenditure—Deduction against profits allowed under Income Tax Act, 1952 (c. 10), s. 137 (d)—Finance Act, 1954 (c. 44), s. 16 (1), (3) (c) [HINTON (INSPECTOR OF TAXES) v. MADEN & IRELAND, LTD.] 356
- Assessment—Option to purchase its share sold to company's employee—Subsequent exercise of right of purchase—Increase in value of shares after date of option—In what year value of option assessable—Income Tax Act, 1952 (c. 10), s. 156, Sch. E, Case I, r. 1 [ABBOTT v. PHILBIN (INSPECTOR OF TAXES)] 590
- Deduction in computing profits—Capital expenditure—Improvement—Statutory appropriations towards installations at racecourses—Whether capital expenditure [RACECOURSE BETTING CONTROL BOARD v. YOUNG (INSPECTOR OF TAXES), SAME v. INLAND REVENUE COMRS.] 215
- Distribution by statutory body—Distribution pursuant to statute from funds after deduction of working expenses—Distribution benefiting body's trading activities—Whether deductible as expense for income tax purposes—Racecourse Betting Act, 1928 (c. 41), s. 3 (6)—Income Tax Act, 1952 (c. 10), s. 137 (a) [RACECOURSE BETTING CONTROL BOARD v. YOUNG (INSPECTOR OF TAXES), SAME v. INLAND REVENUE COMRS.] 215
- Expenses—Medical specialist in private practice—Holder of part-time hospital appointments as consultant—Office assessable under Sch. E—Expenses not deductible under Sch. E—Whether deductible as expenses of profession under Sch. D—Income Tax Act, 1952 (c. 10), s. 122 (Sch. D, para. 1, proviso), s. 156 (Sch. E) [MITCHELL (INSPECTOR OF TAXES) v. ROSS, SAME v. HIRTENSTEIN, SAME v. MARSHALL, TAYLOR-GOOPY (INSPECTOR OF TAXES) v. TARNESBY, SAME v. DREW] 341
- Double taxation—Mutual life assurance society—Resident abroad—Australian company with branch office in United Kingdom—Assessments to income tax on income of society's life assurance fund—Whether assessments competent—Income Tax Act, 1918 (c. 40), Sch. 1, Sch. D, Rules applicable to Case III, r. 3—Finance (No. 2) Act, 1945 (c. 13), s. 51 (1)—Income Tax Act, 1952 (c. 10), s. 347 (1), s. 430—Double Taxation Relief (Taxes on Income) (Australia) Order, 1947 (S.R. & O. 1947 No. 806), Schedule, art. II (1) (i), (3), art. III (2), (3) [OSTIME (INSPECTOR OF TAXES) v. AUSTRALIAN MUTUAL PROVIDENT SOCIETY] 245
- Relief—Company acquiring foreign shares—Shares constituting new source or addition to source of income—Case V assessment of dividends—Based on initial year's income in that and ensuing year—Claim for allowance of foreign tax in initial year against both assessments—Income Tax Act, 1952 (c. 10), s. 347, Sch. 16, para. 13—Double Taxation Relief (Taxes on Income) (Australia) Order, 1947 (S.R. & O. 1947 No. 806), Schedule, art. XII (1) [IMPERIAL CHEMICAL INDUSTRIES, LTD. v. CARO (INSPECTOR OF TAXES)] 750
- Removal of relief. See Exemption—Removal of exemption, post.
- Exemption—Removal of exemption—A person entitled under any enactment to an exemption—Application to resident in Eire—Dividend stripping—Finance (No. 2) Act, 1955 (c. 17), s. 4 (2) [INLAND REVENUE COMRS. v. COLLOD DEALINGS, LTD.] 351

INCOME TAX—*continued*.

- Income—*Indemnity to employee against loss on house purchase—Employers' housing assistance scheme—Reimbursement of loss on transfer to new place of employment—Income Tax Act, 1952 (c. 10), Sch. 9, Rules applicable to Sch. E, r. 1* [HOCHSTRASSER (INSPECTOR OF TAXES) *v.* MAYES] 817
- Option to purchase its share sold to company's employee—*Subsequent exercise of right of purchase—Increase in value of shares after date of option—Whether increase taxable at date of exercise of option—Income Tax Act, 1952 (c. 10), s. 156, Sch. E, Case I, r. 1* [ABBOTT *v.* PHILBIN (INSPECTOR OF TAXES)] 590
- Investment allowance. *See* Allowance—*Investment allowance, ante.*
- Profits—*Computation of profits—Year of assessment—Interim income payments in respect of compensation on nationalisation of coal industry—Payments in respect of specified periods—Whether income of those periods or of years of receipt—Income Tax Act, 1918 (c. 40), Sch. D, Case VI, r. 2* [WHITWORTH PARK COAL CO., LTD. (IN LIQUIDATION) *v.* INLAND REVENUE COMRS., RAMSHAW COAL CO., LTD. (IN LIQUIDATION) *v.* SAME, BRANCEPETH COAL CO., LTD. (IN LIQUIDATION) *v.* SAME] 703
- Medical specialist—*Part-time consultant at national health service hospital—Whether assessable under Income Tax Act, 1952 (c. 10), Sch. E* [MITCHELL (INSPECTOR OF TAXES) *v.* ROSS] 341
- Residence—*Company—Place where management and control is exercised—Subsidiary company in East Africa—Parent company in fact exercising central management and control in London—Finance Act, 1953 (c. 34), s. 20 (9)* [UNIT CONSTRUCTION CO., LTD. *v.* BULLOCK (INSPECTOR OF TAXES)] 831
- Undistributed income—*Notional distribution among shareholders—Infant shareholders whose shares were transferred to them by their father—Settlement—Whether sums notionally distributed to infants deemed to be father's income for tax purposes—East African Income Tax (Management) Act, 1952 (No. 3 of 1952), s. 22 (1), s. 24 (1)* [HOUKY *v.* COMR. OF INCOME TAX] 781

INDUSTRIAL INJURY

- Review of decision—*Medical appeal tribunal's determination setting aside an assessment of loss of faculty—"Fresh evidence"—National Insurance (Industrial Injuries) Act, 1946 (c. 62), s. 40 (1)* [R. *v.* MEDICAL APPEAL TRIBUNAL (NORTH MIDLAND REGION), *Ex parte* HUBBLE] 40

INFANT

- Care—*Local authority—Divorce cases. See* DIVORCE (Custody—*Local authority*).
- Custody—*Divorce proceedings, in. See* DIVORCE (Custody).
- Guardianship of Infants Acts—*Joint guardianship—Benefit to infant the sole determining factor in deciding whether joint guardian should be appointed—Order not to be made for collateral purpose—Appeal from magistrates' order—Guardianship of Infants Act, 1925 (c. 45), s. 4 (2)* [Re H. (AN INFANT)] 746
- Legitimacy. *See* LEGITIMACY.
- Negligence in relation to a child. *See* CHILD (Negligence).

INFORMATION

See MAGISTRATES.

INJUNCTION

- Husband and wife—*Restraining husband from molesting wife—Wife's application for injunction pending leave to present petition for dissolution of marriage within three years—Jurisdiction of court to entertain* [WINSTONE *v.* WINSTONE] 580
- Sale of goods—*Motor car—Injunction at instance of manufacturers against retail purchaser re-selling car as new* [MORRIS MOTORS, LTD. *v.* LILLEY (TRADING AS G. & L. MOTORS)] 737

INSANITY

- Amnesia. *See* CRIMINAL LAW (Trial—*Plea—Fitness to plead*).
- Divorce on the ground of. *See* DIVORCE.

INSECURE

- Document filed at central office—*Order for injunction—Application by stranger to action—R.S.C., Ord. 61, r. 17* [Ex parte ASSOCIATED NEWSPAPERS, LTD.] 878
- Document, of. *See* Document filed at central office, *ante*; DISCOVERY (Production of documents).

INSURANCE

- Life assurance—*Income tax—Mutual insurance. See* INCOME TAX (Double taxation—*Mutual life assurance society*).
- Motor insurance—*Third-party risks—Passenger injured—Voluntary passenger—Policy extending to voluntary passengers—Hospital expenses of passenger's treatment sought to be recovered by hospital from insurers—Insurers ignorant of hospital treatment at time when they paid passenger—Whether hospital subsequently entitled to recover their expenses from insurers—Whether payment by insurers made in consequence of policy issued under Act of 1930—Whether voluntary passenger was a person within s. 36 (2) of Act of 1930—Road Traffic Act, 1930 (c. 43), s. 36 (2), as substituted by Road and Rail Traffic Act, 1933 (c. 53), s. 33* [BARNET GROUP HOSPITAL MANAGEMENT COMMITTEE *v.* EAGLE STAR INSURANCE CO., LTD.] 210
- Using motor vehicle on road while uninsured—*Broken down car parked on road outside owner's house—Car not completely immovable, but in such condition that it could not be mechanically propelled—Owner having no intention of driving or moving car at material time—Whether car in use on road—Road Traffic Act, 1930 (c. 43), s. 35 (1)* [ELLIOTT *v.* GREY] 733

INTERPRETER

- Foreign plaintiff—*Conduct of proceedings. See* PRACTICE (Conduct of proceedings).

INVESTMENT

- Allowance. *See* INCOME TAX (Allowance).

INVESTMENT CLAUSE

- Extension of powers. *See* TRUST AND TRUSTEE (Variation of trusts by the court).

JOINTURE

- Estate duty—*Payable without deduction. See* ESTATE DUTY (Incidence—*Property not passing to executor as such—Recovery of duty from person entitled to sum charged on property*).

JUDGE	PAGE
Appeal— <i>Presence of judge in court—Dismissal of appeal in Fiji on reading of reserved written judgments of judges who had come to Fiji to hear appeal but were not present when judgments were read—Validity</i> [BHARAT, SON OF DORSAMY v. R.]	292
JUDGMENT	
Divorce— <i>Reading judgment in previous suit between same parties—Discretion case</i> [SHARMA v. SHARMA AND DAVIS]	321
JUDICIAL SEPARATION	
See DIVORCE.	
JURISDICTION	
Arbitrator. See ARBITRATION (Award—Remission).	
County court. See COUNTY COURT.	
Court of Appeal. See COURT OF APPEAL.	
Nullity, in. See NULLITY.	
Ouster of. See DECLARATION.	
See also HABEAS CORPUS.	
JUSTICES	
See MAGISTRATES.	
JUVENILE COURT	
See ADOPTION (Court).	
LAND DRAINAGE	
Repair of drains— <i>Maintenance of drains subject to an inclosure award of 1803—Failure to keep drains in fit and proper condition—Nonfeasance—Breach of statutory duty—Drains only incidentally affecting small part of highway—Whether rural district council liable to be sued for failure to maintain and repair drains</i> [ATTORNEY-GENERAL (ON THE RELATION OF THOMAS BROWNLEE PAISLEY) v. ST. IVES RURAL DISTRICT COUNCIL]	371
LANDLORD AND TENANT	
Agricultural holding. See AGRICULTURE (Agricultural holding).	
Double value—“ <i>Wilfully</i> ” holding over after determination of the term— <i>Landlord and Tenant Act, 1730 (c. 28), s. 1</i> [FRENCH v. ELLIOTT]	866
Negligence— <i>Want of repair. See Repair—Dwelling-house—Flat let on weekly tenancy by local authority, post.</i>	
New tenancy— <i>Business premises—Holding—Occupation of part of premises resumed by tenant after date of application for new tenancy—Occupation for purpose of extending right to new lease—Whether colourable—Landlord and Tenant Act, 1954 (c. 56), s. 23 (3), s. 32 (1)</i> [NARCISSI v. WOLFE]	71
Notice to quit— <i>Service—Registered letter addressed to tenants' former address forwarded to new address—Validity of service—Waiver of invalidity—Landlord and Tenant Act, 1927 (c. 36), s. 23 (1)—Landlord and Tenant Act, 1954 (c. 56), s. 66 (4)</i> [STYLO SHOES, LTD. v. PRICES TAILORS, LTD.]	901
Opposition by landlord— <i>Discovery—Discovery relating to tenants' ability to perform covenants—Discovery relating to landlord's financial position—Landlord and Tenant Act, 1954 (c. 56), s. 30 (1) (a), (c), (g)</i> [Re ST. MARTIN'S THEATRE]	298
Intention to demolish and carry out substantial work of construction— <i>Notice stating ground of opposition—Notice did not state that landlord could not reasonably do the work without obtaining possession of the holding—Whether notice valid—Landlord and Tenant Act, 1954 (c. 56), s. 25 (1), s. 30 (1) (f)</i> [BOLTON'S (HOUSE FURNISHERS), LTD. v. OPPENHEIM]	90
Intention to occupy premises for own business— <i>Acquisition of interest by landlords under contract made in June, 1954—No pecuniary consideration from landlords—Tenancy expiring in March, 1959—Landlords' notice not having effect for certain purposes until three months after application disposed of—Whether landlords' interest purchased after beginning of the period of five years ending with the termination of the current tenancy—Landlord and Tenant Act, 1954 (c. 56), s. 25 (1) proviso, s. 30 (2), s. 64</i> [FREDERICK LAWRENCE, LTD. v. FREEMAN HARDY & WILLIS, LTD.]	77
Notice of breach of covenant to repair. See Repair— <i>Breach of covenant, post.</i>	
Notice to quit— <i>Waiver—Service—Waiver of invalidity</i> [STYLO SHOES, LTD. v. PRICES TAILORS, LTD.]	901
Repair— <i>Breach of covenant—Notice to remedy breach served on tenant—Notice also alleging breach of non-existent covenant not to sub-let—Validity of notice—Law of Property Act, 1925 (c. 20), s. 146 (1)—Leasehold Property (Repairs) Act, 1938 (c. 34), s. 1 (2), as amended by Landlord and Tenant Act, 1954 (c. 56), s. 51 (2) (b)</i> [SILVESTER v. OSTROWSKA]	642
Damages for failure to repair— <i>Failure to deliver up in repair—Premises to be demolished—Premises erected pursuant to conditional development permission under Town and Country Planning Act, 1947—Condition that building should be removed by Apr. 1, 1956—Tenancy terminated on Mar. 28, 1957—Evidence—Landlord and Tenant Act, 1927 (c. 36), s. 18 (1)</i> [KEATS v. GRAHAM]	919
Dwelling-house— <i>Flat let on weekly tenancy by local authority—No obligation on landlords to repair expressed in tenancy—Landlord having right of entry to repair—Restriction on tenant's doing repairs—Duty on tenant to deliver up in tenantable repair—Whether obligation on landlord to repair implied</i> [SLEAFER v. LAMBETH METROPOLITAN BOROUGH COUNCIL]	378
Tenancy— <i>Year to year—Characteristics of tenancy and meaning of description</i> [GLADSTONE v. BOWER]	475
LANDS TRIBUNAL	
See RATES.	
LANGUAGE	
Court proceedings— <i>English language. See PRACTICE (Conduct of proceedings).</i>	
LAY DAYS	
See SHIPPING (Demurrage—Computation).	
LEASE	
Church. See ECCLESIASTICAL LAW.	

LEGAL AID

- Costs—*Taxation—Review of taxation—Jurisdiction of court to order review—Application stated to be by plaintiff's solicitor—Legal Aid and Advice Act, 1949 (c. 51), Sch. 3, para. 4 (1)—Legal Aid (General) Regulations, 1950 (S.I. 1950 No. 1359), reg. 18 (3) (b), as substituted by S.I. 1954 No. 166, reg. 27 [SUTTON v. SEARS]* 545

LEGITIMACY

- Presumption of legitimacy—*Rebuttal—Adultery by wife—Marital intercourse also at time of conception—Use of contraceptives—Parties regarding child as illegitimate—Whether presumption of legitimacy rebutted [FRANCIS v. FRANCIS]* 206

LIEN

- Fund—*Proceeds of sale of produce of oil well subject to lien—Cesser of lien—Rights of lienholder over fund representing proceeds—Fund held as trust fund subject to order of the court—Mechanics' Lien Act (Alberta) (R.S.A. 1942 c. 236), as amended, s. 2 (g), s. 6 (1), s. 43 [PONOKA-CALMAR OILS, LTD. v. EARL F. WAKEFIELD CO.]* 571

LISTS

- Queen's Bench Division. *See* PRACTICE (Chambers).

LITERARY AND SCIENTIFIC INSTITUTION

- Rates—*Exemption. See* RATES (Exemption).

LOCAL AUTHORITY

- Requisitioned premises. *See* REQUISITION (Compensation).

LOCAL GOVERNMENT

- Housing. *See* HOUSING (Requisitioned premises).
Resolution of local authority—*Abandonment. See* HIGHWAY (Street—Private street works—Resolution of local authority).

LONDON

- Damage to property vested in local authority—*Accidental damage—Recovery of cost of repairs—London Government Act, 1939 (c. 40), s. 181 (3) [KENSINGTON BOROUGH COUNCIL v. WALTERS]* 652

LOTTERY

- See* GAMING.

MAGISTRATES

- Adoption. *See* ADOPTION.

- Committal to quarter sessions for sentence—*Indictable offence tried summarily—Offender seven-teen years old—Advisability of committal under s. 29, rather than under s. 28, of Magistrates' Courts Act, 1952 (c. 55) [R. v. DANGERFIELD]* 88

- Custody—*Legitimacy—Presumption. See* LEGITIMACY (Presumption of legitimacy).

- Guardianship of infants. *See* INFANT (Guardianship of Infants Acts).

- Husband and wife—*Aggravated assault—Husband conditionally discharged after pleading guilty to assaulting wife and causing her grievous bodily harm—Case dealt with summarily—Whether an aggravated assault within Offences against the Person Act, 1861 (c. 100), s. 43—Whether a conviction for the purposes of the Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 4—Criminal Justice Act, 1948 (c. 58), s. 12 (1) [CASSIDY v. CASSIDY]* 187

- Maintenance—*Wilful neglect to maintain—Mental illness alleged—Refusal to undergo electrical shock treatment—Wife justified in withdrawing from cohabitation—Failure by husband to prove mental disability—Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 4 [STIRLAND v. STIRLAND]* 891

- Wilful neglect to maintain—*No matrimonial misconduct by husband—Wife suffering from neurosis—Danger to wife's mental health if she resumed cohabitation—No liability on husband—Liability of husband under National Assistance Act, 1948 (c. 29), s. 42, s. 43—Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 4 [LILLEY v. LILLEY]* 283

- Maintenance order—*Discharge—Date—Re-marriage of wife, after divorce, prior to date of complaint for discharge—Payments by former husband to collecting officer continued after re-marriage—Whether any jurisdiction to remit sums paid prior to date of complaint for discharge—Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 5 (c)—Magistrates' Courts Act, 1952 (c. 55), s. 76 [FILDES (FORMERLY SIMKIN) v. SIMKIN]* 697

- Remission of arrears. *See* Husband and wife—Maintenance order—Discharge—Date—Re-marriage of wife, after divorce, prior to date of complaint for discharge, ante.

- Infants. *See* INFANT.

- Information—*Two informations relating to same facts—Conviction on one information [R. v. BURNHAM JUSTICES, Ex parte ANSORGE]* 505

- Juvenile court. *See* ADOPTION (Court).

- Procedure—*Two informations relating to same facts. See* Information, ante.

MAINTENANCE

- Order. *See* MAGISTRATES (Husband and wife).

- Wife. *See* MAGISTRATES (Husband and wife).

MALAYA

- See* PRIVY COUNCIL.

MARRIAGE

- Breach of promise—*Writing—Necessity for written promise—Ceylon [UDALAGAMA v. BOANGE]* 403

- Nullity of. *See* NULLITY.

- Re-marriage—*Jurisdiction in divorce after. See* DIVORCE (Custody—Jurisdiction).

MASTER AND SERVANT

- Liability of master—*Provision of safe system of working. See* SAFE SYSTEM OF WORKING.

- Wrongful dismissal—*Crown servant—Whether action for. See* CROWN (Crown servant—Dismissal).

MEDICAL REPORT

- Discovery—*Privilege. See* DISCOVERY (Production of documents—Privilege).

MEMORANDUM OF ASSOCIATION

- See* COMPANY.

- MEMORIAL**
Trust for. *See* CHARITY (Uncertainty).
- MEMORY**
Loss of. *See* CRIMINAL LAW (Trial—Plea—Fitness to plead).
- MENTAL TREATMENT**
Refusal to undergo—*Effect in relation to desertion. See* MAGISTRATES (Husband and wife—Maintenance—Wilful neglect to maintain—Mental illness alleged).
- METROPOLIS**
See LONDON.
- MINER**
Working facilities. *See* COAL MINING (Working facilities).
- MINERALS**
Right to work. *See* COAL MINING (Working facilities).
- MISREPRESENTATION**
Fraudulent misrepresentation—*Belief in truth of representation as understood by representor—Circular letter inducing purchase of shares [AKERHIELM v. DE MARE].. .. .* 485
Injunction. *See* INJUNCTION (Sale of goods).
- MOTOR INSURANCE**
See INSURANCE.
- MOTOR VEHICLE**
Insurance. *See* INSURANCE (Motor insurance).
Negligent driving—*Civil action. See* ROAD TRAFFIC (Negligence).
Sale. *See* SALE OF GOODS (Motor car).
See also ROAD TRAFFIC.
- MURDER**
See CRIMINAL LAW (Capital murder).
- MUTUAL TRADING**
Insurance—*Income tax. See* INCOME TAX (Double taxation—*Mutual life assurance society*).
- NAME**
Locality—*Name of—Acquisition of right of property in. See* PASSING OFF (Geographical name descriptive of particular district of France).
- NATIONAL ASSISTANCE**
Husband and wife—*Separation—No agreement and no misconduct—Difference between remedy of National Assistance Board for recovering cost of assistance and liability of husband for wilful neglect to maintain—National Assistance Act, 1948 (c. 29), s. 42, s. 43—Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 4 [LILLEY v. LILLEY].. .. .* 283
- NATIONAL HEALTH SERVICE**
Hospital—*Negligence—Discovery. See* DISCOVERY (Production of documents—*Privilege—Medical reports concerning hospital treatment resulting in injury*).
Specialist—*Income tax—Whether holder of a public office. See* INCOME TAX (Deduction in computing profits—*Expenses—Medical specialist in private practice*).
- NATIONALISATION**
Coal industry. *See* COAL MINING (Nationalisation of industry).
- NEGLIGENCE**
Child. *See* CHILD.
Contributory negligence—*Causation—Accident plaintiff's fault. See* FACTORY (Dangerous machinery).
Defence—*Volenti non fit injuria—Rescuer killed in attempting rescue of men placed in danger by negligence [WARD v. T. E. HOPKINS & SON, LTD., BAKER v. SAME]* 225
Driving of motor vehicle. *See* ROAD TRAFFIC.
Landlord. *See* LANDLORD AND TENANT (Repair—*Dwelling-house*).
Motor cyclist. *See* ROAD TRAFFIC (Negligence—*Collision at cross-roads*).
Rescue—*Negligence placing workmen in imminent peril from gas on their descending a well—Doctor descending well to rescue them—Whether duty of care owed by master to servant extended to doctor [WARD v. T. E. HOPKINS & SON, LTD., BAKER v. SAME].. .. .* 225
- NEW TENANCY**
See LANDLORD AND TENANT.
- NEW TRIAL**
See COUNTY COURT (Appeal).
- NEXT OF KIN**
See WILL (Gift to next of kin).
- NOTICE**
Breach of covenant to repair. *See* LANDLORD AND TENANT (Repair).
Pleading—*Particulars. See* PRACTICE (Particulars—*Pleading*).
- NOTICE OF INTENDED PROSECUTION**
See ROAD TRAFFIC.
- NOTICE TO QUIT**
See AGRICULTURE (Agricultural holding); LANDLORD AND TENANT.
- NOVUS ACTUS INTERVENIENS**
Rescue—*Whether rescuer's act a novus actus interveniens [WARD v. T. E. HOPKINS & SON, LTD., BAKER v. SAME]* 225
- NULLITY**
Jurisdiction—*Marriage celebrated in England—Parties domiciled in Scotland—Petitioner resident in England—Petition on ground of respondent's impotence [HILL (OTHERWISE PETCHET) v. HILL]* 754
- NURSING**
Rates—*Limitation—Whether organisation charitable. See* RATES (Limitation of rates chargeable).

OBSTRUCTION

Motor vehicle, by. *See* ROAD TRAFFIC.

OPTION

Income tax. *See* INCOME TAX (Income).

ORIGINATING SUMMONS

See DISCOVERY.

PARENT

Negligence—*Liability in relation to child.* *See* CHILD (Negligence).

PARTICULARS

See PRACTICE.

PARTICULARS OF CLAIM

See COUNTY COURT (Practice).

PASSING OFF

Geographical name descriptive of particular district of France—*Plaintiffs a class of producers within that district—"Spanish Champagne" used to describe wine produced in Spain—Unlawful competition—Whether action lay to restrain such unfair competition* [J. BOLLINGER v. COSTA BRAVA WINE CO., LTD.] 800

PAYMENT INTO COURT

See COSTS.

PERSON OF UNSOUND MIND

Court of Protection—*Practice—Title of proceedings under Trustee Act, 1925* [PRACTICE NOTE] 320Divorce. *See* DIVORCE (Insanity).

Variation of trusts by the court—*Court of Protection—Application to determine question whether proposed arrangement beneficial to person of unsound mind—Practice under Variation of Trusts Act, 1955 (c. 53), s. 1 (3)* [PRACTICE NOTE] 897

PETITION

Divorce. *See* DIVORCE.

PLEADING

Notice. *See* PRACTICE (Particulars).Particulars. *See* PRACTICE (Particulars).Striking out. *See* CONSTITUTIONAL LAW (Foreign sovereign state—*Immunity from suit—Counterclaim*).

POLICE

Land—*Compulsory acquisition.* *See* COMPULSORY PURCHASE (Police purposes).

POWER OF APPOINTMENT

Exercise—*Excessive exercise—Power to appoint £1,500—Appointment of £1,000 free of duty—Whether appointment in excess of power* [Re LONSDALE'S WILL TRUSTS] 679

PRACTICE

Adoption. *See* ADOPTION.Central office—*Inspection of documents.* *See* INSPECTION (Document filed at central office).

Chambers—*Queen's Bench Division—Lists—Applications to judge in chambers to be published in daily cause list—Duration of hearing to be estimated and indorsed on filed copy—Special appointment for applications estimated to last more than forty-five minutes* [PRACTICE DIRECTION] 97

Conduct of proceedings—*Language—Foreign plaintiff wishing to conduct proceedings through interpreter—Discretion of court* [Re TREPCA MINES, LTD.] 798

County court. *See* COUNTY COURT.Court of Protection. *See* PERSON OF UNSOUND MIND (Court of Protection).Criminal court. *See* CRIMINAL LAW.Discovery. *See* DISCOVERY (Production of documents).Divorce. *See* DIVORCE.Exhibits to affidavit—*Production.* *See* DISCOVERY (Production of documents).Language—*Proceedings in English language.* *See* Conduct of proceedings, *ante*.

Particulars—*Pleading—"Notice" contrasted with "knowledge"—Notice that cheque being dealt with without owner's authority alleged against bankers—Materiality of form and precise terms of notice, or of circumstances from which notice was to be inferred—R.S.C., Ord. 19, r. 22, r. 23* [CRESTA HOLDINGS, LTD. v. KARLIN] 656

Stay of proceedings—*Company in liquidation sued by employee of company for damages for wrongful dismissal by liquidator* [COOK v. "X" CHAIR PATENTS CO., LTD.] 906

Striking out pleading—*Counterclaim.* *See* CONSTITUTIONAL LAW (Foreign sovereign state—*Immunity from suit—Counterclaim*).

PRESUMPTION

Legitimacy. *See* LEGITIMACY.

PREVENTIVE DETENTION

See CRIMINAL LAW (Sentence).

PRISON

Discharge—*Remission of part of sentence—Discretion of Prison Commissioners—Reduction of sentence on appeal—How far misconduct before the appeal was allowed should be taken into account—Prison Rules, 1949 (S.I. 1949 No. 1073), r. 37, as substituted by Prison Rules, 1952 (S.I. 1952 No. 1405), r. 3* [HANCOCK v. PRISON COMRS.] 513

PRIVATE STREET WORKS

See HIGHWAY (Street).

PRIVY COUNCIL

Canada—*Alberta—Lien—Mechanics' lien—Oil well—Meaning of "owner"—Receiver appointed to receive proceeds of sale of oil—Renewal statement not filed—Rights against funds in receiver's hands—Mechanics' Lien Act (Alberta) (R.S.A. 1942 c. 236), as amended, s. 2 (g), s. 6 (1), s. 24 (6), s. 43* [PONOKA-CALMAR OILS, LTD. v. EARL F. WAKEFIELD CO.] 571

Ceylon—*Marriage—Breach of promise—Action for damages for breach of promise—Promise to be made in writing—Ceylon Marriage Registration Ordinance (c. 95, Legislative Enactments of Ceylon, Vol. III), s. 19, proviso* [UDALAGAMA v. BOANGE] 403

PRIVY COUNCIL—continued.	PAGE
Eastern Africa— <i>Income tax</i> —Undistributed income—Direction that percentage of company's undistributed income be deemed to have been distributed among shareholders—Shareholders including two infants holding under a settlement—Whether sums deemed to have been received by infants to be treated as part of settlor's income—East African Income Tax (Management) Act, 1952 (No. 8 of 1952), s. 22 (1), s. 24 (1) [HOURY v. COMR. OF INCOME TAX] ..	781
Misrepresentation—Fraudulent misrepresentation—Belief in truth of representation as understood by representor—Circular letter inducing purchase of shares [AKERHIELM v. DE MARE] ..	445
Fiji—Criminal law—Murder—Provocation—Judge sitting with assessors—Failure of judge to direct assessors on provocation [BHARAT, SON OF DORSAMY v. R.] ..	292
Malaya—Sale of land—Contract—Conditional contract—Purchase conditional on obtaining renewal of leases—Time for performance of condition—Recovery of deposit [ABERFOYLE PLANTATIONS, LTD. v. CHENG] ..	910
Singapore—Shipping—Bill of lading—Exemption clause—Contract to deliver goods on production of bill of lading to person entitled under bill of lading—No delivery by shipping company to such person—Construction of exemption clause [SZE HAI TONG BANK, LTD. v. RAMBLER CYCLE Co., LTD.] ..	182
PROBATION See CRIMINAL LAW (Practice).	
PRODUCTION Documents, of. See DISCOVERY.	
PROFITS TAX Computation of profits—Deduction—Racecourse Betting Control Board—Whether payments made as working expenses or as statutory distributions of surplus deductible where board's business benefited—Racecourse Betting Act, 1928 (c. 41), s. 3 (6)—Income Tax Act, 1952 (c. 10), s. 137 (a) [RACECOURSE BETTING CONTROL BOARD v. YOUNG (INSPECTOR OF TAXES), SAME v. INLAND REVENUE COMRS.] ..	215
PROTECTION Court of Protection. See PERSON OF UNSOUND MIND (Court of Protection).	
PROTECTORATE Habeas corpus. See HABEAS CORPUS (Jurisdiction).	
QUARTER SESSIONS Committal of offender to, for sentence—Sentences of less than twelve months' imprisonment on each of two charges, the sentences running consecutively—Whether the court has power to make an order under Criminal Justice Act, 1948 (c. 58), s. 22 (1), as amended by Prison Act, 1952 (c. 52), s. 54, Sch. 3 [R. v. MORDANAM] ..	875
Committal of offender to quarter sessions with view to borstal sentence—Road traffic offences—Disqualification—Powers of quarter sessions—Criminal Justice Act, 1948 (c. 58), s. 20 (5) (a)—Magistrates' Courts Act, 1952 (c. 55), s. 28 [R. v. DANGERFIELD] ..	88
RACECOURSE Improvements—Payments by Racecourse Betting Control Board—Taxation of the board. See INCOME TAX (Deduction in computing profits—Distribution by statutory body).	
RATES Advertising stations—Neon sign—Grant of rights of fixing and exhibiting a flashing neon advertising sign to be erected by the grantee—Sign erected—Whether hereditament should be valued with sign erected or on the footing that the sign was yet to be erected—Local Government Act, 1948 (c. 26), s. 56 [IMPERIAL TOBACCO Co. (OF GREAT BRITAIN AND IRELAND), LTD. v. PIERSON (VALUATION OFFICER)] ..	313
Assessment—Dwelling-house—Method of valuation—Interest on purchase price, etc.—Valuation for Rating Act, 1953 (c. 42), s. 2 (2) [SOLE v. HENNING (VALUATION OFFICER)] ..	398
De-rating—Industrial hereditament—Adapting for sale—Sorting, grading and matching of skins—Rating and Valuation (Apportionment) Act, 1928 (c. 44), s. 3 (1), (2)—Factory and Workshop Act, 1901 (c. 22), s. 149 (1) [HUDSON'S BAY Co. v. THOMPSON (VALUATION OFFICER)] ..	150
Exemption—Literary society—Purposes of literature exclusively—"Annual voluntary contributions"—Subscription library—Benefit confined to members—Whether instituted for purposes of literature exclusively—What were annual voluntary contributions—What proportion sufficient to make society one supported in part by such contributions—Scientific Societies Act, 1843 (c. 36), s. 1 [LONDON LIBRARY v. CANE (VALUATION OFFICER)] ..	726
Lands Tribunal—Appeal from decision of local valuation court—Onus of proof—Tribunal requiring to be satisfied as to something wrong in findings below—Lands Tribunal Rules, 1956 (S.I. 1956 No. 1734), r. 45 (4) [SOLE v. HENNING (VALUATION OFFICER)] ..	398
Limitation of rates chargeable—Royal College of Nursing—Organisation whose main objects are charitable—Organisation to promote the "advance of nursing as a profession"—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (c. 9), s. 8 (1) (a) [ROYAL COLLEGE OF NURSING v. ST. MARYLEBONE CORPN.] ..	663
Union of working men's clubs—Main objects—Finding by quarter sessions what main objects were—Business of general advisers—Conclusiveness—Not concerned with the advancement of social welfare—Objects including to carry on the business of publishers, traders, manufacturers, etc.—Whether established or conducted for profit—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (c. 9), s. 8 (1) (a) [THE WORKING MEN'S CLUB AND INSTITUTE UNION, LTD. v. SWANSEA CORPN.] ..	769
Zoo—Zoological society incorporated as company limited by guarantee—Main objects charitable—Organisation concerned with advancement of education—Whether organisation, though not established for profit, was conducted for profit—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (c. 9), s. 8 (1) (a) [NORTH OF ENGLAND ZOOLOGICAL SOCIETY v. CHESTER RURAL DISTRICT COUNCIL] ..	116
RECEIVER Fund—Proceeds of sale of oil subject to lien—Rights of former lienholders. See LIEN (Fund—Proceeds of sale of produce of oil well subject to lien).	
REGISTRATION Trade mark. See TRADE MARK.	

RENT RESTRICTION

Decontrol—Possession—Suspension of execution of order for possession—Costs—Landlord and Tenant (Temporary Provisions) Act, 1958 (c. 68), s. 4 (2) [SPYROPOULOS v. MCCLELLAND] 319

REPAIR

Covenant to, in lease. *See* LANDLORD AND TENANT.
Liability of landlord. *See* LANDLORD AND TENANT.

REQUISITION

Compensation—Release from requisition—Compensation to owner for accepting licensee as statutory tenant—Date when compensation becomes payable—Requisitioned Houses and Housing (Amendment) Act, 1955 (c. 24), s. 4 (2) (c) [EAST HAM CORPN. v. MINISTRY OF HOUSING AND LOCAL GOVERNMENT] 508

RESCUE

Liability to rescuer injured. *See* NEGLIGENCE.

RESIDENCE

Income tax. *See* INCOME TAX.

RESTRICTIVE TRADE PRACTICES

Reference—Bread price restriction—Scottish Bakers' Associations—Agreements not to sell except at prices recommended by Associations—Whether removal of restriction would deny public substantial benefit—Restrictive Trade Practices Act, 1956 (c. 68), s. 21 (1) (b) [Re SCOTTISH ASSN. OF MASTER BAKERS' AGREEMENT, Re WHOLESALE AND RETAIL BAKERS OF SCOTLAND ASSN.'S AGREEMENT] 98
Water-Tube Boilermakers' Association—Scheme for allotting contracts among members—Whether removal of restriction would deny public substantial benefit—Whether restriction reasonably necessary to enable members to negotiate fair terms for supply of goods to preponderant buyer—Whether removal of restriction would be likely to cause substantial reduction in the volume or earnings of the export business—Restrictive Trade Practices Act, 1956 (c. 68), s. 21 (1) (b), (d), (f) [Re WATER-TUBE BOILERMAKERS' ASSN.'S AGREEMENT] 257

REVENUE

Customs. *See* CUSTOMS.

ROAD TRAFFIC

Accident—Hospital expenses. *See* HOSPITAL (Motor accident).

Disqualification for holding licence—Borstal training sentence contemporaneously. *See* QUARTER SESSIONS (Committal of offender to quarter sessions with view to borstal sentence—Road traffic offences).

Insurance against third-party risks. *See* INSURANCE (Motor insurance—Third-party risks).

Insurance of motor vehicle. *See* INSURANCE (Motor insurance).

Motor vehicle—Taking and driving away without owner's consent—Accused not present when vehicle wrongfully taken by another person—Whether travelling in the vehicle subsequently, knowing it to have been taken without lawful authority, sufficient to constitute offence—Road Traffic Act, 1930 (c. 43), s. 28 (1) [R. v. STALLY] 814

Negligence—Collision at cross-roads—Major and minor road—"Slow. Major road ahead" sign in minor road—Motor cyclist emerging from minor road without observing sign and without slowing down, at speed of twenty miles an hour—Omnibus travelling on major road at speed of not more than twenty miles an hour—Possibility of danger emerging—Duty to take precautions—Contributory negligence [LANG v. LONDON TRANSPORT EXECUTIVE] 609

Notice of intended prosecution—Notice sent to defendant's residence by registered post—Defendant away on holiday unknown to police—Notice received by person in defendant's employ—Whether there had been compliance with Road Traffic Act, 1930 (c. 43), s. 21 (c)—Interpretation Act, 1889 (c. 63), s. 26 [LAYTON v. SHIRES] 587

Obstruction—Waiting regulations—Convictions of two separate offences on same facts—One conviction quashed—Motor Vehicles (Construction and Use) Regulations, 1955 (S.I. 1955 No. 482), reg. 89—London Traffic (Restriction of Waiting) (Station Parade, Gerrards Cross) Regulations, 1952 (S.I. 1952 No. 1294), reg. 3 [R. v. BURNHAM JUSTICES, Ex parte ANSORGE] 505

ROYAL FORCES

Civilian employee. *See* CROWN (Crown servant—Dismissal).

RUNNING DOWN

See ROAD TRAFFIC (Negligence).

SAFE SYSTEM OF WORKING

Safe place of work—Well—Clearing well of water—Petrol pump used on platform down well—Danger from carbon monoxide—Employees told not to go down well—Danger of death not indicated—Liability of master to servants and to doctor attempting rescue [WARD v. T. E. HOPKINS & SON, LTD., BAKER v. SAME] 225

SALE OF GOODS

Motor car—"New" car—When a car ceases to be new [MORRIS MOTORS, LTD. v. LILLEY (TRADING AS G. & L. MOTORS)] 737

Unpaid seller—Assent to other sale or disposition—Seller to be paid out of cash received from buyer's customers—Goods lying in warehouse—Delivery order by seller to buyer sent by buyer to warehousemen—Fresh delivery order by buyer to purchasers from him—Original seller not paid by buyer—Whether unpaid seller's right of lien on goods lost—Whether purchaser from buyer protected—Sale of Goods Act, 1893 (c. 71), s. 47, proviso, s. 25 (2) [D. F. MOUNT, LTD. v. JAY & JAY (PROVISIONS) CO., LTD.] 307

SALE OF LAND

Contract—Conditional contract—Purchase conditional on vendor's obtaining renewal of leases—Time for performance of condition—Recovery of deposit [ABERFOYLE PLANTATIONS, LTD. v. CHENG] 910

Deposit—Recovery. *See* Contract—Conditional contract, ante.

SCHEME

See CHARITY.

SENTENCE

Remission. *See* PRISON (Discharge).

See also QUARTER SESSIONS (Committal of offender to, for sentence; Committal of offender to quarter sessions with view to borstal sentence).

SERVANT

Civilian employee at War Department depot. *See* CROWN (Crown servant—Dismissal).

SERVICE

Notice determining business tenancy. *See* LANDLORD AND TENANT (New tenancy—Business premises—Notice to quit).

SETTLEMENT

Income tax. *See* INCOME TAX (Undistributed income).

Variation of trusts—Discretionary trust for specified class—Class included any future wife of married settlor—Subsequent alteration of tax legislation under which liability of settlor to tax might arise from inclusion of future wife within specified class—Variation of Trusts Act, 1953 (c. 53) [Re CLITHEROE'S SETTLEMENT TRUSTS]

789

SHARE

Valuation for estate duty. *See* ESTATE DUTY (Company).

SHIPPING

Bill of lading—Exemption—Cesser of liability of carrier on goods being discharged—Construction [SZE HAI TONG BANK, LTD. v. RAMBLER CYCLE CO., LTD.]

182

Charterparty—Construction—Exception—Strikes, "force majeure" or "hindrance . . . beyond charterers' control"—Nomination of loading port where five out of seven grain elevators strike-bound—Wheat intended cargo, but alternative cargo options—Decision of Wheat Board to load only liners and not tramps at port during strike—Sufficient wheat in non-strike board elevators to load tramps concerned—Delay in loading tramps—Whether nomination of strike-bound loading port valid—Whether charterers protected from demurrage claims by exceptions clause—Whether charterers bound to ship alternative cargoes—Whether, on a berth charterparty, charterers were in breach for not acquiring cargo until congestion of shipping after strike would allow ship to berth [REARDON SMITH LINE, LTD. v. MINISTRY OF AGRICULTURE, FISHERIES AND FOOD, GARIBALDI SOCIETA CO-OPERATIVA DI NAVIGAZIONE A.R.L. v. PRESIDENT OF INDIA, CARLTON STEAMSHIP CO., LTD. v. MINISTRY OF AGRICULTURE, FISHERIES AND FOOD, CAPE OF GOOD HOPE MOTORSHIP CO., LTD. v. SAME, MIRAMAR COMPANIA NAVIERA S.A. v. GOVERNMENT OF THE UNION OF SOUTH AFRICA]

434

Lay days—Reversible lay days [REARDON SMITH LINE, LTD. v. MINISTRY OF AGRICULTURE, FISHERIES AND FOOD, GARIBALDI SOCIETA CO-OPERATIVA DI NAVIGAZIONE A.R.L. v. PRESIDENT OF INDIA, CARLTON STEAMSHIP CO., LTD. v. MINISTRY OF AGRICULTURE, FISHERIES AND FOOD, CAPE OF GOOD HOPE MOTORSHIP CO., LTD. v. SAME, MIRAMAR COMPANIA NAVIERA S.A. v. GOVERNMENT OF THE UNION OF SOUTH AFRICA]

434

Collision—Damages—Detention—Measure of damages—No specific vessel chartered as replacement tonnage—Interest on capital value [THE HEBRIDEAN COAST]

126

Demurrage—Arbitration. *See* ARBITRATION (Award—Remission—Arbitrator's jurisdiction).

Computation—Lay days—Reversible lay days—Method of computation of time—Saturdays [REARDON SMITH LINE, LTD. v. MINISTRY OF AGRICULTURE, FISHERIES AND FOOD, GARIBALDI SOCIETA CO-OPERATIVA DI NAVIGAZIONE A.R.L. v. PRESIDENT OF INDIA, CARLTON STEAMSHIP CO., LTD. v. MINISTRY OF AGRICULTURE, FISHERIES AND FOOD, CAPE OF GOOD HOPE MOTORSHIP CO., LTD. v. SAME, MIRAMAR COMPANIA NAVIERA S.A. v. GOVERNMENT OF THE UNION OF SOUTH AFRICA]

434

Port charterparty. *See* Charterparty—Construction—Exception—Strikes, "force majeure" or "hindrance . . . beyond charterers' control", ante.

SINGAPORE

See PRIVY COUNCIL.

SMALL DWELLINGS

See HOUSING.

SOLICITOR

Charging order—Taxation—Special circumstances need not be shown—Solicitors Act, 1957 (c. 27), s. 69 (2) (b) proviso (i), s. 72 [HARRIS v. YARM]

618

SPECIALIST

Medical—Income tax. *See* INCOME TAX (Deduction in computing profits—Expenses).

STAMP DUTY

Conveyance on sale—Transfer of shares—Shares subject to settlement—Oral agreement to exchange reversionary interest in settled shares for shares owned by life tenants—Trustees' subsequent transfer of shares to life tenant—Whether conveyance of beneficial interest—Stamp Act, 1891 (c. 39), s. 54, Sch. 1—Law of Property Act, 1925 (c. 20), s. 53 (1), (2) [OUGHTRED v. INLAND REVENUE COMRS.]

623

Voluntary disposition—Inter vivos—Disposition by declaring new trusts—Transfer of shares—Transfer by settlor to trustees of settlement—Subsequent oral direction to trustees on what trusts shares to be held—Deed of declaration by trustees subsequently confirming trusts—Whether direction a "disposition" of settlor's interest—Whether deed liable to ad valorem stamp duty—Stamp Act, 1891 (c. 39), Sch. 1—Finance (1909-10) Act, 1910 (c. 8), s. 74 (1)—Law of Property Act, 1925 (c. 20), s. 53 (1) (c) [GREY v. INLAND REVENUE COMRS.]

603

STATUTE

Construction—Compulsory acquisition—Implied grant. *See* COMPULSORY PURCHASE (Implied grant).

Consolidating statute—Recent amending legislation included in the consolidation—Meaning of "disposition" in a section of the consolidating statute not limited to the meaning of corresponding words in the original enactment thereby superseded as altered by the intervening legislation—Law of Property Act, 1925 (c. 20), s. 53 (1) (c) [GREY v. INLAND REVENUE COMRS.]

603

"May" construed as meaning "shall" [Re SHUTER (No. 2)]

481

Contract—Agreement confirmed by statute—Whether agreement binding by statutory force or binding in contract—Malvern Hills Act, 1924 (c. xxxvi), s. 54, Sch. 4 [PYX GRANITE CO., LTD. v. MINISTRY OF HOUSING AND LOCAL GOVERNMENT]

1

Offence—Whether enactment is declaratory or creates an offence—Betting and Lotteries Act, 1934 (c. 58), s. 21 [SALES-MATIC, LTD. v. HINCHLIFFE]

401

Operation—Effect to be given to plain words notwithstanding international treaty [INLAND REVENUE COMRS. v. COLLO DEALINGS, LTD.]

351

Remedy—Whether jurisdiction of court ousted [PYX GRANITE CO., LTD. v. MINISTRY OF HOUSING AND LOCAL GOVERNMENT]

1

	PAGE
STATUTORY DUTY	
Breach—Causation—Contributory negligence— <i>Workman deliberately inserting hand into moving machine</i> [RUSHTON v. TURNER BROS. ASBESTOS CO., LTD.]	517
Inclosure award, under [ATTORNEY-GENERAL (ON THE RELATION OF THOMAS BROWNLEE PAISLEY) v. ST. IVES RURAL DISTRICT COUNCIL]	371
Merchandise Marks Acts—Whether action by. See TRADE MARK (False trade description).	
STAY OF PROCEEDINGS	
See PRACTICE.	
STREET	
See HIGHWAY.	
STREET REFUGE	
Damage to. See HIGHWAY (London).	
STRIKE	
Docks. See SHIPPING (Charterparty—Construction—Exception).	
SUPERVISION	
Order. See QUARTER SESSIONS (Committal of offender to, for sentence).	
SUPPORT	
Withdrawal—Working facilities. See COAL MINING (Working facilities).	
TAXATION	
Costs. See COSTS.	
See also LEGAL AID (Costs).	
TENANCY	
New—Business premises. See LANDLORD AND TENANT (New tenancy).	
New tenancy under Landlord and Tenant Act, 1954. See LANDLORD AND TENANT (New tenancy).	
Year to year. See LANDLORD AND TENANT.	
TOWN AND COUNTRY PLANNING	
Development—Permission—Necessity for permission—Agreement between quarry owners and local authority as to quarrying areas scheduled to Act of Parliament—Whether agreed quarrying was development "authorised" by any local or private Act—Town and Country Planning General Development Order, 1950 (S.I. 1950 No. 728), art. 3 (1), Sch. 1, class xii— <i>Malvern Hills Act, 1924</i> (c. xxxvi), s. 54, Sch. 4 [PYX GRANITE CO., LTD. v. MINISTRY OF HOUSING AND LOCAL GOVERNMENT]	1
TRADE	
Competition—Unlawful competition. See PASSING OFF (Geographical name descriptive of particular district of France—Plaintiffs a class of producers within that district—"Spanish Champagne" used to describe wine produced in Spain).	
Injunction—Sale of goods. See INJUNCTION (Sale of goods).	
Restrictive practices. See RESTRICTIVE TRADE PRACTICES.	
TRADE MARK	
False trade description—Breach of statutory duty—Whether action for damages lies for breach of statutory duty under Merchandise Marks Acts, 1887 to 1953— <i>Merchandise Marks Act, 1887</i> (c. 28), s. 2 (2)— <i>Merchandise Marks Act, 1953</i> (c. 48), s. 4 [J. BOLLINGER v. COSTA BRAVA WINE CO., LTD.]	800
Passing off. See PASSING OFF.	
Registration—Phonetic equivalent of unregistrable word— <i>Trade Marks Act, 1938</i> (c. 22), s. 9 (1) [ELECTRIX, LTD. v. ELECTROLUX, LTD.]	170
TRIAL	
New. See COUNTY COURT (Appeal).	
See also CRIMINAL LAW.	
TRUST AND TRUSTEE	
Declaration of trust—Transfer by way of declaration of new trust and determination of subsisting equitable interest—Personally—Whether a "disposition" for which writing needed— <i>Law of Property Act, 1925</i> (c. 20), s. 53 (1) (c) [GREY v. INLAND REVENUE COMRS.]	603
Proceeds of sale—Fund held by receiver—Rights of lienholders over property sold transferred to fund. See LIEN (Fund—Proceeds of sale of produce of oil well subject to lien).	
Public non-charitable trust—Gift to parish council "for purpose of some useful memorial" to testator—Validity [Re ENDACOTT (decd.)]	562
Remuneration of trustee—New trustee an attesting witness to will. See WILL (Attestation—Solicitor attesting).	
Uncertainty. See CHARITY (Uncertainty).	
Variation of trusts by the court—Investment—Evidence of stockbroker or expert [Re ALLEN'S SETTLEMENT]	673
Practice—Approval on behalf of person of unsound mind—Variation of Trusts Act, 1958 (c. 53), s. 1 (3) [PRACTICE NOTE]	897
Order—Direction that variation should be carried into effect—New trusts operating subject to subsisting life interest—Variation of Trusts Act, 1958 (c. 53), s. 1 [Re JOSEPH'S WILL TRUSTS]	474
Whether court will approve variation with possible risk to beneficiary—Variation of Trusts Act, 1958 (c. 53), s. 1 [Re COHEN'S WILL TRUSTS, Re COHEN'S SETTLEMENT TRUSTS]	523
See also SETTLEMENT (Variation of trusts).	
VARIATION OF TRUSTS	
See SETTLEMENT; TRUST AND TRUSTEE (Variation of trusts by the court).	
VOLENTI NON FIT INJURIA	
See NEGLIGENCE (Defence).	
WAGES	
Holidays scheme—Whether employer's contributions are wages [LONDON COUNTY COUNCIL v. HENRY BOOT & SONS, LTD.]	636

WAIVER

Landlord and tenant. *See* LANDLORD AND TENANT (Notice to quit).

Service—*Invalidity*. *See* LANDLORD AND TENANT (New tenancy—*Business premises—Notice to quit*).

WAYLEAVE

See ELECTRICITY (Supply).

WIFE

Maintenance. *See* MAGISTRATES (Husband and wife).

WILL

Attestation—*Solicitor attesting—Provision for trustees' remuneration—Provision for solicitor's professional charges—Solicitor appointed trustee subsequent to death of testator—Whether entitled to remuneration or professional charges—Wills Act, 1837 (c. 26), s. 15 [Re ROYCE'S WILL TRUSTS]* 278

Charging clause—*Attesting witness appointed trustee after testator's death. See* Attestation—*Solicitor attesting, ante.*

Condition—*Certainty—Condition subsequent—Gift over if daughter should marry a person who did not "practise the Jewish religion" [Re KRAWITZ'S WILL TRUSTS]* 793

Gift to next of kin—*Such of testator's "next of kin" according to the Statutes of Distribution as should be living in the United Kingdom at the decease of his daughter—Whether brothers and nieces of testator entitled to take with widow—Administration of Estates Act, 1925 (c. 23), s. 50 (1) [Re KRAWITZ'S WILL TRUSTS]* 793

Survivor—*Gift subject to life interest to three persons "or the survivors or survivor of them" [Re DOUGLAS'S WILL TRUSTS]* 785

WINDING-UP

Company, of. *See* COMPANY.

WRITING

Marriage—*Promise of marriage. See* PRIVY COUNCIL (Ceylon—*Marriage*).

ZOOLOGICAL GARDENS

Charity. *See* CHARITY (Education—*Zoo*).

Rates. *See* RATES (Limitation of rates chargeable—*Zoo*).

CASES NOTED

	PAGE
Abbott v. Philbin ([1959] 2 All E.R. 270; [1959] 1 W.L.R. 667). <i>Reversed</i> . C.A.	590
Agripex Hungarian Trading Co. for Agricultural Products v. Sociedad Financiera de Bienes Raices S.A. ([1958] 2 All E.R. 701; [1958] 2 Q.B. 405). <i>Dictum of PARKER, L.J., applied in</i> Reardon Smith Line, Ltd. v. Ministry of Agriculture, Fisheries and Food	434
Anderson, <i>Ex p.</i> (1861) (30 L.J.Q.B. 129; 3 L.T. 622). <i>Considered in</i> Re Mwenya	525
Arnison v. Smith (1889) (41 Ch.D. 348). <i>Criticised in</i> Akerhielm v. De Mare	485
A.-G. v. Johnson ([1907] 2 K.B. 885; 76 L.J.K.B. 1150; 97 L.T. 720). <i>Applied in</i> Philipson-Stow v. I.R. Comrs.	879
Bailey v. Potteries Electric Traction Co., Ltd. ([1931] 1 K.B. 494, 495; 100 L.J.K.B. 17; 143 L.T. 663). <i>Dictum of SCRUTTON, L.J., applied in</i> Hudson's Bay Co. v. Thompson	150
Baker v. T. E. Hopkins & Son, Ltd. ([1958] 3 All E.R. 147; [1958] 1 W.L.R. 993). <i>Affirmed</i> . C.A.	225
Barbey v. Contract & Trading Co. (Southern), Ltd. ([1959] 2 All E.R. 145; [1959] 2 W.L.R. 568). <i>Affirmed</i> . H.L.	846
Barclays Bank, Ltd. v. I.R. Comrs. ([1959] 1 All E.R. 65; [1959] Ch. 341; [1959] 2 W.L.R. 99). <i>Reversed</i> . C.A.	140
Barraclough v. Brown ([1997] A.C. 615; 66 L.J.Q.B. 672; 76 L.T. 797). <i>Distinguished in</i> Pyx Granite Co., Ltd. v. Ministry of Housing and Local Government	1
Battersea Metropolitan Borough v. British Iron & Steel Research Asscn. ([1949] 1 K.B. 462, 457; [1949] L.J.R. 658, 655). <i>Dicta of</i> DENNING, L.J., and JENKINS, J., <i>considered in</i> London Library v. Cane	726
Beckermert Mining Co., Ltd.'s Application, Re ([1938] 1 All E.R. 389). <i>Not followed in</i> Re Application of the National Coal Board	58
Berchtold, Re ([1923] 1 Ch. 192; 92 L.J.Ch. 185; 128 L.T. 591). <i>Considered in</i> Philipson-Stow v. I.R. Comrs.	879
Berry v. St. Marylebone Corpn. ([1957] 3 All E.R. 682; [1958] Ch. 410; [1957] 3 W.L.R. 1035). <i>Dicta of</i> ROMER, L.J., <i>applied in</i> North of England Zoological Society v. Chester R.D.C.	116
Biles v. Caesar ([1957] 1 All E.R. 151; [1957] 1 W.L.R. 156). <i>Applied in</i> Bolton's (House Furnishers), Ltd. v. Oppenheim	90
Birmingham New Library, Re (1849) (18 L.J.M.C. 89; sub nom. R. v. Shaw, 13 L.T.O.S. 23). <i>Overruled in</i> London Library v. Cane	726
Biss, Re ([1956] 1 All E.R. 89; [1956] Ch. 243; [1956] 2 W.L.R. 94). <i>Followed in</i> Re Cohen (dec'd.)	740
Bolton (H. L.) (Engineering) Co., Ltd. v. T. J. Graham & Sons, Ltd. ([1956] 3 All E.R. 624; [1957] 1 Q.B. 159; [1957] 3 W.L.R. 804). <i>Followed in</i> Frederick Lawrence, Ltd. v. Freeman Hardy & Willis, Ltd.	77
Bolton's (House Furnishers) Ltd. v. Oppenheim ([1959] 2 All E.R. 473; [1959] 1 W.L.R. 685). <i>Affirmed</i> . C.A.	90
Boot (Henry) & Sons, Ltd. v. L.C.C. ([1959] 1 All E.R. 77; [1959] 1 W.L.R. 133). <i>Reversed</i> . H.L.	636
Bright v. Bright ([1953] 2 All E.R. 939; [1954] P. 270; [1953] 2 W.L.R. 659). <i>Disapproved in</i> Fisher v. Fisher	131
Brightman & Co. v. Bunge Y Born ([1924] 2 K.B. 619; 93 L.J.K.B. 1070; 132 L.T. 188). <i>Distinguished in</i> Reardon Smith Line, Ltd. v. Ministry of Agriculture, Fisheries and Food	434
British Launderers' Research Asscn. v. Hendon Borough Rating Authority ([1949] 1 All E.R. 23; [1949] 1 K.B. 467; [1949] L.J.R. 418). <i>Dictum of</i> DENNING, L.J., <i>applied in</i> London Library v. Cane	726
Bullock v. Corry (1878) (3 Q.B.D. 356; 47 L.J.Q.B. 352; 38 L.T. 102). <i>Applied in</i> Hobbs v. Hobbs and Cousens	827
Bullock v. Unit Construction Co., Ltd. ([1959] 1 All E.R. 591; [1959] Ch. 315; [1959] 2 W.L.R. 437). <i>Reversed</i> . H.L.	831
Bunge Y Born Co. v. H. A. Brightman & Co. ([1925] A.C. 807, 816; 94 L.J.K.B. 843, 848; 133 L.T. 740, 744). <i>Dicta of</i> LORDS DUNEDIN and SUMNER <i>applied in</i> Reardon Smith Line, Ltd. v. Ministry of Agriculture, Fisheries and Food	434
Casey v. Casey ([1949] 2 All E.R. 110; [1949] P. 420; [1949] L.J.R. 1642). <i>Distinguished in</i> Hill v. Hill	754
Chartered Bank of India, Australia & China v. British India Steam Navigation Co., Ltd. ([1909] A.C. 369; 78 L.J.P.C. 111; 100 L.T. 661). <i>Distinguished in</i> Sze Hai Tong Bank, Ltd. v. Rambler Cycle Co., Ltd.	182
Chivers & Sons, Ltd. v. Cambridge C.C. ([1957] 1 All E.R. 882; [1957] 2 Q.B. 68; [1957] 2 W.L.R. 646). <i>Followed in</i> Working Men's Club and Institute Union, Ltd. v. Swansea Corpn.	769
Ciampa v. British India Steam Navigation Co., Ltd. ([1915] 2 K.B. 779; 84 L.J.K.B. 1657). <i>Dictum considered in</i> Reardon Smith Line, Ltd. v. Ministry of Agriculture, Fisheries and Food	434
Clavering v. Ellison (1859) (29 L.J.Ch. 761). <i>Followed in</i> Re Krawitz's Will Trusts	793
Cockburn v. Smith ([1924] 2 K.B. 119; 93 L.J.K.B. 764; 131 L.T. 334). <i>Applied in</i> Sleafer v. Lambeth Metropolitan B.C.	378
Coleman v. Coleman ([1955] 3 All E.R. 619, 620; [1955] 1 W.L.R. 1237, 1238). <i>Dicta applied in</i> Sharma v. Sharma and Davis	321
Cotton v. Cotton ([1954] 2 All E.R. 105; [1954] P. 305; [1954] 2 W.L.R. 947). <i>Followed in</i> Francis v. Francis	206
Currie v. Consolidated Kent Collieries Corpn., Ltd. ([1906] 1 K.B. 134; 75 L.J.K.B. 199; 94 L.T. 148). <i>Applied in</i> Cook v. "X" Chair Patents Co., Ltd.	906
Davies v. Braithwaite ([1931] All E.R. Rep. 792; [1931] 2 K.B. 628; 100 L.J.K.B. 619; 145 L.T. 693). <i>Distinguished in</i> Mitchell v. Ross	341
Davies v. Powell Duffryn Associated Collieries, Ltd. (No. 2) ([1942] 1 All E.R. 664; [1942] A.C. 616; 111 L.J.K.B. 425; 167 L.T. 79). <i>Test stated by</i> LORD WRIGHT <i>applied in</i> Scott v. Musial	193
De Beers Consolidated Mines, Ltd. v. Howe ([1906] A.C. 458; 75 L.J.K.B. 860; 95 L.T. 222). <i>Dictum of</i> LORD LOREBURN, L.C., <i>applied in</i> Unit Construction Co., Ltd. v. Bullock	831
Dobell & Co. v. Green & Co. ([1900] 1 Q.B. 526; 69 L.J.Q.B. 454; 82 L.T. 314). <i>Applied in</i> Reardon Smith Line, Ltd. v. Ministry of Agriculture, Fisheries and Food	434
Donaldson v. McNiven ([1952] 2 All E.R. 691). <i>Distinguished in</i> Newton v. Edgerley	337
Douglas's Will Trusts, Re ([1959] 2 All E.R. 620; [1959] 1 W.L.R. 744). <i>Affirmed</i> . C.A.	785
Drummond, Re ([1914] 2 Ch. 90; 83 L.J.Ch. 817; 111 L.T. 156). <i>Distinguished in</i> Re Endacott (dec'd.)	562
Dunn v. R. ([1896] 1 Q.B. 116; 65 L.J.Q.B. 279; 73 L.T. 695). <i>Applied in</i> Riordan v. War Office	552
Egyptian Delta Land & Investment Co., Ltd. v. Todd ([1929] A.C. 1; 98 L.J.K.B. 1; 140 L.T. 50). <i>Explained in</i> Unit Construction Co., Ltd. v. Bullock	831

	PAGE
Evans v. Wills (1876) (1 C.P.D. 229; 45 L.J.Q.B. 420; 34 L.T. 679). <i>Applied in</i> Wiltshire v. Fell	862
Fardon v. Harcourt-Rivington (1932) All E.R. Rep. 83; 146 L.T. 392). <i>Principle stated by</i> LORD DUNEDIN <i>applied in</i> Lang v. London Transport Executive	609
Fielding v. Preston (1857) (29 L.T.O.S. 337). <i>Applied in</i> Re Cohen (<i>dec'd.</i>)	740
Fitzhardinge, Re (1899) (80 L.T. 376). <i>Applied in</i> Re Lonsdale's Will Trusts	679
Fox v. Jolly (1916) 1 A.C. 12; 84 L.J.K.B. 1931; 113 L.T. 1029). <i>Dictum of</i> LORD BUCKMASTER, L.C., <i>applied in</i> Silvester v. Ostrowska	642
France, Fenwick & Co., Ltd. v. Philip Spackman & Sons (1912) (108 L.T. 372). <i>Dictum considered in</i> Reardon Smith Line, Ltd. v. Ministry of Agriculture, Fisheries and Food	434
General Nursing Council for England and Wales v. St. Marylebone Corpn. ([1959] 1 All E.R. 333; [1959] 2 W.L.R. 318). <i>Dictum of</i> LORD KEITH OF AVONHOLM <i>applied in</i> Royal College of Nursing v. St. Marylebone Corpn.	663
Glynn v. Margetson & Co. ([1893] A.C. 357; 62 L.J.Q.B. 469; 69 L.T. 3). <i>Principle of construction stated by</i> LORD HALSBURY <i>applied in</i> Sze Hai Tong Bank, Ltd. v. Rambler Cycle Co., Ltd.	182
Greta Holme, The ([1897] A.C. 605; 66 L.J.P. 171; 77 L.T. 234). <i>Dictum of</i> LORD HERSCHELL <i>applied in</i> The Hebridean Coast	126
Grey v. I.R. Comrs. ([1958] 2 All E.R. 428; [1958] Ch. 690; [1958] 3 W.L.R. 45). <i>Affirmed.</i> H.L.	603
Groves v. Lord Wimborne ([1898] 2 Q.B. 407; 67 L.J.Q.B. 865; 79 L.T. 236). <i>Dictum of</i> A. L. SMITH, L.J., <i>applied in</i> A.-G. v. St. Ives R.D.C.	371
Guinness Trust (London Fund) v. West Ham Corpn. ([1959] 1 All E.R. 482; [1959] 1 W.L.R. 233). <i>Applied in</i> Working Men's Club and Institute Union, Ltd. v. Swansea Corpn.	769
— ([1959] 1 All E.R. 488; [1959] 1 W.L.R. 239). <i>Dicta of</i> JENKINS, L.J., <i>applied in</i> North of England Zoological Society v. Chester R.D.C.	116
Hammond v. Hammond ([1957] 3 All E.R. 16; [1957] P. 349; [1957] 3 W.L.R. 395). <i>Not followed in</i> Sutton v. Sears	545
Hart v. Windsor (1844) (13 L.J.Ex. 129; 2 L.T.O.S. 440). <i>Applied in</i> Sleafer v. Lambeth Metropolitan B.C.	378
Hastings (No. 3), Re ([1959] 1 All E.R. 698; [1959] Ch. 368; [1959] 2 W.L.R. 454). <i>Affirmed.</i> C.A.	221
Haynes v. Harwood ([1934] All E.R. Rep. 107, 108; [1935] 1 K.B. 156, 157; 104 L.J.K.B. 67, 68; 152 L.T. 123, 124). <i>Dictum of</i> GREER, L.J., <i>applied in</i> Ward v. T. E. Hopkins & Son, Ltd.	225
High Road, Kilburn, Re 83 ([1959] 1 All E.R. 527; [1959] 1 W.L.R. 279). <i>Considered in</i> Frederick Lawrence, Ltd. v. Freeman Hardy & Willis, Ltd.	77
Hinchliffe, Re ([1895] 1 Ch. 117; 64 L.J.Ch. 76; 71 L.T. 532). <i>Distinguished in</i> Re Moritz (<i>dec'd.</i>)	767
Hines v. Eastern Counties Farmers' Co-op Assocn., Ltd. ([1931] 1 K.B. 504; 100 L.J.K.B. 17; 143 L.T. 663). <i>Dictum of</i> SCRUTTON, L.J., <i>applied in</i> Hudson's Bay Co. v. Thompson	150
Hochstrasser v. Mayes ([1958] 3 All E.R. 285; [1959] Ch. 22; [1958] 3 W.L.R. 215). <i>Affirmed.</i> H.L.	817
Hong v. A. & R. Brown, Ltd. ([1948] 1 All E.R. 185; [1948] 1 K.B. 517; [1948] L.J.R. 1817). <i>Principle stated by</i> LORD GREENE, M.R., <i>followed in</i> Wagnan v. Vare Motors, Ltd.	326
Hooper, Re ([1931] All E.R. Rep. 129; [1932] 1 Ch. 38; 101 L.J.Ch. 61; 146 L.T. 208). <i>Distinguished in</i> Re Endacott (<i>dec'd.</i>)	562
Hudson's Bay Co. v. Thompson ([1958] 3 All E.R. 244; [1958] 1 W.L.R. 955). <i>Reversed.</i> H.L.	150
Hutter v. Hutter ([1944] 2 All E.R. 368; [1944] P. 95; 113 L.J.P. 78; 171 L.T. 241). <i>Observations of</i> PILCHER, J., <i>applied in</i> Hill v. Hill	754
I.R. Comrs. v. Australian Mutual Provident Society ([1947] 1 All E.R. 600; [1947] A.C. 605; [1947] L.J.R. 690; 177 L.T. 9). <i>Considered in</i> Ostime v. Australian Mutual Provident Society	245
I.R. Comrs. v. Bibby & Sons, Ltd. ([1945] 1 All E.R. 667; 114 L.J.K.B. 353; 173 L.T. 17). <i>Applied in</i> Barclays Bank, Ltd. v. I.R. Comrs.	140
I.R. Comrs. v. Butterley Co., Ltd. ([1956] 2 All E.R. 197; [1957] A.C. 32; [1956] 2 W.L.R. 1101). <i>Applied in</i> Whitworth Park Coal Co., Ltd. v. I.R. Comrs.	703
I.R. Comrs. v. Forrest (1890) (15 App. Cas. 348; 60 L.J.Q.B. 288; 63 L.T. 40). <i>Dictum of</i> LORD WATSON <i>applied in</i> London Library v. Cane	726
I.R. Comrs. v. Gribble ([1913] 3 K.B. 218; 82 L.J.K.B. 903; 108 L.T. 889). <i>Dictum of</i> BUCKLEY, L.J., <i>applied in</i> Frederick Lawrence, Ltd. v. Freeman Hardy & Willis, Ltd.	77
I.R. Comrs. v. Hambrook ([1956] 1 All E.R. 811; [1956] 2 Q.B. 649; [1956] 2 W.L.R. 925). <i>Dictum of</i> LORD GODDARD, C.J., <i>applied in</i> Riordan v. War Office.	552
I.R. Comrs. v. Westminster (Duke) ([1935] All E.R. Rep. 259; [1936] A.C. 1; 104 L.J.K.B. 383; 153 L.T. 223). <i>Applied in</i> Hochstrasser v. Mayes	817
Institution of Civil Engineers v. I.R. Comrs. ([1931] All E.R. Rep. 454; [1932] 1 K.B. 149; 100 L.J.K.B. 705; 145 L.T. 553). <i>Applied in</i> Royal College of Nursing v. St. Marylebone Corpn.	663
John, Re ([1932] All E.R. Rep. 556; [1933] Ch. 370; 102 L.J.Ch. 72; 148 L.T. 450). <i>Applied in</i> Re Cohen (<i>dec'd.</i>)	740
Johnson v. Johnson ([1900] P. 19; 69 L.J.P. 13; 81 L.T. 791). <i>Applied in</i> R. v. Medical Appeal Tribunal, <i>Ex p.</i> Hubble	40
Kay's Settlement, Re ([1939] 1 All E.R. 245; [1939] Ch. 329; 108 L.J.Ch. 156; 160 L.T. 172). <i>Distinguished in</i> Re Moritz (<i>dec'd.</i>)	767
Keele Estates (No. 2), Re ([1952] 2 All E.R. 164; [1952] Ch. 603). <i>Explained and distinguished in</i> Re Lonsdale's Will Trusts	679
Leng v. Leng ([1946] 2 All E.R. 590; 175 L.T. 517). <i>Considered and applied in</i> Lilley v. Lilley	283
Lilley v. Lilley ([1958] 3 All E.R. 528; [1958] 3 W.L.R. 728). <i>Affirmed.</i> C.A.	283
Liverpool Corpn. v. West Derby Union (1905) (92 L.T. 467). <i>Not followed in</i> London Library v. Cane	726
London Passenger Transport Board v. Upson ([1949] 1 All E.R. 63, 70, 72, 75; [1949] A.C. 162, 173, 175, 181; [1949] L.J.R. 241, 249, 250, 254). <i>Dicta applied in</i> Lang v. London Transport Executive	609
Lopes, Re ([1930] All E.R. Rep. 47; [1931] 2 Ch. 135; 100 L.J.Ch. 298; 146 L.T. 10). <i>Dicta of</i> FARWELL, J., <i>adopted in</i> North of England Zoological Society v. Chester R.D.C.	116
M'Alister (or Donoghue) v. Stevenson ([1932] All E.R. Rep. 11; [1932] A.C. 580; 101 L.J.P.C. 127; 147 L.T. 285). <i>Dictum of</i> LORD ATKIN <i>applied in</i> Ward v. T. E. Hopkins & Son, Ltd.	225
Marlborough (Duke) v. A.-G. (No. 1) ([1945] 1 All E.R. 165; [1945] Ch. 78; 114 L.J.Ch. 83; 172 L.T. 21). <i>Considered in</i> Philipson-Stow v. I.R. Comrs.	879
Mechanical & General Inventions Co., Ltd. & Lehwess v. Austin & Austin Motor Co., Ltd. ([1935] All E.R. Rep. 37; [1935] A.C. 378; 104 L.J.K.B. 418; 153 L.T. 162). <i>Test stated by</i> LORD WRIGHT <i>applied in</i> Scott v. Musial	193
Miller, Re ([1914] 1 Ch. 511; 83 L.J.Ch. 457; 110 L.T. 505). <i>Considered in</i> Philipson-Stow v. I.R. Comrs.	879
Mint v. Good ([1950] 2 All E.R. 1162; [1951] 1 K.B. 521). <i>Dictum of</i> SOMERVELL, L.J., <i>explained in</i> Sleafer v. Lambeth Metropolitan B.C.	378
Mordaunt Brothers v. British Oil & Cake Mills, Ltd. ([1910] 2 K.B. 507; 79 L.J.K.B. 969; 103 L.T. 218). <i>Dictum of</i> PICKFORD, J., <i>applied in</i> D. F. Mount, Ltd. v. Jay & Jay (Provisions) Co., Ltd.	307
Moses, Re ([1908] 2 Ch. 235; 77 L.J.Ch. 783; 99 L.T. 519). <i>Considered in</i> Philipson-Stow v. I.R. Comrs.	879

	PAGE
National Deposit Friendly Society Trustees v. Skegness U.D.C. ([1958] 2 All E.R. 601; [1959] A.C. 293; [1958] 3 W.L.R. 172). <i>Applied in</i> Working Men's Club and Institute Union, Ltd. v. Swansea Corpn.	769
— ([1958] 2 All E.R. 612; [1959] A.C. 320; [1958] 3 W.L.R. 187). <i>Dictum of</i> LORD DENNING applied in Working Men's Club and Institute Union, Ltd. v. Swansea Corpn.	769
North of England Zoological Society v. Chester R.D.C. ([1958] 3 All E.R. 535; [1958] 1 W.L.R. 1258). <i>Affirmed.</i> C.A.	116
Ostime v. Australian Mutual Provident Society ([1958] 2 All E.R. 665; [1959] Ch. 427; [1958] 3 W.L.R. 354). <i>Affirmed.</i> H.L.	245
Oughtred v. I.R. Comrs. ([1958] 2 All E.R. 443; [1958] Ch. 678; [1958] 3 W.L.R. 64). <i>Affirmed.</i> H.L.	623
Pearce v. Foster (1885) (15 Q.B.D. 119; 54 L.J.Q.B. 433; 52 L.T. 887). <i>Observations of</i> SIR WILLIAM BRETT, M.R., <i>applied in</i> Hobbs v. Hobbs and Cousens	827
Penny v. Railways Comr. ([1900] A.C. 628; 69 L.J.P.C. 113; 83 L.T. 182). <i>Considered in</i> Re Douglas's Will Trusts	785
Philipson-Stow v. I.R. Comrs. ([1959] 1 All E.R. 583; [1959] Ch. 395; [1959] 2 W.L.R. 427). <i>Affirmed.</i> C.A.	879
Phillips v. Britannia Hygienic Laundry Co. ([1923] 2 K.B. 841; 93 L.J.K.B. 9; 129 L.T. 781). <i>Dictum of</i> ATKIN, L.J., <i>applied in</i> A.-G. v. St. Ives R.D.C.	371
Powell v. Powell (1889) (14 P.D. 177; sub nom. <i>Re</i> Powell, 61 L.T. 436). <i>Applied in</i> Cassidy v. Cassidy	187
Prevost, <i>Re</i> ([1930] 2 Ch. 386; 99 L.J.Ch. 426; 143 L.T. 744). <i>Dictum of</i> EYE, J., <i>adopted and applied in</i> London Library v. Cane	726
Pyx Granite Co., Ltd. v. Ministry of Housing and Local Government ([1958] 1 All E.R. 625; [1958] 1 Q.B. 554; [1958] 2 W.L.R. 371). <i>Reversed.</i> H.L.	1
R. v. Campbell, <i>Ex p.</i> Nomikos ([1956] 2 All E.R. 283; [1956] 1 W.L.R. 626). <i>Observations of</i> LORD GODDARD, C.J., <i>applied in</i> R. v. Burnham JJ., <i>Ex p.</i> Anson	505
R. v. Crewe (Earl). <i>Ex p.</i> Skegness ([1910] 2 K.B. 592, 605, 608, 618; 79 L.J.K.B. 884, 886, 887, 891; 102 L.T. 771, 776, 777, 780). <i>Dicta of</i> VAUGHAN WILLIAMS and FARWELL, L.J.J., <i>not followed in</i> Re Mwenya	525
— ([1910] 2 K.B. 629; 79 L.J.K.B. 897; 102 L.T. 784). <i>Dicta of</i> KENNEDY, L.J., <i>followed in</i> Re Mwenya	525
R. v. Medical Appeal Tribunal (North Midland Region), <i>Ex p.</i> Hubble ([1958] 2 All E.R. 374; [1958] 2 Q.B. 228; [1958] 3 W.L.R. 24). <i>Affirmed.</i> C.A.	40
R. v. Midland Ry. Co. (1887) (19 Q.B.D. 540; 56 L.J.Q.B. 585; 57 L.T. 619). <i>Distinguished in</i> Pyx Granite Co., Ltd. v. Ministry of Housing and Local Government	1
R. v. Moore ([1957] 2 All E.R. 703; [1957] 1 W.L.R. 841). <i>Applied in</i> R. v. Caddy	138
R. v. Secretary of State for Home Affairs, <i>Ex p.</i> O'Brien ([1923] 2 K.B. 361; 129 L.T. 419). <i>Explained and distinguished in</i> Re Mwenya	525
R. v. Sharp ([1958] 1 All E.R. 62). <i>Overruled in</i> R. v. Podola	418
R. v. Spriggs ([1958] 1 All E.R. 300; [1958] 1 Q.B. 270; [1958] 2 W.L.R. 162). <i>Explained in</i> R. v. Walden	203
R. v. Turner ([1910] 1 K.B. 346; 79 L.J.K.B. 176; 102 L.T. 367). <i>Applied in</i> R. v. Long	559
Racecourse Betting Control Board v. Young ([1958] 2 All E.R. 385; [1958] 1 W.L.R. 705). <i>Affirmed.</i> H.L.	215
Randall v. Randall ([1938] 4 All E.R. 696; [1939] P. 131; 108 L.J.P. 49; 160 L.T. 133). <i>Considered in</i> Whysall v. Whysall	389
Razzel v. Snowball ([1954] 3 All E.R. 432; [1954] 1 W.L.R. 1386). <i>Dictum of</i> DENNING, L.J., <i>considered in</i> Mitchell v. Ross	341
Rolph v. Marston Valley Brick Co., Ltd. ([1956] 2 All E.R. 56; [1956] 2 Q.B. 27; [1956] 2 W.L.R. 937). <i>Dictum of</i> DEVLIN, J., <i>considered but not applied in</i> Sutton v. Sears	545
Royal College of Nursing v. St. Marylebone Corpn. ([1958] 1 All E.R. 129; [1958] 1 W.L.R. 95). <i>Affirmed.</i> C.A.	663
Royce's Will Trusts, <i>Re</i> ([1958] 3 All E.R. 586; [1958] 3 W.L.R. 676). <i>Reversed.</i> C.A.	278
Rumball, <i>Re</i> ([1955] 3 All E.R. 71; [1956] Ch. 105; [1955] 1 W.L.R. 1037). <i>Distinguished in</i> Re Endacott (decd.)	562
Salisbury v. Gilmore ([1942] 1 All E.R. 457; [1942] 2 K.B. 38; 111 L.J.K.B. 593; 166 L.T. 329). <i>Followed in</i> Keats v. Graham	919
Sandwell Park Colliery Co., <i>Re</i> ([1928] All E.R. Rep. 651; [1929] 1 Ch. 277; 98 L.J.Ch. 229; 140 L.T. 612). <i>Principles in, applied in</i> Aberfoyle Plantations, Ltd. v. Cheng	910
Seabrook v. British Transport Commission ([1959] 2 All E.R. 15; [1959] 1 W.L.R. 509). <i>Applied in</i> Patch v. United Bristol Hospitals Board	876
Secretary of State for Home Affairs v. O'Brien ([1923] A.C. 603; 92 L.J.K.B. 830; 129 L.T. 577). <i>Explained and distinguished in</i> Re Mwenya	525
Sharpley & Manby's Application, <i>Re</i> ([1942] 1 All E.R. 66; sub nom. <i>Sharpley v. Manby</i> , [1942] 1 K.B. 217; 111 L.J.K.B. 182; 166 L.T. 44). <i>Applied in</i> Style Shoes, Ltd. v. Prices Tailors, Ltd.	901
Sifton v. Sifton ([1938] 3 All E.R. 435; [1938] A.C. 656; 107 L.J.P.C. 97; 159 L.T. 289). <i>Followed in</i> Re Krawitz's Will Trusts	793
Simonin v. Mallac (1860) (29 L.J.P.M. & A. 101; 2 L.T. 328). <i>Observations of</i> SIR CRESSWELL CRESSWELL <i>applied in</i> Hill v. Hill	754
Smith v. Butler ([1900] 1 Q.B. 694; 69 L.J.Q.B. 521; 82 L.T. 281). <i>Principles in, applied in</i> Aberfoyle Plantations, Ltd. v. Cheng	910
Smith-Bosanquet, <i>Re</i> ([1940] 3 All E.R. 519; [1940] Ch. 954; 109 L.J.Ch. 440; 164 L.T. 267). <i>Explained and approved in</i> Re Lonsdale's Will Trusts	679
Smyth v. Smyth ([1956] 2 All E.R. 476; [1956] P. 427; [1956] 3 W.L.R. 210). <i>Applied in</i> Fildes v. Simkin	697
South African Despatch Line v. Panamanian S.S. Niki (Owners) ([1958] 3 All E.R. 596; [1959] 1 Q.B. 252). <i>Dictum of</i> DIPLOCK, J., <i>applied in</i> Reardon Smith Line, Ltd. v. Ministry of Agriculture, Fisheries and Food	434
South African Republic v. Compagnie Franco-Belge du Chemin de Fer du Nord ([1898] 1 Ch. 190; 77 L.T. 555). <i>Followed in</i> High Commissioner for India v. Ghosh	659
Steamship "Induna" Co., Ltd. v. British Phosphate Comrs. ([1949] 1 All E.R. 524, 525; [1949] 2 K.B. 436, 437; [1949] L.J.R. 1060). <i>Dictum considered in</i> Reardon Smith Line, Ltd. v. Ministry of Agriculture, Fisheries and Food	434
Swedish Central Ry. Co., Ltd. v. Thompson ([1925] A.C. 495; 94 L.J.K.B. 527; 133 L.T. 97). <i>Explained in</i> Unit Construction Co., Ltd. v. Bullock	831
Tennants (Lancashire), Ltd. v. C. S. Wilson & Co., Ltd. ([1917] A.C. 510, 515; 86 L.J.K.B. 1196, 1199; 116 L.T. 783, 785). <i>Dicta of</i> LORDS LOREBURN and DUNEDIN <i>applied in</i> Reardon Smith Line, Ltd. v. Ministry of Agriculture, Fisheries and Food	434
Teutonia, The (1872) (L.R. 4 P.C. 171; 41 L.J.Adm. 57; 26 L.T. 48). <i>Considered and explained in</i> Reardon Smith Line, Ltd. v. Ministry of Agriculture, Fisheries and Food	434
Thompson v. Thompson ([1957] 1 All E.R. 161; [1957] P. 19; [1957] 2 W.L.R. 138). <i>Explained and followed in</i> Fisher v. Fisher	181

	PAGE
Thorpe v. Bestwick (1881) (6 Q.B.D. 312; 50 L.J.Q.B. 321; 44 L.T. 181). <i>Reasoning of</i> MATHEW, J., <i>applied in</i> Re Royce's Will Trusts	278
Toombs v. Roch (1846) (15 L.J.Ch. 312; sub nom. Tombs v. Roch, 7 L.T.O.S. 429). <i>Principle stated by</i> KNIGHT-BRUCE, V.-C., <i>applied in</i> Re Cohen (<i>decd.</i>)	740
W. v. W. ([1953] 2 All E.R. 1016; [1954] P. 55; [1953] 3 W.L.R. 708). <i>Dictum of</i> BARNARD, J., <i>applied in</i> Francis v. Francis	206
Whitworth Park Coal Co., Ltd. v. I.R. Comrs. ([1958] 2 All E.R. 91; [1958] Ch. 792; [1958] 2 W.L.R. 815). <i>Affirmed on different grounds.</i> H.L.	703
Wilson v. O'Leary (1872) (7 Ch. App. 448; 41 L.J.Ch. 342; 26 L.T. 463). <i>Considered in</i> Re Royce's Will Trusts	278
Woods v. Woods (1884) (10 P.D. 172). <i>Applied in</i> Cassidy v. Cassidy	187
Working Men's Club and Institute Union, Ltd. v. Swansea Corpn. ([1958] 3 All E.R. 414; [1958] 1 W.L.R. 1135). <i>Reversed.</i> C.A.	769
Yarmouth v. France (1887) (19 Q.B.D. 658; 57 L.J.Q.B. 12). <i>Dictum of</i> LINDLEY, L.J., <i>applied in</i> Hinton v. Maden & Ireland, Ltd.	356
Yarn Spinners' Agreement, Re ([1959] 1 All E.R. 316, 317). <i>Followed in</i> Re Scottish Assocn. of Master Bakers' Agreement	98

STATUTES, ETC., NOTED

PUBLIC GENERAL STATUTES

PAGE

Administration of Estates Act, 1925 (c. 23)—	
s. 35	740
s. 50 (1)	793
Adoption Act, 1958 (c. 5), s. 10	856
Agricultural Holdings Act, 1948 (c. 63)—	
s. 2 (1)	475
s. 24 (2) (d)	866
Betting and Lotteries Act, 1934 (c. 58), s. 21	401
Charitable Trusts Amendment Act, 1855 (c. 124), s. 29	301
Coal Industry (No. 2) Act, 1949 (c. 79), s. 1 (2)	703
Coal Industry Nationalisation Act, 1946 (c. 59), s. 22 (2), (3)	703
Companies Act, 1948 (c. 38), ss. 325 (1), 326 (1), (2)	333
County Courts Act, 1955 (c. 8), s. 12 (2) (a) (i)	898
Criminal Appeal Act, 1907 (c. 23)—	
s. 4 (3)	513
s. 9	522
s. 19	522
(a)	418
Criminal Justice Act, 1948 (c. 58)—	
s. 12 (1)	187
s. 20 (5) (a)	88
s. 22 (1) (as amended by the Prison Act, 1952 (c. 52), s. 54 and Sch. 3)	875
s. 23 (1)	559
Customs and Excise Act, 1952 (c. 44), ss. 257, 304	583
Debtors Act, 1869 (c. 62), s. 5	862
Electric Lighting Act, 1882 (c. 56), s. 32	409
Electric Lighting (Clauses) Act, 1899 (c. 19), <i>Schedule</i> , s. 10 (b) (as amended by the Electricity Act, 1947 (c. 54), s. 57, Sch. 4, Part 3)	409
Electricity (Supply) Act, 1919 (c. 100), s. 22 (1) (as amended by the Electricity Act, 1947 (c. 54), s. 57, Sch. 4, Part 1)	409
Electricity Act, 1957 (c. 48), s. 26 (1) (b), (2)	409
Exchange Control Act, 1947 (c. 14), s. 33 (1), Sch. 4, para. 4	846
Factories Act, 1937 (c. 67), s. 14 (1)	517
Factory and Workshop Act, 1901 (c. 22), s. 149 (1)	150
Finance Act, 1894 (c. 30), s. 14 (1)	679
Finance (1909-10) Act, 1910 (c. 8), s. 74 (1)	603
Finance Act, 1940 (c. 29), s. 55 (1) (a), (3) (a)	140
Finance Act, 1949 (c. 47), s. 28 (2)	879
Finance Act, 1953 (c. 34), s. 20 (9)	831
Finance Act, 1954 (c. 44), s. 16 (1), (3) (c)	356
Finance (No. 2) Act, 1955 (c. 17), s. 4 (2)	351
Fugitive Offenders Act, 1881 (c. 69), s. 7	481
Guardianship of Infants Act, 1925 (c. 45), s. 4 (2)	746
Homicide Act, 1957 (c. 11), s. 2 (1)	203
Income Tax Act, 1918 (c. 40)—	
<i>Sch. 1</i>	245
<i>Sch. D, Case III, r. 3</i>	245
<i>Case VI, r. 2</i>	703
Income Tax Act, 1952 (c. 10)—	
s. 122, <i>Sch. D, para. 1, proviso</i>	341
s. 137 (a)	215
(d)	356
s. 156, <i>Sch. E</i>	341
<i>Case I, r. 1</i>	590
s. 347	750
(1), 430	245
<i>Sch. 9, Rules applicable to Sch. E, r. 1</i>	817
<i>Sch. 16, para. 13</i>	750
Interpretation Act, 1889 (c. 63), s. 26	587
Landlord and Tenant Act, 1730 (c. 28), s. 1	866
Landlord and Tenant Act, 1927 (c. 36)—	
s. 18 (1)	919
s. 23 (1)	901
Landlord and Tenant Act, 1954 (c. 56)—	
s. 23 (3)	71
s. 25 (1)	90
<i>proviso</i>	77
s. 30 (1) (a), (c)	298
(f)	90
(g)	298
(2)	77
s. 32 (1)	71
s. 64	77
s. 66 (4)	901
Landlord and Tenant (Temporary Provisions) Act, 1958 (c. 68), s. 4 (2)	319
Law of Property Act, 1925 (c. 20)—	
s. 53 (1)	623
(c)	603
(2)	623
s. 146 (1)	642
Leasehold Property (Repairs) Act, 1938 (c. 34), s. 1 (2) (as amended by the Landlord and Tenant Act, 1954 (c. 56), s. 51 (2) (b))	642
Legal Aid and Advice Act, 1949 (c. 51), <i>Sch. 3, para. 4 (1)</i>	545
Local Government Act, 1929 (c. 17), s. 30 (1), <i>proviso</i>	371
Local Government Act, 1948 (c. 26), s. 56	313
London Government Act, 1939 (c. 40), s. 181 (3)	652

	PAGE
Magistrates' Courts Act, 1952 (c. 55)—	88
s. 28	697
s. 76	505
Magistrates' Courts Act, 1957 (c. 29), s. 1 (1)	
Matrimonial Causes Act, 1950 (c. 25)—	389
s. 1 (1) (d)	51
s. 26 (1)	180
Matrimonial Proceedings (Children) Act, 1958 (c. 40), s. 5 (1)	800
Merchandise Marks Act, 1887 (c. 28), s. 2 (2)	800
Merchandise Marks Act, 1953 (c. 48), s. 4	58
Mines (Working Facilities and Support) Act, 1923 (c. 20), s. 6 (1), (5)	283
National Assistance Act, 1948 (c. 29), ss. 42, 43	210
National Health Service Act, 1946 (c. 81), s. 76, <i>Sch.</i> 10	40
National Insurance (Industrial Injuries) Act, 1946 (c. 62), s. 40 (1)	187
Offences against the Person Act, 1861 (c. 100), s. 43	693
Police Act, 1946 (c. 46), ss. 5 (3), 15	674
Private Street Works Act, 1892 (c. 57), ss. 6 (1), 8 (1), (2), 11	175
Public Health Act, 1875 (c. 55), s. 149	175
Public Health Acts Amendment Act, 1907 (c. 53), s. 18 (c)	215
Racecourse Betting Act, 1928 (c. 41), s. 3 (6)	150
Rating and Valuation (Apportionment) Act, 1928 (c. 44), s. 3 (1), (2)	116, 663, 769
Rating and Valuation (Miscellaneous Provisions) Act, 1955 (c. 9), s. 8 (1) (a)	508
Requisitioned Houses and Housing (Amendment) Act, 1955 (c. 24), ss. 4 (2) (c), 10 (1)	
Restrictive Trade Practices Act, 1956 (c. 68)—	98, 257
s. 21 (1) (b)	257
(d), (f)	
Road Traffic Act, 1930 (c. 43)—	587
s. 21 (c)	814
s. 28 (1)	733
s. 35 (1)	210
s. 36 (2) (as substituted by the Road and Rail Traffic Act, 1933 (c. 53), s. 33)	175
Road Traffic Act, 1956 (c. 67), s. 45 (1)	307
Sale of Goods Act, 1893 (c. 71), s. 47, <i>proviso</i> , s. 25 (2)	726
Scientific Societies Act, 1843 (c. 36), s. 1	301
Settled Land Act, 1925 (c. 18), s. 29 (1)	669
Small Dwellings Acquisition Act, 1899 (c. 44), s. 6 (2)	618
Solicitors Act, 1957 (c. 27), ss. 69 (2) (b), <i>proviso</i> (1), 72	
Stamp Act, 1891 (c. 39)—	623
s. 54	603, 623
<i>Sch.</i> 1	
Summary Jurisdiction (Married Women) Act, 1895 (c. 39)—	187, 283, 891
s. 4	697
s. 5 (c)	
Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49)—	221
s. 31 (1) (a)	326
(h)	1
Town and Country Planning Act, 1947 (c. 51), ss. 14 (2), 17 (1)	170
Trade Marks Act, 1938 (c. 22), s. 9 (1)	398
Valuation for Rating Act, 1953 (c. 42), s. 2 (2)	789
Variation of Trusts Act, 1958 (c. 53)	474, 523
s. 1	897
(3)	278
Wills Act, 1837 (c. 26), s. 15	

PRIVATE STATUTE

Malvern Hills Act, 1924 (c. xxxvi), s. 54, <i>Sch.</i> 4	1
--	---

COMMONWEALTH AND DEPENDENCIES

Ceylon Marriage Registration Ordinance (c. 95, Legislative Enactments of Ceylon, Vol. III), s. 19, <i>proviso</i>	403
Double Taxation Relief (Taxes on Income) (Australia) Order, 1947 (S.R. & O. 1947 No. 806)—	
<i>Schedule</i> , <i>arts.</i> II (1) (i), (3), III (2), (3)	245
<i>art.</i> XII (1)	750
East African Income Tax (Management) Act, 1952 (No. 8 of 1952), ss. 22 (1), 24 (1)	781
Mechanics' Lien Act (Alberta) (R.S.A. 1942 c. 236), as amended, ss. 2 (g), 6 (1), 24 (6), 43	571

RULES

Adoption (Juvenile Court) Rules, 1959 (S.I. 1959 No. 504), r. 9 (2)	856
C.C.R., <i>Ord.</i> 37, r. 5 (1)	843
Courts-Martial Appeal Rules, 1952 (S.I. 1952 No. 194), r. 5 (1)	138
Criminal Appeal Rules, 1908 (S.R. & O. 1908 No. 227), r. 23	138
Juvenile Courts (Constitution) Rules, 1954 (S.I. 1954 No. 1711), r. 11	856
Lands Tribunal Rules, 1956 (S.I. 1956 No. 1734), r. 45 (4)	398
Prison Rules, 1949 (S.I. 1949 No. 1073), r. 37 (as substituted by Prison Rules, 1952 (S.I. 1952 No. 1405), r. 3)	513
R.S.C.—	
<i>Ord.</i> 19, rr. 22, 23	656
<i>Ord.</i> 22, r. 6	326
<i>Ord.</i> 54 o, r. 12	58
<i>Ord.</i> 61, r. 17	878

REGULATIONS

Agriculture (Control of Notices to Quit) Regulations, 1948 (S.I. 1948 No. 190), <i>reg.</i> 7	866
Legal Aid (General) Regulations, 1950 (S.I. 1950 No. 1359), <i>reg.</i> 18 (3) (b) (as substituted by S.I. 1954 No. 166, <i>reg.</i> 27)	545
London Traffic (Restriction of Waiting) (Station Parade, Gerrards Cross) Regulations, 1952 (S.I. 1952 No. 1294), <i>reg.</i> 3	505
Motor Vehicles (Construction and Use) Regulations, 1955 (S.I. 1955 No. 482), <i>reg.</i> 89	505
War Department (Outstations) Civilian Staff Regulations, 1950, <i>regs.</i> 437, 438	552

ORDER

Town and Country Planning General Development Order, 1950 (S.I. 1950 No. 728), <i>art.</i> 3 (1), <i>Sch.</i> 1, <i>class</i> xli	1
---	---

WORDS AND PHRASES

	PAGE
<i>Abode. See "Place of abode".</i>	
<i>Advance of nursing as a profession</i>	663
<i>Advertisement ("right to use any land . . . for the purpose of advertisements")</i>	313
<i>Annual voluntary contributions [annual character; gifts in kind]</i>	726
<i>Authorised</i>	1
<i>Cause. See "Sufficient cause".</i>	
<i>Contributions. See "Annual voluntary contributions".</i>	
<i>Dealing with</i>	583
<i>Deemed</i>	144
<i>Disposition ("charged under a disposition"; Finance Act, 1894, s. 14 (1))</i>	679
<i>Ensure [Juvenile Courts (Constitution) Rules, 1954, r. 11]</i>	856
<i>For purpose of some useful memorial</i>	562
<i>Force majeure</i>	434
<i>Fresh evidence</i>	40
<i>Hinder. See "Hindrance . . . beyond charterers' control".</i>	
<i>Hindrance . . . beyond charterers' control</i>	434
<i>Incurably of unsound mind</i>	389
<i>Knowledge [contrasted with "notice" for purpose of pleading]</i>	656
<i>Literature ("purposes of . . . literature exclusively" (rating exemption))</i>	726
<i>Lunatic</i>	389
<i>May [read as "shall"]</i>	481
<i>New ("new motor vehicle")</i>	737
<i>Next of kin ("Such of my next of kin according to the Statutes of Distribution as shall be living in the United Kingdom at the decease of my daughter")</i>	793
<i>Notice [pleading; whether condition of mind]</i>	656
<i>Or the survivors or survivor of them</i>	785
<i>Owner</i>	571
<i>Person [in s. 23 (1) of Landlord and Tenant Act, 1927]</i>	904
<i>Person of unsound mind</i>	389
<i>Place of abode [for purposes of service]</i>	905
<i>Practise the Jewish religion</i>	793
<i>Profession ("advance of nursing as a profession")</i>	663
<i>Purpose of any of the functions of the police authority</i>	693
<i>Rates of wages</i>	636
<i>Securities ("on such securities as they think fit")</i>	785
<i>Shall ["may" read as "shall"]. See "May".</i>	
<i>Slow. Major road ahead</i>	609
<i>Spanish Champagne</i>	800
<i>Sufficient cause ("unless sufficient cause is shown to the contrary")</i>	481
<i>Tenancy from year to year</i>	475
<i>Unsound mind. See "Incurably of unsound mind"; "Person of unsound mind".</i>	
<i>Volenti non fit injuria</i>	225
<i>Voluntary contributions. See "Annual voluntary contributions".</i>	
<i>Wage</i>	636
<i>Widfully</i>	866
<i>Without any deduction [estate duty; expression of contrary intention]</i>	679

CORRIGENDA

- [1959] 2 All E.R.
p. 746. CAVANAGH v. ULSTER WEAVING CO. Counsel for the appellant: read "*C. A. Nicholson, Q.C.*" instead of "*James McSparran, Q.C.*"
- [1959] 3 All E.R.
p. 48. *R. v. MEDICAL APPEAL TRIBUNAL.* Footnote (5): read "[1954] 3 All E.R. at p. 748" instead of as printed.
p. 68. *RE APPLICATION OF NATIONAL COAL BOARD.* Footnote (12): read "[1952] Ch. 519" instead of "[1959] Ch. 519."
p. 92. *BOLTON'S (HOUSE FURNISHERS) LTD. v. OPPENHEIM.* Counsel for the tenants: read "*Ronald Bernstein*" instead of "*S. N. Bernstein.*"
p. 390. *WHYSALL v. WHYSALL.* First footnote: for "*Mayor of Camden v. I.R. Comrs.*" read "*Marquis Camden v. I.R. Comrs.*"
p. 476. *GLADSTONE v. BOWER.* Counsel for the plaintiff: for "*R. H. Blundell, Q.C.*" read "*Lionel Blundell, Q.C.*"
p. 480. *GLADSTONE v. BOWER.* Solicitors: after "*Theodore Goddard & Co.*" read "*agents for Llewellyn-Jones & Armon Ellis, Rhyl.*"
p. 787. *RE DOUGLAS'S WILL TRUSTS.* Line H.4, THEOBALD ON WILLS (11th Edn.): for "*at p. 522*" read "*at p. 552.*"

THE ALL ENGLAND LAW REPORTS

INCORPORATING THE
LAW TIMES REPORTS
AND THE
LAW JOURNAL REPORTS

PYX GRANITE CO., LTD. v. MINISTRY OF HOUSING AND LOCAL GOVERNMENT AND OTHERS.

[HOUSE OF LORDS (Viscount Simonds, Lord Goddard, Lord Oaksey, Lord Keith of Avonholm and Lord Jenkins), May 26, 27, 28, June 1, July 6, 1959.]

D *Town and Country Planning—Development—Permission—Necessity for permission—Agreement between quarry owners and local authority as to quarrying areas scheduled to Act of Parliament—Whether agreed quarrying was development “authorised” by any local or private Act—Town and Country Planning General Development Order, 1950 (S.I. 1950 No. 728), art. 3 (1), Sch. 1, class xii—Malvern Hills Act, 1924 (14 & 15 Geo. 5 c. xxxvi), s. 54, Sch. 4.*

E *Declaration—Jurisdiction—Exclusion of jurisdiction by statute—Necessity for clear exclusion—Discretionary statutory power to impose conditions on grant of permission—Whether jurisdiction excluded by provision of distinct statutory procedure or by discretionary nature of statutory power—Town and Country Planning Act, 1947 (10 & 11 Geo. 6 c. 51), s. 14 (2), s. 17 (1).*

F *Statute—Contract—Agreement confirmed by statute—Whether agreement binding by statutory force or binding in contract—Malvern Hills Act, 1924 (14 & 15 Geo. 5 c. xxxvi), s. 54, Sch. 4.*

In 1924, the appellants, a quarrying company, owned freehold land, and had quarrying rights in other land, in the Malvern Hills. While the Malvern Hills Act, 1924, a local Act for the preservation of the beauties of the Malvern Hills (an area defined in s. 5* of the Act), was passing through Parliament, negotiations took place between the company and the promoters of the bill, the Malvern Conservators and Malvern Urban District Council. These negotiations resulted in an agreement between the parties that the company should continue to quarry on its freehold land, should surrender its quarrying rights in certain other land, should retain its quarrying rights in the N. area and should have transferred to it additional quarrying rights in certain other parts of that area. The terms were embodied in heads of agreement which contemplated a deed being executed subsequently and which were set out in a schedule to the Act. By s. 54 of the Act it was provided that “For the protection of the [company] . . . The heads of agreement . . . are hereby confirmed and made binding on [the parties] and the provisions of this Act shall only apply to or affect the undertaking property or rights of the company subject to the provisions of the said heads of agreement”. By deed dated Dec. 14, 1925, duly executed by all the parties, the areas in which the company should and should not quarry were defined. On Nov. 17, 1947, the company applied for planning permission to develop for quarrying purposes two of the areas of land agreed for quarrying. One of these areas, the T. area, was freehold property of the company, and the other was the N. area. On Sept. 30, 1953, the Minister refused permission to work parts

* The terms of s. 5 of the Malvern Hills Act, 1924, are printed at p. 19, letter B, post.

of the T. area, granted permission to work the remainder of the T. area on conditions and only until June 30, 1966, and refused permission for any work in the N. area except to the extent necessary to ensure safety. By the Town and Country Planning General Development Order, 1950, art. 3 (1) and Sch. 1, class xii, permission was given for "Development authorised by any local or private Act of Parliament . . . being an Act . . . which designates specifically both the nature of the development thereby authorised and the land upon which it may be carried out". In December, 1954, the company brought an action against the Ministry of Housing and Local Government and the County Council of the Administrative County of Worcester for, inter alia, a declaration that it was entitled to carry out the proposed development without obtaining any special development permission. The respondents objected that the court had no jurisdiction to adjudicate whether the company needed to apply for planning permission, contending that the question was exclusively within the Minister's jurisdiction under s. 17* of the Town and Country Planning Act, 1947. It was not disputed that the nature of the development and the land on which it was to be carried out was designated by the Act of 1924, but it was contended that work was not "authorised" by that Act.

Held: (i) the company were not confined to the procedure provided by s. 17 of the Town and Country Planning Act, 1947, because s. 17 did not create a new remedy for enforcing a new statutory right but created a means of ascertaining the extent of statutory liabilities, and because the jurisdiction of the court to make a declaration was not ousted without clear words having that effect, and such words were not present in s. 17.

Barracough v. Brown ([1897] A.C. 615) distinguished.

(ii) the effect of s. 54 of the Malvern Hills Act, 1924, was to "authorise" (in the sense of approving or countenancing—see p. 22, letter C, post) the company's working of quarries within the limits of para. 1 of Sch. 4 to the Act of 1924 (including authorising the working of the company's freehold, the T. area), and was not merely to make the heads of agreement contractually binding; accordingly the development was permitted unconditionally by art. 3 of the General Development Order, 1950, and no further application for planning permission was needed.

R. v. Midland Ry. Co. ((1887), 19 Q.B.D. 540) distinguished.

(iii) (LORD KEITH OF AVONHOLM dissenting) on the true construction of the Act of 1924 the T. area was included in the area of land within the jurisdiction of the conservators under s. 5 and there defined as the Malvern Hills.

(iv) the present case was a proper case in which to make a declaration.

Decision of the COURT OF APPEAL ([1958] 1 All E.R. 625) reversed.

[As to the jurisdiction to make declaratory judgments where other remedies are available, see 22 HALSBURY'S LAWS (3rd Edn.) 749, para. 1610; and for cases on the subject, see 30 DIGEST (Repl.) 175-177, 242-254; as to the effect of agreements scheduled to a statute, see 31 HALSBURY'S LAWS (2nd Edn.) 546, para. 726, and 8 HALSBURY'S LAWS (3rd Edn.) 146, para. 252; and for cases on the subject, see 12 DIGEST (Repl.) 668, 669, 5171-5177.

For the Town and Country Planning Act, 1947, s. 17, see 25 HALSBURY'S STATUTES (2nd Edn.) 515.

For the Town and Country Planning General Development Order, 1950, art. 3 (1), Sch. 1, class xii, see 21 HALSBURY'S STATUTORY INSTRUMENTS 146, 161.]

Cases referred to:

Barracough v. Brown, [1897] A.C. 615; 66 L.J.Q.B. 672; 76 L.T. 797; 62 J.P. 275; 30 Digest (Repl.) 175, 243.

* The relevant terms of s. 17 of the Town and Country Planning Act, 1947, are printed at p. 12, letters D to G, post.

- A** *Evans v. Hulton (E.) & Co., Ltd.*, (1924), 131 L.T. 534; Digest Supp.
Francis v. Yiewsley & West Drayton U.D.C., [1957] 1 All E.R. 825; [1957] 2 Q.B. 136; [1957] 2 W.L.R. 627; *affd.* C.A., [1957] 3 All E.R. 529; [1958] 1 Q.B. 478; [1957] 3 W.L.R. 919; 3rd Digest Supp.
Pyx Granite Co., Ltd. v. Malvern Hills Conservators, (Ch. D. Romer, J.) May 11, 1925, C.A. June 24, 1925) unreported.
- B** *R. v. Midland Ry. Co.*, (1887), 19 Q.B.D. 540; 56 L.J.Q.B. 585; 57 L.T. 619; 30 Digest (Repl.) 668, 5173.
Vine v. National Dock Labour Board, [1956] 3 All E.R. 939; [1957] A.C. 488; [1957] 2 W.L.R. 106; 3rd Digest Supp.
Wolverhampton New Waterworks Co. v. Hawkesford, (1859), 6 C.B.N.S. 336; 28 L.J.C.P. 242; 33 L.T.O.S. 366; 141 E.R. 486; *subsequent proceedings*, (1861), 11 C.B.N.S. 456; 10 Digest (Repl.) 1207, 8436.
- C**

Appeal.

Appeal by Pyx Granite Co., Ltd., quarry owners, from an order of the Court of Appeal (LORD DENNING, HODSON and MORRIS, L.J.J.), dated Feb. 7, 1958, and reported [1958] 1 All E.R. 625, reversing a decision of LLOYD-JACOB, J. (sitting as an additional judge of the Queen's Bench Division), dated Apr. 16, 1957, declaring (i) that the carrying on of quarrying operations for the winning and making of stone at and in the appellant company's lands and quarries known as Tank Quarry, Scar Rock Quarry and North Quarry, situate in the urban district of Malvern in the county of Worcester was development within the meaning of the Town and Country Planning Act, 1947, which was included in class xii of Part 1 of Sch. 1 to the Town and Country Planning (General Development) Order, 1948, and permitted unconditionally by art. 3 thereof and thereafter was included in class xii of Part 1 of Sch. 1 to the Town and Country Planning (General Development) Order, 1950, and which was accordingly permitted unconditionally by art. 3 thereof; and (ii) that the decisions of the Minister dated Sept. 5, 1949, and Sept. 30, 1953, were of no effect in so far as they purported to refuse permission to carry out such quarrying operations, and were of no effect in so far as they purported to grant permission subject to conditions; and that these decisions in no way limited or took away the appellant company's rights to carry on quarrying operations under and by virtue of the unconditional permission given by art. 3 of the Orders of 1948 and 1950. The respondents were the Ministry of Housing and Local Government and the County Council of the Administrative County of Worcester. The facts are summarised in the headnote.

- G** *J. R. Willis, Q.C.*, and *W. Scrivens* for the appellant company.
G. D. Squibb, Q.C., *J. R. Cumming-Bruce* and *A. P. Leggatt* for the respondents.
 Their Lordships took time for consideration.
 July 6. The following opinions were read.

VISCOUNT SIMONDS: My Lords, the relevant facts and instruments

- H** are so fully stated in the opinion of my noble and learned friend, LORD JENKINS, which I have been privileged to read, that I recall at once what are the questions which your Lordships have to decide in this case. There are at least two questions of primary importance which must be determined, two further questions which have been fully argued but in the view that I take of the first two questions no longer arise, and, finally, a fifth question which has given me more difficulty than any other largely because it was little, if at all, discussed in the Court of Appeal and we have not the advantage of the opinion of that court on it.

I The first question, my Lords, is this. The appellant company are entitled as freeholders, leaseholders or licensees to carry on quarrying operations for the working and winning of stone on certain lands which I will call part of the Malvern Hills. I leave for future consideration the question whether that is an accurate description; it is, in substance, the fifth question that I have mentioned. It is indisputable that such operations constitute "development" within the meaning of the Town and Country Planning Acts. From this it follows that such operations

cannot be carried on without the permission of the relevant authority, whether the local planning authority or the proper Minister, at first the Minister of Town and Country Planning and later the Minister of Housing and Local Government. The question is whether such permission has, in fact, been given, and it is to be resolved by a consideration of two instruments, first, the Town and Country Planning (General Development) Order, 1948, made under the authority of the Town and Country Planning Act, 1947, which for this purpose may be read as one with a similar order of 1950 (I will refer to it as "the development order") and, secondly, a private Act known as the Malvern Hills Act, 1924. By art. 3 of the development order, the validity of which has not been challenged, it was provided that, subject as therein mentioned, development of any class specified in Sch. 1 thereto was thereby permitted and might be undertaken on land to which the order applied without the permission of the local planning authority or the Minister. Schedule 1 contains in class xii the words material to the decision of this case. They are:

"Development authorised by any local or private Act of Parliament or by any order approved by both Houses of Parliament, being an Act or order which designates specifically both the nature of the development thereby authorised and the land upon which it may be carried out."

I will assume that the Malvern Hills Act, 1924, to which I will refer as the "private Act", designates specifically the nature of the development and the land on which it may be carried out, and I turn to the question which has been the sole issue in this part of the case, viz., was the development authorised by the private Act? On this question differing opinions have been expressed. LLOYD-JACOB, J., thought that it was authorised; in the Court of Appeal LORD DENNING and HODSON, L.J., largely relying on *R. v. Midland Ry. Co.* (1), thought it was not, while MORRIS, L.J., distinguished that case and upheld the view of LLOYD-JACOB, J. I think that MORRIS, L.J., was right.

My Lords, in the year 1924 the Malvern Hills Conservators, a body appointed under earlier Acts whose duty it was to preserve and control the Malvern Hills for the benefit of the public, promoted a bill for the extension and definition of their powers. It was opposed by the appellant company, whose interest lay in the quarrying of stone on their land. As commonly happens in such cases a compromise was reached. It was embodied in a clause which became s. 54 of the Act and was in these terms:

"For the protection of the Pyx Granite Co., Ltd. (in this section referred to as 'the company') the following provisions shall unless otherwise agreed in writing between the company and the conservators of the Malvern council have effect (that is to say):—The heads of agreement as set forth in Sch. 4 to this Act are hereby confirmed and made binding on the company and the conservators and the Malvern council and the provisions of this Act shall only apply to or affect the undertaking property or rights of the company subject to the provisions of the said heads of agreement."

Postponing comment on a section which is, in some respects, remarkable, I turn to the scheduled heads of agreement, and I find myself so fully in agreement with MORRIS, L.J., in his description of their tenor and effect in conjunction with the Act that I take the liberty of quoting it and adopting it as my own. He said (2):

"That Act was one which effected most carefully worked out planning in regard to the Malvern Hills. The conservators were given additional powers. The company agreed to a limitation and fixation of their rights. From their previously existing rights something was extracted, and to them something else was added. The company's rights were limited, outside their freehold property, to a defined quarryable area. It was implicit in the agreement made that the continuing rights of the company to quarry on their

A freehold area were recognised. The company were to supply the council with stone for the repair of roads. The company were to put in repair a quarry road between certain defined points, and were to keep such road in repair. The company were to widen the quarry road to permit of a footpath by the side of it. The company were to be at liberty to make and use a tunnel under the area of land dividing their freehold property from the quarries which the council were handing over to the company. All this elaborately worked out detailed planning was, in my judgment, formally approved by Parliament when it provided by s. 54 that 'for the protection of the company [the Act should] only apply to or affect the undertaking, property or rights of the company subject to the provisions of the heads of agreement'. It seems to me that formal approval and sanction were given by Parliament to the activities of the company as planned and arranged within the scope of the agreement that was made. In this way the activities of the company which constituted 'development' were, in a very real sense, 'authorised' by the Act of 1924. Parliament enacted that the specific arrangements (under which the range of the company's activities was defined and limited) were confirmed and made binding on the company, the conservators and the Malvern council. I feel impelled to the view that Parliament authorised the arrangements which it confirmed and made binding."

I emphasise that, as the learned lord justice points out, s. 54 of the private Act is expressed to be "for the protection of the company", and that no better protection from the obligations or liabilities that would otherwise be imposed on it could be provided than by the limiting words of the last lines of the section. But for this section and these words in particular, quarrying would be subject to restriction. Their presence means that the company can claim the authority of Parliament to continue their operations. It would, I think, be taking too narrow a view of the meaning of the word "authorised" to exclude from its scope such a result. I do not think it necessary to refer to head 14 of the heads of agreement, or to the litigation to which it gave rise. They do not affect the single question for your Lordships' determination, viz., whether the proposed development is "authorised" by the private Act. It is, however, proper to note that, in the year 1925, the parties entered into a formal agreement as contemplated by head 18. Grave difficulties might have arisen if there had been substantial departure from the terms of the heads of agreement, and I do not venture to say what then might have been the result of the words "unless otherwise agreed", etc., in s. 54. Fortunately that question does not arise.

My Lords, I think that the other members of the Court of Appeal might have come to the same conclusion but for *R. v. Midland Ry. Co.* (3) to which I have referred. That case is not binding on your Lordships, but it is of respectable antiquity and I see no reason to challenge its correctness. But it is, for the reasons given by MORRIS, L.J., clearly distinguishable. I would again respectfully adopt what he has said, but I would add that, in the present case, the confirmation of the agreement, the feature which it has in common with the agreement in the cited case, is attended by another feature which is wholly absent from that case, viz., the emphatic provision in the last lines of the section to which I have more than once referred. I conclude, therefore, this part of the case by saying that the proposed development by the appellant company fell within class xii of the development order and permission was, in my opinion, not required. I should add here that it was conceded by the respondents that, in their submission to this effect, the appellant company were not prejudiced by the fact that they made an application to the Minister which they subsequently asserted to be unnecessary.

I come now to the second question which must be decided. It was submitted by the respondents that the court had no jurisdiction to entertain the action.

It was urged that s. 17 of the Act supplied the only procedure by which the subject could ascertain whether permission is necessary for the development of his land. That section enacts that, if any person who proposes to carry out

“any operations on land . . . wishes to have it determined . . . whether an application for permission in respect thereof is required under this Part of this Act having regard to the provisions of the development order, he may . . . apply to the local planning authority to determine that question.”

This matter is somewhat complicated by the fact that, under other sections of the Act, the Minister may “call in” the application for his own determination. But nothing turns on this, for, whether the application is heard in the first place by the local planning authority and then on appeal by the Minister, or is heard in the first place on a “call in” by the Minister, his determination is expressed to be final. The question is whether the statutory remedy is the only remedy and the right of the subject to have recourse to the courts of law is excluded. Obviously it cannot altogether be excluded; for, as LORD DENNING has pointed out ([1958] 1 All E.R. at p. 629), if the subject does what he has not permission to do and so-called enforcement proceedings are taken against him, he can apply to the court of summary jurisdiction under s. 23 of the Act and ask for the enforcement notice to be quashed, and he can thence go to the High Court on Case Stated. But I agree with LORD DENNING and MORRIS, L.J., in thinking that this circuity is not necessary. It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words. That is, as McNAIR, J., called it in *Francis v. Yiewsley & West Drayton U.D.C.* (4), a “fundamental rule” from which I would not for my part sanction any departure. It must be asked then what is there in the Act of 1947 which bars such recourse. The answer is that there is nothing except the fact that the Act provides him with another remedy. Is it then an alternative or an exclusive remedy? There is nothing in the Act to suggest that, while a new remedy, perhaps cheap and expeditious, is given, the old and, as we like to call it, the inalienable remedy of Her Majesty's subjects to seek redress in her courts is taken away. And it appears to me that the case would be unarguable but for the fact that, in *Barraclough v. Brown* (5) on a consideration of the statute there under review it was held that the new statutory remedy was exclusive. But that case differs vitally from the present case. There the statute gave to an aggrieved person the right in certain circumstances to recover certain costs and the expenses from a third party who was not otherwise liable in a court of summary jurisdiction. It was held that that was the only remedy open to the aggrieved person and that he could not recover such costs and expenses in the High Court. LORD HERSCHELL said (6):

“I do not think the appellant can claim to recover by virtue of the statute, and at the same time insist upon doing so by means other than those prescribed by the statute which alone confers the right.”

Or as LORD WATSON said (7): “The right and the remedy are given uno flatu, and the one cannot be dissociated from the other”. The circumstances here are far different. The appellant company are given no new right of quarrying by the Act of 1947. Their right is a common law right and the only question is how far it has been taken away. They do not uno flatu claim under the Act and seek a remedy elsewhere. On the contrary, they deny that they come within its purview and seek a declaration to that effect. There is, in my opinion, nothing in *Barraclough v. Brown* (5) which denies them that remedy, if it is otherwise appropriate.

(4) [1957] 1 All E.R. 825; [1957] 2 Q.B. 136. (5) [1897] A.C. 615.

(6) [1897] A.C. at p. 620.

(7) [1897] A.C. at p. 622.

A The appropriateness of the remedy was the final point on this part of the case. It was urged that, even if the court had jurisdiction to make the declaration claimed, it was a discretionary jurisdiction which should not be exercised in this case. My Lords, this plea should not, in my opinion, prevail. It is surely proper that, in a case like this involving, as many days of argument showed, difficult questions of construction of Acts of Parliament, a court of law should
B declare what are the rights of the subject who claims to have them determined. I do not dissent from the contention of the respondents that, where the administrative or the quasi-judicial powers of the Minister are concerned, declaratory judgments should not readily be given by the court. But here, if ever, was a case where the jurisdiction could properly be invoked. It might even be thought surprising that the Minister should not be glad to have such questions authorita-
C tively determined.

These two questions being thus determined, viz., that the court has jurisdiction to declare that the development proposed by the appellant company does not require the Minister's permission and that such a declaration ought to be made, two other questions which occupied the courts below need not be considered. They were (i) whether the Minister could lawfully annex certain conditions to the
D limited permission that he gave, and (ii) whether their legality could be challenged except by certiorari. If no permission was required, the question of the legality of annexed conditions cannot arise.

The fifth and final question has caused me much difficulty. It is a question which, if the private Act had been drafted with proper care, could never have arisen, and it does not appear to have been seriously raised, at any rate in the
E Court of Appeal. I have doubted whether it is permissible to raise it in this House. But I have come to the conclusion, with which I think your Lordships agree, that, if only to quiet doubts, the matter should be disposed of. The question is no less than what is the area which is the subject of the private Act and, therefore, the area in respect of which under the Act of 1947 permission for development is not required. And it is the more strange that there should be
F any doubt about this, when it appears that the land, about which the doubt may arise, is for the purpose of quarrying operations the most important to the appellant company. The difficulty, my Lords, arises initially from the language of s. 5 of the private Act which defines the area of the conservators' jurisdiction. It is said to

G "comprise the lands rights and interests described in Sch. 1, Sch. 2 and Sch. 3 to this Act together with all lands common or waste over which the conservators now have or may hereafter acquire rights and interests all of which are in this Act referred to as 'the Malvern Hills'."

The meaning of the expression "all lands common or waste" has been debated, and it has been urged that, since common and waste are themselves a kind of
H land, these words must be read as adjectivally qualifying lands and the expression must be read as if it were "common or waste lands". The result of this would be to exclude from the conservators' jurisdiction any land in which they might have or acquire any right or interest other than common or waste land. So strange a consequence must be avoided if any other interpretation is possible. I think that it is, for I do not regard it as extravagant to suppose that the drafts-
I man of this Act, if only ex majore cautela, thought it proper to add "common or waste" in case it should be supposed that they were not "lands". It is legitimate to add that, if common or waste lands only were intended, the transposition to "lands common or waste" is one that requires explanation, which is not forthcoming. I conclude then that "the Malvern Hills" include any freehold land in which the conservators had on the passing of the private Act any right or interest. Now the appellant company were the owners of the freehold of a parcel of land immediately adjoining other land over which they had quarrying rights and which were beyond doubt part of the Malvern Hills. On it was

situate a quarry known as Tank Quarry, and it is common ground that the working of this quarry was as important to them as was the control of such working essential to the conservators. It would not, therefore, be surprising to find that any bargain between them dealt with this land. And so it was. For the agreement between them, both the heads scheduled to the private Act and the formal agreement executed in 1925, provided that the conservators should have an option within a limited time to purchase the undertaking of the appellant company. The undertaking included the land in question. Therefore, this land was land in which the conservators had at the time of the passing of the Act or by virtue of the agreement acquired an undoubted right or interest. It fell forthwith within the description of Malvern Hills in the private Act, and thenceforward retained that label whether or not the option was exercised. It is satisfactory to note, though I should not be prepared to rely on the doctrine of *contemporanea expositio* in such a case, that it is in this way that the parties, particularly in the formal agreement of 1925, interpreted the private Act and its schedules.

I am, therefore, of opinion that the freehold land in question is land in respect of which permission for development was not required, and I would allow this appeal and restore the judgment of LLOYD-JACOB, J., with costs here and below.

LORD GODDARD: My Lords, the appellants in this case seek a declaration whether or not they require planning permission for the working of quarries either on their freehold land or on land leased to them. The respondents contended that this question was within the exclusive jurisdiction of the Minister, either by way of appeal from the planning authority, or if, as happened here, he had called in the case for his own decision in the first instance. In support of this contention, the respondents relied on the decision of this House in *Barraclough v. Brown* (8). What that case decided was that, where a statute conferred a right, which had not hitherto existed, to recover certain expenses in a court of summary jurisdiction, it was to that court alone to which recourse must be had and that those seeking to recover the expenses could not first ask the High Court to declare that the right to recover existed. It was for the court indicated by the statute to decide both as to the right and the amount. I agree with the majority in the Court of Appeal, who held that this decision had no application to the facts of this case, and that there were no words in the statute which deprived the appellant company of their right to obtain a declaration. It was also argued that, if there was a remedy obtainable in the High Court, it must be by way of *certiorari*. I know of no authority for saying that, if an order or decision can be attacked by *certiorari*, the court is debarred from granting a declaration in an appropriate case. The remedies are not mutually exclusive though, no doubt, there are some orders, notably convictions before justices, where the only appropriate remedy is *certiorari*.

The main question in this appeal is whether the proposed development on the appellant company's land is authorised by any local or private Act of Parliament, for if it is, no planning permission is required. The statutory authority relied on is s. 54 of the Malvern Hills Act, 1924, which gives effect to, and makes binding on, the appellant company, the conservators and the Malvern council certain heads of agreement which are set out in Sch. 4 to the Act. In the Court of Appeal, relying on *R. v. Midland Ry. Co.* (9), LORD DENNING put the question succinctly in this way (10): Does the section make the heads of agreement binding as a contract, simply dispensing with the execution by the parties, or does it make them as binding as a statute giving them the same force as if enacted in the statute itself? On this question I am in full agreement with the judgment of

(8) [1897] A.C. 615.

(9) (1887), 19 Q.B.D. 540.

(10) [1958] 1 All E.R. at p. 631; [1958] 1 Q.B. at p. 569.

A MORRIS, L.J. He held that the statute conferred protection on the appellant company, recognising their existing rights in respect of their freehold property and governing and defining their other rights. The section is inserted in the Act expressly for the protection of the appellant company, and provides that the Act is only to apply to the undertaking, property or rights of the appellant company subject to the provisions of the heads of agreement. In my opinion, the protection

B given by the section extends to the freehold property as well as to the leaseholds. The heads of agreement limit the rights of the appellant company of quarrying outside their freehold, and thereby impliedly recognise the right of quarrying inside it. Accordingly, in my opinion, development by quarrying is authorised by the statute and no planning permission is required. It is, therefore, unnecessary to consider the validity of the conditions which the Minister purported to impose,

C and I would allow the appeal.

LORD OAKSEY: My Lords, I have had the opportunity of reading the opinion of my noble and learned friend, LORD GODDARD, and I agree with it.

LORD KEITH OF AVONHOLM: My Lords, I have had the advantage of reading the opinion to be delivered by my noble and learned friend, LORD

D JENKINS, and agree with the result at which he has arrived and with his reasons, with one qualification.

I have difficulty in agreeing that the appellant company's freehold land, which was the site of the Tank Quarry, was within the jurisdiction of the conservators in terms of s. 5 of the Malvern Hills Act, 1924, and so was part of the area defined under that section as "the Malvern Hills". The only power, as I see it, that the

E conservators had with reference to that area, and even here I have great doubt, is under the option given them by para. 12 of Sch. 4 to purchase the appellant company's undertaking as a going concern in the third, fourth or fifth year after the passing of the Act. The purchase of the undertaking would, I think, have stopped all quarrying operations by the appellant company in their quarrying area (including their freehold land). Whether it would have transferred the freehold to

F the conservators is much more doubtful. But this power, whatever its effect, could not, I think, bring the freehold land within the jurisdiction of the conservators under s. 5 until it was exercised. It was not exercised and is now spent. I have difficulty in seeing how, on any view, it can now be within their jurisdiction.

But that does not, in my opinion, affect the result of this appeal. Section 54 of the Act of 1924 provides that the provisions of the Act shall only apply to or

G affect the undertaking property or rights of the appellant company subject to the provisions of the heads of agreement set forth in Sch. 4. The first head of this agreement says:

"The company's rights of quarrying to be limited (outside their freehold property) to the quarryable area at North Malvern defined [on the Islington plan]."

H I read this as meaning that the quarrying rights are to be limited except with regard to the freehold property. The only thing that could have affected this unlimited right might have been acquisition of the undertaking under head 12 of the agreement. Just as the limited quarrying rights were, I think, authorised by the Act, so I think the unlimited rights were authorised by the Act. I,

I accordingly, agree that this appeal should be allowed.

LORD JENKINS: My Lords, the litigation in which this appeal arises concerns a dispute between the appellant company (hereinafter called "the company") and the respondent Ministry and county council on the question whether (as contended by the company) the working by the company after the appointed day of (so far as now material) two granite quarries in the Malvern Hills known respectively as the Tank Quarry and the North Quarry, which admittedly constitutes development within the meaning of the Town and Country Planning Act, 1947, is development which was unconditionally permitted under

art. 3 of Sch. 1 to the Town and Country Planning (General Development) Order, 1948, made in pursuance of s. 13 of that Act. The company contend that this question should be answered in the affirmative on the ground that such working is within the meaning of class xii in such schedule, A

“Development authorised by any local or private Act of Parliament . . . being an Act . . . which designates specifically both the nature of the development thereby authorised and the land upon which it may be carried out,” B

the Act relied on by the company as having authorised the development being the Malvern Hills Acts, 1884 to 1924. If the company's contention to the above effect is well founded, it is common ground that the permission which (as hereinafter appears) the Minister purported to grant to the company under s. 14 and s. 15 of the Act to work the quarries on certain conditions was wholly inoperative, inasmuch as the company already had unconditional permission to work them under the order. If, on the other hand, this contention fails, and the question of permission must accordingly be taken to have remained at large for the Minister's decision, the company contends that certain of the conditions which the Minister purported to impose were ultra vires, and that the permission must, therefore, take effect free of those conditions. C

On Dec. 21, 1954, the company commenced the present action claiming relief in the shape of declarations framed with a view to establishing the contentions to which I have briefly referred. The respondents took a preliminary objection to the effect that the court had no jurisdiction to adjudicate on the company's claim that the working of the quarries was development falling within the terms of class xii in Sch. 1 to the order, and, therefore, unconditionally permitted, on the ground that the statutory procedure for the determination of questions such as this provided by s. 17 of the Act was exhaustive, and that the jurisdiction thereby conferred on the local authority or the Minister was exclusive. The respondents also raised a preliminary objection with respect to the company's subsidiary contention that, even if the permission granted by the Minister was otherwise operative, certain of the conditions attached to it were ultra vires. This objection was to the effect that the validity of the conditions imposed by the Minister could only be challenged by certiorari, the time for which was long past, and not by an action for a declaration; and further that, in any event, the court should on principle refuse to interfere by declaration in a matter essentially depending on the Minister's discretion. D

The case was heard by LLOYD-JACOB, J., who decided in favour of the company on all points, and by his judgment dated Apr. 16, 1957, granted the declarations sought. The respondents appealed from the judgment, and on Feb. 7, 1958, the Court of Appeal (LORD DENNING, HODSON and MORRIS, L.J.J.) by a majority (MORRIS, L.J., dissenting) allowed the appeal. LORD DENNING rejected the respondents' preliminary objection based on s. 17 of the Act, so far agreeing with MORRIS, L.J. HODSON, L.J., on the other hand was for upholding it. LORD DENNING, agreeing in this with HODSON, L.J., held that the development constituted by the working of the quarries was not “authorised” by the Malvern Hills Acts within the meaning of class xii of Sch. 1 to the order. MORRIS, L.J., on the other hand, held that this development was so authorised. As to the validity of the conditions, and the preliminary objection that this question could not be made the subject of a declaration, LORD DENNING rejected the preliminary objection, but held that the conditions were valid. HODSON, L.J., agreed that the conditions were valid. He doubted whether the Minister's decision could be impeached by declaration, and, moreover, was of opinion that, if the Minister's decision could be so impeached, the result of declaring the conditions invalid could only be to destroy the entire permission. In the view taken by MORRIS, L.J., on the rest of the case the questions as to the validity of the conditions and the right of the company to seek a declaration thereon did not arise, but he intimated that if he had shared the view that they did arise, he would have agreed E

A with LORD DENNING's conclusions in regard to them. From that judgment the company now appeals to your Lordships' House.

It is not surprising that the case has been the subject of a conflict of judicial opinion in the courts below, for it raises questions of considerable difficulty. To make discussion of the points at issue intelligible I should next refer to some of the provisions of the Act of 1947. Section 12 provides, by sub-s. (1) and sub-s.

B (2), as follows:—

“(1) Subject to the provisions of this section and to the following provisions of this Act, permission shall be required under this Part of this Act in respect of any development of land which is carried out after the appointed day.

C “(2) In this Act, except where the context otherwise requires, the expression ‘development’ means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land . . .”

Section 13 provides, by sub-s. (1) and sub-s. (2), as follows:—

D “(1) The Minister shall by order provide for the grant of permission for the development of land under this Part of this Act, and such permission may be granted—(a) in the case of any development specified in any such order, or in the case of development of any class so specified, by that order itself; (b) in any other case, by the local planning authority (or, in the cases hereinafter provided, by the Minister) on an application in that behalf made to the local planning authority in accordance with the provisions of the order.

E “(2) An order under sub-s. (1) of this section (hereinafter called a ‘development order’) may be made either as a general order applicable (subject to such exceptions as may be specified therein) to all land, or as a special order applicable only to such land as may be so specified, and the permission granted by any such order may be granted either unconditionally or subject to such conditions or limitations as may be so specified.”

F Section 14 provides, by sub-s. (1), as follows:—

G “Subject to the provisions of this and the next following section, where application is made to the local planning authority for permission to develop land, that authority may grant permission either unconditionally or subject to such conditions as they think fit, or may refuse permission; and in dealing with any such application the local planning authority shall have regard to the provisions of the development plan, so far as material thereto, and to any other material considerations.”

Section 15 provides as follows:—

H “(1) The Minister may give directions to any local planning authority, or to local planning authorities generally, requiring that any application for permission to develop land, or all such applications of any class specified in the directions, shall be referred to the Minister instead of being dealt with by the local planning authority, and any such application shall be so referred accordingly.

I “(2) Where an application for permission to develop land is referred to the Minister under this section, the provisions of sub-s. (1) and sub-s. (2) of the last foregoing section shall apply, subject to any necessary modifications, in relation to the determination of the application by the Minister as they apply in relation to the determination of such an application by the local planning authority: Provided that before determining any such application the Minister shall, if either the applicant or the local planning authority so desire, afford to each of them an opportunity of appearing before and being heard by a person appointed by the Minister for the purpose.

“(3) The decision of the Minister on any application referred to him under this section shall be final.”

Section 16 provides:—

“(1) Where application is made under this Part of this Act to a local planning authority for permission to develop land, or for any approval of that authority required under a development order, and that permission or approval is refused by that authority, or is granted by them subject to conditions, then if the applicant is aggrieved by their decision he may by notice served within the time, not being less than twenty-eight days from the receipt of notification of their decision, and in the manner prescribed by the development order, appeal to the Minister: . . .

“(2) Where an appeal is brought under this section from a decision of the local planning authority the Minister may allow or dismiss the appeal or may reverse or vary any part of the decision of the local planning authority, whether or not the appeal relates to that part, and deal with the application as if it had been made to him in the first instance; and the provisions of the last foregoing section shall apply, subject to any necessary modifications, in relation to the determination of an application by the Minister on appeal under this section as they apply in relation to the determination by the Minister of an application referred to him under that section.”

Section 17 provides as follows:—

“(1) If any person who proposes to carry out any operations on land or make any change in the use of land wishes to have it determined whether the carrying out of those operations or the making of that change in the use of the land, would constitute or involve development of the land within the meaning of this Act, and, if so, whether an application for permission in respect thereof is required under this Part of this Act having regard to the provisions of the development order, he may, either as part of an application for such permission, or without any such application, apply to the local planning authority to determine that question.

“(2) The foregoing provisions of this Part of this Act shall, subject to any necessary modifications, apply in relation to any application under this section and to the determination thereof as they apply in relation to applications for permission to develop land and to the determination of such applications: Provided that where it is decided by the Minister under any of the said provisions that any operations or use to which an application under this section relates would constitute or involve development of the land, or that an application for permission is required as aforesaid in respect thereof, that decision shall not be final for the purposes of any appeal to the court under the provisions of this Part of this Act relating to the enforcement of planning control, in relation to those operations or that use.”

Section 23 deals with enforcement of planning control. Subsection (1) enables the local planning authority to serve an enforcement notice in respect of any development carried out without permission or in breach of conditions, and such notice (by sub-s. (2))

“may . . . require the demolition or alteration of any buildings or works, the discontinuance of any use of land, or the carrying out on land of any building or other operations.”

Subsection (4) gives a right of appeal to a court of summary jurisdiction, and sub-s. (5) gives a right of appeal from the court of summary jurisdiction to a court of quarter sessions. Section 26 and s. 27 in certain cases empower the local planning authority by order confirmed by the Minister to require the discontinuance of authorised uses of land subject to compensation in respect of any damage shown to have been suffered by any person in consequence of the order. These provisions have not been resorted to in the present case. Section 118 (1) declares “for the avoidance of doubt” that the provisions of the Act are applicable to land regulated by special enactments, but again this provision has not been resorted to here.

A The planning history of the matter is briefly this. The Town and Country Planning Act, 1947, which repealed a number of earlier enactments relating to town and country planning, received the royal assent on Aug. 6, 1947, but did not come into operation until the appointed day fixed under s. 120 of the Act, namely July 1, 1948. Between those two dates, namely on Nov. 17, 1947, the company made an application to the Malvern Urban District Council under the repealed enactments for permission to develop the land on which their quarries were situated

“for quarrying purposes including mining or quarrying operations . . . tipping, and the usual processing and manufacture for sale thereof as heretofore.”

C This application included a reference to the “special statutory control of amenities” in the area by the Malvern Hills Conservators, but it is clear that the company cannot at that time have appreciated the vital bearing the Malvern Hills Acts, 1884 to 1924, might have on the question of permission. By virtue of the transitional provisions contained in Sch. 10 to the Act of 1947 this application was treated as having been made on the appointed day under s. 14 of that Act.

D The next step was a direction by the Minister dated Jan. 14, 1948, under the repealed enactments, which, by virtue of the transitional provisions aforesaid, was treated as a direction given on the appointed day under s. 15 of the Act of 1947, that is to say a direction that the company’s application should be referred to the Minister instead of being dealt with by the local planning authority. Next, after the Act of 1947 had come into force, there was a letter dated Sept. 5, 1949, from the Minister giving the company permission to work the North Quarry (which had developed a dangerous fault) only to the extent necessary to ensure safety, and subject to certain other conditions. On June 11, 1952, the Minister informed the company that a public local inquiry was to be held in regard (inter alia) to the company’s application of Nov. 17, 1947, and such inquiry was in due course held. Finally, by a letter dated Sept. 30, 1953, to the company the Minister informed them of his decision on their application. That letter contained this passage:

F “At the inquiry it was contended, on behalf of the applicants, that the quarrying operations proposed were development included in class xii of Sch. 1 to Part 1 of the Town and Country General Development Order, 1950, in respect of which permission had been granted by art. 3 of that order. G The Minister is advised, however, that notwithstanding the provisions of the Malvern Hills Act, 1924, and the said order, permission is required for the continuance of the operations in question; and he must therefore deal with the application on its merits.”

H The effect of the Minister’s decision was that he refused permission altogether in respect of the North Quarry area and parts of the Tank Quarry area, but granted permission with respect to the remainder of the Tank Quarry area subject to a number of conditions, including one to the effect that the winning and working of granite should be limited to a period ending June 30, 1966. The Minister went on to say that the permission granted by his decision of Sept. 5, 1949, was not affected by the present decision.

I The General Development Order of 1948 which is relied on by the company as having, by art. 3 thereof, given unconditional permission for the development in question under class xii in Sch. 1 thereto, came into force on the appointed day, namely July 1, 1948, that being also the date on which the company’s application was treated as having been made under the Act of 1947 by virtue of the provisions in Sch. 10 to that Act. As from May 22, 1950, the General Order of 1948 was replaced by the Town and Country Planning General Development Order, 1950 (S.I. 1950 No. 728), but the Order of 1950 preserved in art. 3 thereof and in class xii in Part 1 of Sch. 1 thereto the effect of art. 3 of and class xii in Sch. 1 to the 1948 General Order, and, accordingly, there is no material distinction between the

two orders for the present purpose. Both orders contained in art. 4 provisions under which a direction excluding the development now in question from the permission accorded by art. 3 could have been given, but these provisions have not been resorted to in the present case. This was how the matter stood when the company on Dec. 21, 1954, commenced their action against the respondent Ministry and county council for declaratory relief of the nature I have indicated and I may now return to the issues raised.

It will be convenient to deal first with the preliminary objection based on s. 17 of the Act. The argument for the respondents is of this nature. Section 15 (3) provides that the decision of the Minister on any application referred to him under that section is to be final. Section 16 (2) provides by reference to s. 15 (3) that the decision of the Minister on any application determined by him on an appeal from the local planning authority shall likewise be final. Section 17 itself provides, by sub-s. (2), that the foregoing provisions of Part 3 of the Act (which, be it observed, include s. 15 and s. 16) shall apply in relation to any application under s. 17 as they apply in relation to applications to develop land and to the determination of such applications. The effect of that clearly must be to make the Minister's decision under s. 17 (2) final, subject only to the proviso to sub-s. (2), under which a decision of the Minister to the effect that the relevant operations or use would constitute development or that an application for permission is required in respect thereof is not to be final for the purposes of any appeal to the court under the enforcement provisions of Part 3, the reference being to the right of appeal to a court of summary jurisdiction given by s. 23. In this context—so proceeds the argument—it is plainly the intention of s. 17 that, with the qualification introduced by the proviso to sub-s. (2), the Minister should have exclusive jurisdiction finally to determine whether any given operations on or change of use of land would constitute development, and, if so, whether an application for permission in respect thereof is required, just as he has exclusive jurisdiction finally to determine an application referred to him under s. 15, or coming before him on an appeal from the local planning authority under s. 16. The matters on which the Minister is empowered to adjudicate under s. 17 include the very point at issue here. In short, the statute has prescribed the tribunal which is to determine the matters referred to in s. 17 and, by so doing, has precluded recourse to any other tribunal.

I am not concerned to dispute that, where an application has been made, and referred to the Minister under s. 15, or brought before him on appeal under s. 16, and he has made his decision thereon, the finality with which that decision is invested by the express terms of the Act could not be challenged by the applicant in proceedings against the Minister for a declaration to the effect that his decision was wrong. Nor am I concerned to dispute that a person who has applied for and obtained the Minister's ruling under s. 17 (1) of the Act is (subject only to the proviso to sub-s. (2) where applicable) similarly precluded from challenging its finality in any such proceeding. But, as I think, very fairly in the circumstances of the case, counsel for the respondents disclaimed the argument that the Minister's decision on the company's application referred to him under s. 15 of the Act now precludes the company from raising the contention that unconditional permission was automatically granted on the appointed day by the General Development Order of 1948, and that the application and the Minister's decisions thereon were, therefore, wholly ineffectual.

Accordingly, the respondents' preliminary objection is to be dealt with on the footing that this contention was one which it was open to the company to raise at the time of action brought, the only question being whether they were entitled to raise it, as they sought to do, by an action in the High Court for declaratory relief, or were, as the respondents contend, confined by the terms of the Act of 1947 to raising it for the decision of the local planning authority, or of the Minister on appeal, under s. 17 of the Act. The respondents contend that the company were so confined, on the ground that planning control is purely a

A creature of statute, that the statute creating it has prescribed by s. 17 a particular mode of deciding with respect to it questions of the nature described in s. 17, and, accordingly, that s. 17 must be construed as excluding recourse to any other tribunal for the decision of any question of that nature.

B It is said that this proposition is warranted by the case in your Lordships' House of *Barracough v. Brown* (11). In that case (to put it shortly) the undertakers of a certain navigation were by a private Act of Parliament empowered, in the event of any vessel being sunk in the navigation, to remove the vessel and to defray the expenses by sale or, if they thought fit, to "recover such expenses from the owner of such . . . vessel in a court of summary jurisdiction". The undertakers sued in the High Court the persons who had been the owners of the sunken vessel at the time of the sinking, but had ceased to be such before the expenses were incurred, claiming the amount of the expenses as damages recoverable at common law. It was objected that the court had no jurisdiction to entertain the action, and the undertakers sought to meet this objection by the argument that, even if they could not recover the expenses by an action in the High Court, they were at all events entitled to come to the High Court for a declaration that, on the true interpretation of the statute, they had a right to recover them. The undertakers failed in both courts below and in your Lordship's House. In holding that the appeal should be dismissed, LORD HERSCHELL said this (12):

E "Unwilling as I am to determine the appeal otherwise than on the merits of the case, I feel bound to hold that it was not competent for the appellant to recover the expenses, even if the respondents were liable for them, by action in the High Court. The respondents were under no liability to pay these expenses at common law. The liability, if it exists, is created by the enactment I have quoted. No words are to be found in that enactment constituting the expenses incurred a debt due from the owners of the vessel. The only right conferred is 'to recover such expenses from the owner of such vessel in a court of summary jurisdiction'. I do not think the appellant can claim to recover by virtue of the statute, and at the same time insist upon doing so by means other than those prescribed by the statute which alone confers the right."

F Dealing with the argument that a claim for a declaration could be maintained, he said this (13):

G "It might be enough to say that no such case was made by the appellant's claim. But, apart from this, I think it would be very mischievous to hold that when a party is compelled by statute to resort to an inferior court he can come first to the High Court to have his right to recover—the very matter relegated to the inferior court—determined. Such a proposition was not supported by authority, and is, I think, unsound in principle."

H LORD WATSON said this (14):

I "The only right which the undertakers have to recover from an owner is conferred by these words: 'Or the undertakers may, if they think fit, recover such expenses from the owner of such boat, barge, or vessel in a court of summary jurisdiction'. The right and the remedy are given *uno flatu*, and the one cannot be dissociated from the other. By these words the legislature has, in my opinion, committed to the summary court exclusive jurisdiction, not merely to assess the amount of expenses to be repaid to the undertaker, but to determine by whom the amount is payable; and has therefore, by plain implication, enacted that no other court has any authority to entertain or decide these matters."

(11) [1897] A.C. 615.

(12) [1897] A.C. at p. 619.

(13) [1897] A.C. at p. 620.

(14) [1897] A.C. at p. 622.

LORD SHAND said (15):

"I agree entirely with what had fallen from my noble friend LORD WATSON on both points. It appears to me that the jurisdiction which can alone be exercised in a case of this kind belongs to a court of summary jurisdiction, and that therefore this suit could not be properly initiated in the court in which it has been brought."

LORD DAVEY said (15):

"My Lords, I agree . . . that there is no common law right of action in this case, and that the High Court had no jurisdiction over the subject-matter of this action under the . . . Acts and that the appeal must consequently be dismissed. I only desire to express my dissent from the contention . . . that although the High Court could not make any judgment or give any relief in this action, the court might make a declaration binding the parties. In my opinion this is altogether wrong."

The principle which the respondents seek to call in aid is succinctly stated by WILLES, J., in *Wolverhampton New Waterworks Co. v. Hawkesford* (16), where he observed that there were three classes of cases in which liability might be established founded on a statute and said of the third:

"But there is a third class, viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. The present case falls within this latter class, if any liability at all exists. The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to. The company are bound to follow the form of remedy provided by the statute which gives them the right to sue."

In truth, the validity of the principle relied on by the respondents is not open to doubt. But the question is whether it is applicable in the present case, and in my opinion it is not.

Where a statute creates a new right which has no existence apart from the statute creating it, and the statute creating the right at the same time prescribes a particular method of enforcing it, then, in the words of LORD WATSON in *Barraclough v. Brown* (17) "the right and the remedy are given uno flatu, and the one cannot be dissociated from the other". As LORD HERSCHELL put it in the same case (18), the party asserting the right cannot

"claim to recover by virtue of the statute, and at the same time insist upon doing so by means other than those prescribed by the statute which alone confers the right."

The principle is wholly apposite in cases comparable to *Barraclough v. Brown* (19). If A has a right founded entirely on a particular statute to recover a sum of money from B, and the statute goes on to provide that the sum in question may be recovered in proceedings of a particular kind, then it is wholly reasonable to impute to the legislature an intention that the sum in question, recoverable solely by virtue of the statute, should be recoverable in proceedings of the kind provided by the statute and not otherwise. The statute puts on B for the benefit of A a liability to which B could not otherwise be subjected, and at the same time prescribes a particular form of proceedings in which it may be enforced. No doubt B must then submit to being amerced to the extent and in the manner provided by the statute. But the incidents of the burden cast on B by the terms of the statute are not to be changed from or made more onerous than those which the statute provides, as they would be if A was at liberty to recover the sum in

(15) [1897] A.C. at p. 623

(16) (1859), 6 C.B.N.S. at p. 356.

(17) [1897] A.C. at p. 622.

(18) [1897] A.C. at p. 620.

(19) [1897] A.C. at p. 615.

A question, or seek a declaration of his right to recover it, in any other form of proceedings to which he might choose to have recourse. As it seems to me, the purpose underlying the principle is the protection of the person against whom the statutory right is asserted from oppression on the part of the person asserting it.

But how does the principle stand in relation to the planning legislation? The Act of 1947, so far as it relates to planning, cannot be said to confer *uno flatu* on a landowner statutory rights coupled with particular remedies for breaches of those rights. On the contrary, that Act restricts to a remarkable degree the ordinary right of a landowner to deal with his land as he pleases; and it might almost be said that the only rights it creates are rights conferred on the Minister and the local planning authorities for the purpose of performing their statutory duty in relation to the administration and enforcement of planning control. Section 17 of the Act of 1947 cannot, in my judgment, reasonably be described as conferring on landowners a special remedy for the enforcement of statutory rights. On the contrary, what it appears to me to do is to provide a cheap and expeditious procedure by which they can, if they so desire, ascertain the extent of the restrictions which, according to official opinion, are imposed by the Act on their ordinary rights as landowners. The company here cannot be said to occupy the position of the undertakers in *Barracrough v. Brown* (20). They are not seeking to enforce statutory rights by methods other than those prescribed by the Act creating them. They are merely seeking to ascertain the extent of their statutory liabilities. It is true that s. 17 itself may be said in a sense to create a statutory remedy in the shape of an application under it for the determination of any question of the kind to which it refers, but it is not a remedy for the breach of any statutory right. It is merely directed to the removal of doubts regarding the effect of the legislation in particular cases.

For these reasons, the principle of *Barracrough v. Brown* (20) has, in my judgment, no application here, and, apart from that principle, I can find no sufficient ground for holding that s. 17 provides an exclusive method of determining questions of the kind to which it relates, and deprives the courts of the jurisdiction which they ordinarily possess of determining by declaration questions of that description. Clear words would be necessary to produce this result, and, paying due regard to the terms of s. 17, and to the argument that it must be read in conjunction with s. 15 and s. 16, I cannot find any sufficient indication that it was intended to oust the jurisdiction of the court on any question which might have been made the subject of an application under s. 17. The section is permissive and not imperative. That in itself is not a circumstance of any positive weight (see the permissive language of the section in *Barracrough v. Brown* (20)); but the fact remains that it is not in terms made obligatory to apply under s. 17, which is at least consistent with the company's contention. Much more important is the circumstance that s. 17 made its first appearance in planning legislation in the Act of 1947. In its absence, the right now claimed by the company of going to the court for declaratory relief could hardly have been doubted. If the introduction of s. 17 had been intended to change the law by ousting the jurisdiction of the court on questions capable of being dealt with under the section, that important change would surely have been made in express terms. For the reasons which I have stated, I am of opinion that the preliminary objection fails.

This conclusion accords with the views expressed by McNAIR, J., and the Court of Appeal in *Francis v. Yiewsley & West Drayton U.D.C.* (21). That was a case in which a person served with an enforcement notice under s. 23 of the Act of 1947 did not avail himself of the right of appeal to a court of summary jurisdiction given by s. 23 (4), but applied to the court for a declaration that the enforcement notice was invalid. It was held that he was not precluded by the

(20) [1897] A.C. 615.

(21) [1957] 1 All E.R. 825; [1957] 2 Q.B. 136; C.A. [1957] 3 All E.R. 529; [1958] 1 Q.B. 478.

statutory provisions from applying to the court for relief and that he was entitled to the relief claimed. On the footing that the court had jurisdiction to entertain the action, I think that the case was clearly one in which the company, if they made good their contentions on the merits, could properly be given declaratory relief: see *Vine v. National Dock Labour Board* (22).

I may, therefore, now pass to the substantial issue in the case, viz., whether the company's quarrying operations constituted

"Development authorised by any local or private Act of Parliament . . . which designates specifically both the nature of the development thereby authorised and the land upon which it may be carried out"

within the meaning of class xii in Sch. 1 to the General Development Order of 1948. It is not in dispute that, if the company's quarrying operations were, within the meaning of class xii, "authorised" by the Malvern Hills Acts, 1884 to 1924, the additional requirement that the nature of the development so authorised and the land on which it might be carried out should be specifically designated by the legislation authorising it was satisfied in the present case. The case, therefore, turns substantially on the question whether this development was so authorised. I have so far referred collectively to the Malvern Hills Acts, 1884 to 1924. There were, in fact, three Acts passed respectively in 1884, 1909 and 1924. Of these, the Act of 1909 contains nothing of any relevance to the present dispute, while the Act of 1884 calls for no more than a passing reference. The statutory authorisation of the company's quarrying operations is to be found, if anywhere, in the Act of 1924. The Act of 1884 provided for the appointment of conservators who were given divers powers designed to protect the amenities of the Malvern Hills, but these powers were found to be inadequate to provide the protection intended, and the position at the time of the passing of the Act of 1924 is thus described in the preamble to that enactment:

"And whereas in recent years the amenities of the Malvern Hills have been seriously interfered with by quarrying operations and by the erection of buildings sheds machinery and plant and those operations are being extended in such manner as to threaten to destroy the value of the Malvern Hills as objects of public interest as well as to impede the user and enjoyment thereof for purposes of public recreation and wholly to alter the state of the hills as they existed in the year 1884:

"And whereas the powers of the existing conservators are insufficient to preserve the Malvern Hills from such quarrying operations and to prevent the erection of such buildings sheds machinery and plant as aforesaid and it is desirable that further provision should be made for the acquisition by the existing conservators of the manorial and other rights over the Malvern Hills and of other property or interests in the Malvern Hills or any part thereof and that further powers of protecting controlling and dealing with the Malvern Hills should be conferred upon the existing conservators as in this Act provided:

"And whereas it is expedient that the area of jurisdiction of the existing conservators should be enlarged and their constitution altered as in this Act provided: . . ."

At the time of the passing of the Act of 1924, the company had for many years been operating granite quarries in the Malvern Hills, and at that time owned the freehold of the area known as the Tank Quarry and held leases or licences of the quarrying rights in additional areas lying to the south of the Tank Quarry area. It is unnecessary to discuss in detail the somewhat complicated history of these leases or licences.

The Act of 1924 must be referred to at some length. Section 2 contains a number of definitions, including the following:—

A " 'The Minister' and 'the Ministry' mean respectively the Minister and the Ministry of Agriculture and Fisheries; . . . 'Revenues of the Conservators' includes the revenues of the conservators from time to time arising from the Malvern Hills or from any land or other property for the time being belonging to the conservators . . . "

Section 5 reads:

B "The area within the jurisdiction of the conservators for the purposes of this Act and the Acts of 1884 and 1909 shall comprise the lands rights and interests described in Sch. 1, Sch. 2 and Sch. 3 to this Act together with all lands common or waste over which the conservators now have or may hereafter acquire rights and interests all of which are in this Act referred to as 'the Malvern Hills'."

C By s. 7 (1)

" . . . the existing conservators as re-constituted by this Act and their successors shall continue to be a body corporate by the name of 'the Malvern Hills Conservators' . . . having power to hold and manage lands."

D Section 20 provides that the Malvern Hills shall be regulated and managed by the conservators under and in accordance with that Act and the Acts of 1884 and 1909. By s. 21, the conservators are required to preserve the natural aspect of the Malvern Hills and protect trees, etc. Section 22 and s. 23 are in these terms:

E "22.—(1) Notwithstanding anything contained in the Acts of 1884 and 1909 the conservators are hereby authorised to purchase the whole of any portions of the lands properties quarries manorial rights and interests described in Sch. 2 and Sch. 3 to this Act and the owners thereof and other persons interested therein shall sell the same subject and according to the provisions of this Act and the Acts incorporated herewith.

"(2) In assessing the amount of compensation to be paid under this Act to the owner of any quarry any obligations such owner may be under in regard to his employees shall be taken into account.

F "23.—The powers of the conservators for the compulsory purchase of lands and other interests for the purposes of this Act shall cease after the expiration of five years from Dec. 31, 1924."

By s. 24 (1)

G "On the conservators giving notice of their intention to exercise their option to purchase the undertaking of the Pyx Granite Co., Ltd. . . . pursuant to the heads of agreement set forth in Sch. 4 to this Act the conservators shall "

make a certain deposit.

H By s. 25 (1), the conservators were empowered to make and enforce bye-laws to regulate quarrying in on or under the Malvern Hills; and by s. 25 (2), provision was made for the payment by the conservators of compensation to any owner, lessee or occupier injuriously affected by the operation of any bye-law so made.

I By s. 26 (1), the Minister was empowered at any time on the application of the conservators and after holding a local inquiry to make an order or orders to prohibit quarrying on any part of the Malvern Hills specified in such order or orders. By s. 26 (2), provision was made for the payment of compensation by the conservators to persons whose interests might be affected by such order. By s. 27, the Minister was empowered, after an application had been made to him by the conservators under s. 26 and had not been withdrawn, to make a temporary order or temporary orders to prohibit quarrying on the lands to which such application related. Section 54 provides as follows:—

"For the protection of the Pyx Granite Co., Ltd. (in this section referred to as 'the company') the following provisions shall unless otherwise agreed in writing between the company and the conservators and the Malvern council have effect (that is to say):—The heads of agreement as set forth in Sch.

4 to this Act are hereby confirmed and made binding on the company and the conservators and the Malvern council and the provisions of this Act shall only apply to or affect the undertaking property or rights of the company subject to the provisions of the said heads of agreement.” A

Schedule 2 to the Act, headed “Lands and quarries authorised by this Act to be acquired by the conservators”, contains no reference to the Tank Quarry. B
Schedule 4 to the Act headed

“Heads of Agreement between the Pyx Granite Co., Ltd. and the conservators and the Malvern Urban District Council”

includes the following provisions:—

“1. The company’s rights of quarrying to be limited (outside their freehold property) to the quarryable area at North Malvern defined on a plan to be signed by the Right Honourable the Lord Islington the Chairman of the Committee of the House of Lords to whom the bill is referred a copy of which is to be supplied by the conservators to the company.” C

“2. The company to surrender the remaining area held by them under the Gandolfi licences but to be at liberty to work under the Berington lease until it expires. That lease is not to be renewed.” D

“3. The Malvern Urban District Council (hereinafter referred to as ‘the council’) to transfer to the company their interest as lessees or tenants of the two quarries at North Malvern which they hold and the company to purchase by agreement or by valuation the plant and machinery of the council now there.”

“4. The company to supply the council with all stone they require for repair of roads in their area at 7s. 9d. per ton at the quarry subject to variation of price according to variations in wages.” E

“5. The council to extend the company’s existing licences so far as they affect the areas which the company may under cl. 1 work to June 24, 1960, on the same terms as at present affect such areas respectively under the present licences.” F

“6. The conservators and the council to arrange for the grant to the company of a licence to work the present council’s quarries within the area mentioned in cl. 1 to June 24, 1960, on the terms of the existing 1910 licence so far as applicable.”

“10. The company to exclude from its operations the playground hatched black on the plan and not to affect injuriously the existing reservoir and aqueduct on the land numbered 10 on the deposited plan in the parish of Malvern.” G

“11. The conservators to be at liberty to plant trees on the disused quarry dumps at the North Malvern quarries the work to be done to the satisfaction of the company.” H

“12. The conservators to have an option to purchase the company’s undertaking as a going concern at the expiration of two years after written notice of such intention shall have been given to the company during the third fourth or fifth year after the passing of the bill.”

“14. A clause to be inserted in the bill excluding the undertaking property and rights of the company from its operation except that bye-laws may be made with the approval of the Home Secretary (after notice to the company) in regard only to blasting operations in the company’s quarries for the protection of the public.” I

“15. The company to be at liberty to continue working under the existing licences without restriction until the new licences above mentioned are granted.”

A " 17. The company shall be at liberty to make and use a tunnel fifteen feet wide and ten feet high under the area of land dividing their freehold property from the council's quarries at a point above the reservoir of the council to be agreed between the conservators and the council in accordance with plans to be approved by their respective surveyors and regulations to be made by the council for the protection of the public.

B " 18. These provisions to be inserted in an agreement which shall contain an arbitration clause and to be executed in triplicate such agreement in case of difference to be settled by a conveyancing counsel to be agreed upon between the company and the conservators or failing such agreement to be nominated by the President of the Incorporated Law Society."

C These are, I think, all the provisions of the Act of 1924 to which it is necessary to refer for the present purpose.

D Reserving for later consideration the position in regard to the Tank Quarry, as to which a special question arises, it appears to me to be reasonably plain that, if the heads of agreement in Sch. 4 are to be looked on as taking effect by virtue of the Act, and not merely by virtue of a contract between the parties recorded in the Act but having no statutory force, the Act did authorise the development by quarrying operations of the quarryable area as defined in para. 1 of the heads of agreement, and the plan therein referred to, including as part of that area the leasehold interests to be purchased from the urban district council under para. 3. Paragraph 1, by limiting the company's rights of quarrying to that area, must, I should have thought, be taken by necessary implication to have authorised them to quarry within it.

E This view is, to my mind, borne out by a consideration of the Act as a whole. Its object may be shortly described as being to preserve the amenities of the Malvern Hills, and, in particular, to preserve them from the inroads of quarrying. To that end, the conservators were given considerable powers, including the power of making bye-laws under s. 25, and were enabled to invoke the power of the Minister to make orders prohibiting quarrying operations altogether under F s. 26 and s. 27. The company might have been subjected like other quarry owners in the Malvern Hills to these restrictive provisions. But, owing no doubt to their opposition to the bill, they were accorded special treatment. This was G done by means of s. 54 and the heads of agreement in Sch. 4. Section 54, expressed to be for the protection of the company, enacted that, unless otherwise agreed in writing between the company, the conservators and the Malvern council, the following provisions should have effect; and went on to provide that the heads of agreement in Sch. 4 were thereby confirmed and made binding on the same H three parties, and that the provisions of the Act should only apply to or affect the undertaking property or rights of the company subject to the provisions of the said heads of agreement. Turning to those heads of agreement, one finds that, by para. 1, they limit the company's rights of quarrying to the quarryable I area defined in the plan, include in such area the quarries, the leasehold interest of the urban district council in which was to be purchased by the company under para. 3, and provide, by para. 2, that the company shall surrender the remaining area held by the company under the Gandolfi licences, which, apart from the Berington lease, which we were invited to ignore, may be taken as including the whole of the land over which the company had rights of quarrying as licensees outside the permitted area. Then, under para. 5 and para. 6, provision is made for the extension of the company's existing licences so far as they affect the areas which the company may work under para. 1 to June 24, 1960, and the grant of a licence expiring on the same date to work "the present council's quarries" (sc. "the council's present quarries") within the permitted area. Thus the company, in exchange for their exemption from the restrictive provisions of the Act, and the recognition of their right to work within the area shown on the plan, including as part of such area the leasehold interests to be acquired from the

urban district council, and the extension of such rights until 1960, gave up their right to work the remainder of the land held by them under the Gandolfi licences, submitted to the grant to the conservators of an option to purchase their undertaking under para. 12 and para. 13, and furthermore submitted to the imposition of a number of stipulations to be observed and performed by the company for the protection of the public and the preservation of amenities.

Viewing these arrangements as a whole, it appears to me that they did, according to the ordinary meaning of the word, authorise the company to work within the limits prescribed by para. 1. Apart from s. 54 and the heads of agreement, the company would have been exposed to the risk of their quarries being closed down by an order of the Minister under s. 26. They were, as I think, relieved of that risk and given security of tenure by s. 54 and the heads of agreement on the terms specified in the heads of agreement. That, in my view, amounted to authorisation of their quarrying operations within the reduced area allowed to them. In his most helpful judgment, MORRIS, L.J., referred to the dictionary definition of "to authorise" cited by TOMLIN, J., in *Evans v. E. Hulton & Co., Ltd.* (23), "to give formal approval to, to sanction, approve, countenance". Any one of these equivalents would, in my view, be apposite here.

The main arguments against the view that the development here in question was authorised by the Act of 1924 are two. The first is that the heads of agreement were merely contractual in their operation, so that the authorisation, if any, in this case did not satisfy the requirement in class xii of Sch. 1 to the General Development Order of 1948, because the development if authorised at all was not authorised by "any local or private Act of Parliament". This argument, which commended itself to LORD DENNING, is founded on *R. v. Midland Ry. Co.* (24), but that appears to me to have been a very different case from this. In that case, an agreement concluded between two railway companies contained a provision for arbitration in manner provided by the Railway Companies Arbitration Act, 1859. Later a private Act of Parliament was passed, and this Act scheduled the agreement and provided that it should be "confirmed and made binding" on the parties thereto. Disputes having arisen, one of the companies concerned applied to the railway commissioners to determine the questions in dispute under the provisions of the Regulation of Railways Act, 1873. Objection was taken to the jurisdiction, and the objection succeeded, on the ground that the right to refer differences to arbitration was derived from the agreement itself; and that the difference was not "required or authorised to be referred to arbitration under the provisions of any general or special Act" within the meaning of the Act of 1873; and, consequently, that the railway commissioners had no jurisdiction to entertain the application. It is to be observed that, in that case, there was, by virtue of the agreement, a valid contractual arbitration clause before the private Act was ever passed. In the present case, no concluded agreement had been entered into before the passing of the Act. The heads of agreement were not binding on anyone until the Act had been passed, and their terms were plainly such that, when the Act was passed, they could have no contractual validity independently of the Act. If s. 54 and Sch. 4 had not been included in the Act, it is reasonably plain that a contract in the terms of the heads of agreement in derogation of the terms of the Act could not have been validly made. I respectfully adopt the words of ROMER, J., in the unreported case of *Pyc Granite Co., Ltd. v. Malvern Hills Conservators* (25) where he said:

"The parties only became bound by the heads of agreement by virtue of the express provision to that effect in s. 54 of the Act, and the heads of agreement were in this way made part of the Act."

(23) (1924), 131 L.T. at p. 535.

(24) (1887), 19 Q.B.D. 540.

(25) May 11, 1925.

A For these reasons, I am of opinion that the argument that any authorisation given was not given by the Act, but merely vested in contract, fails. I should add that I see nothing to displace this conclusion in the words "unless otherwise agreed in writing" which occur in s. 54. Those words, to my mind, merely indicate that the statutory protection afforded to the company may be relinquished by the company wholly or in part if the company, the conservators and the council so agree, and do not deprive such protection of its statutory character.

B The other main argument against the view that the development here was "authorised" within class xii is to the effect that the Act did not authorise the company to do anything which they were not entitled to do before it was passed. Before the Act was passed, they were entitled to quarry on any lands owned by them or in which they had or might be able to obtain licences to quarry.

C After the Act was passed, their rights of quarrying were restricted in manner provided by s. 54 and Sch. 4, but they were given no new rights save in so far as they acquired the leasehold interest of the council in the quarries mentioned in para. 3 of Sch. 4, which were included in the permitted area. I think that this argument takes too narrow a view. When the bill which became the Act of 1924 was in the process of passing into law, prevention of quarrying was, so to speak,

D in the air. The legislature must be taken to have had under consideration the whole question of quarrying in relation to its effect on the amenities of the Malvern Hills, and the extent of the restrictions on the former which it would be reasonable and practicable to impose in the interests of the latter. The Act when it emerged could theoretically have stopped quarrying altogether, or subjected it to restrictions of any degree of severity as the legislature might think fit.

E In such circumstances, I think that it is right to regard an owner or licensee of quarry lands who is permitted by the Act to quarry without restriction part of his quarryable lands on condition that he gives up quarrying the rest, as authorised by the Act to quarry (albeit in right of his interest as owner or lessee) that part of his lands which the legislature permits him to quarry. Accordingly, I think that this argument fails also.

F A subsidiary argument arises with respect to the Tank Quarry, the company's own freehold. The difficulty here is this. Section 5 defines "The area within the jurisdiction of the conservators for the purposes of this Act . . ." by saying that it shall comprise the lands, rights and interests described in Sch. 1, Sch. 2 and Sch. 3 to the Act together with all lands common or waste over which the conservators "now have or may hereafter acquire rights and interests all of

G which are in this Act referred to as 'the Malvern Hills'". Schedule 1, "Property vested in the conservators", and Sch. 3, "Manorial rights authorised by this Act to be acquired by the conservators", clearly have no reference to the Tank Quarry. But Sch. 2, "Lands and quarries authorised by this Act to be acquired by the conservators", in which one would expect to find the Tank Quarry, contains no mention of it, although it does include other land held by

H the company as licensees. Passing to Sch. 4 it appears that the only references to the Tank Quarry in that schedule consist of the words in brackets "(outside their freehold property)" in para. 1, and of the provision in para. 17 enabling the company to make a tunnel under the area of land dividing their freehold quarry from the council's quarries. It is, accordingly, suggested that the Tank Quarry is not included in the area within the jurisdiction of the conservators as defined in s. 5 of the Act, and not included in the quarryable area defined in para. 1 of Sch. 4, and, accordingly, that the Act cannot be held to have authorised quarrying on it.

I This is a troublesome point, but I have come to the conclusion that the Tank Quarry must be taken to be included in the area of the conservators' jurisdiction and also to be included in the quarryable area as defined in para. 1 of Sch. 4 for the following reasons. Section 5 of the Act defines the area of the conservators' jurisdiction as comprising not merely the scheduled items but also "all lands common or waste over which the conservators now have or may hereafter acquire

rights and interests". I construe these words as including "all lands, or common, or waste" and not "all common or waste lands". Paragraph 12 of the heads of agreement gives the conservators an option to purchase the company's undertaking as a going concern on the terms stated in that paragraph and in para. 13, this option being also referred to in s. 24 of the Act. Clearly, the company's undertaking must be taken as including the Tank Quarry. An option to purchase confers on the grantee of the option an interest in the property to which the option relates. Accordingly, in my opinion, the Tank Quarry is included in the area of the conservators' jurisdiction under s. 5, as falling with the expression "all lands . . . over which the conservators now have or may hereafter acquire rights and interests". With respect to para. 1 of Sch. 4, I regard the expression "(outside their freehold property)" as of somewhat doubtful import, but as being well capable of meaning "apart from their freehold property" or "over and above their freehold property", so that the permitted area extends to their freehold property as well as to the other property shown on the plan as comprised in the quarryable area. I think this construction should be adopted, particularly in view of the apparent absurdity of omitting the Tank Quarry. This conclusion is, to my mind, aided by the fact that the option given to the conservators is an option to purchase the company's undertaking as a going concern. That surely imports an intention that the working of the Tank Quarry would in the meantime continue. The provisions in para. 17 of Sch. 4 as to the making of the tunnel also appear to me to import the intention that the Tank Quarry should be worked. The fact that the option was never exercised does not, in my view, affect its bearing on the construction of the Act.

I should, perhaps, add a word about the unreported case already referred to. The decision of the Court of Appeal was to the effect that para. 14 of the heads of agreement was inoperative. The judgments are not altogether easy to follow, but, if and so far as they involve the conclusion that, notwithstanding s. 54, enacted as it was for the protection of the company, bye-laws made under s. 25 would bind the company, however inconsistent they might be with the quarrying within the permitted area conferred on the company without qualification by Sch. 4, or that, notwithstanding s. 54, an order could be made by the Minister under s. 26 or s. 27 prohibiting further quarrying by the company within the permitted area, I cannot agree with them.

I find it unnecessary to discuss the agreement of Dec. 14, 1925, made in pursuance, or purported pursuance, of para. 18 of the heads of agreement. To my mind, the solution of the question of authorisation by the Act of 1924 is to be found in the Act itself, including as part of the Act the heads of agreement.

It follows from the views above expressed that, in my opinion, the difficult questions as to the propriety of the conditions attached to the permission given by the Minister under the Act of 1947, on the assumption that he was in a position to give any effective permission at all, and as to the appropriate remedy on the footing that the conditions were bad, which were fully and ably argued before your Lordships, do not arise, and I express no opinion about them one way or the other.

For these reasons, I would allow this appeal.

Appeal allowed.

Solicitors: *Stephenson, Harwood & Tatham* (for the appellant company); *Solicitor, Ministry of Housing and Local Government* (for the respondent the Ministry of Housing and Local Government); *Sharpe, Pritchard & Co.*, agents for *W. R. Scurfield*, Worcester (for the respondents the County Council of the Administrative County of Worcester).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

**A SOCIÉTÉ FRANCO-TUNISIENNE D'ARMEMENT-TUNIS v.
GOVERNMENT OF CEYLON.**

[COURT OF APPEAL (Morris, L.J., and Pilcher, J.), May 26, 27, 28, 29, 1959.]

*Arbitration—Award—Remission—Arbitrator's jurisdiction—Natural justice—
B New point taken by umpire but not made clear to parties—Power to determine
point of law otherwise than as agreed by parties—Demurrage Computation
under charterparty.*

At two ports a vessel, chartered under charterparty in Gencon form, loaded
for the charterers 4,338 long tons of flour distributed over its five holds, and
at a third port loaded, under a clause in the charterparty, a further four hun-
dred tons of other cargo for the shipowners, this cargo being overstowed in
three out of the five holds. The ship arrived at Colombo on Oct. 18, 1956, at
6.12 a.m., and the master gave notice of readiness to discharge at 9 a.m., but
the ship was not able to berth until Oct. 24, and discharging lasted from
5.30 p.m. on that day to 3 a.m. on Nov. 3. Disputes between the shipowners
and the charterers as to several matters, including demurrage, were referred
to arbitrators and, on their disagreement, to an umpire. Under the charter-
party time for discharging was to commence at 2 p.m. if notice of readiness
to discharge was given before noon, time lost in waiting for a berth was to
count as discharging time and there was provision for despatch money.
On a time sheet prepared for the charterers on the completion of discharge
demurrage at Colombo was computed at £829 6s. 10d. based on time counting
from Oct. 18 but on demurrage for four days being reduced to two-fifths
because only two of the five holds were then free of overstowed cargo. In a
letter to the shipowners in May, 1957, the charterers acknowledged their
liability for the £829 6s. 10d. and this liability was again admitted in the
statement of their case handed by their arbitrator to the umpire at the
conclusion of his hearing of the reference. The shipowners' arbitrator
claimed £1,878 16s. 9d. based on a time sheet also taking time as running
from Oct. 18. The umpire found that no demurrage was due and awarded
to the charterers despatch money (which they had not claimed), basing his
calculation on time running only from Oct. 29. In an affidavit he stated that
at the hearing he questioned the accuracy of both time sheets, that it seemed
to him that "no time could begin to run until the vessel was ready to dis-
charge", i.e., when all five hatches (not merely two) were available to the
charterers for discharging and that he suggested that the shipowners could
not say that time was lost in waiting for a berth so long as the ship was not
so ready. He understood that he was to recompute the time sheets accurately
and make his award accordingly. The shipowners' arbitrator stated in an
affidavit that, in his recollection, the umpire never suggested that the ship-
owners "were not entitled to claim that any time was lost in waiting for a
berth . . . because part of the charterers' cargo had been overstowed with
cargo" and that he would have made specified additional submissions if the
umpire had done so. The charterers' arbitrator had no recollection which
could assist the court. A motion to set aside or remit the award having
succeeded in relation to the despatch money, but having failed on a second
ground, viz., that there had been technical misconduct by the umpire in that
he had disallowed sums (viz. the £829 admitted demurrage) which were not
in issue and in relation to which the shipowners had no opportunity of
making submissions to him, the shipowners appealed on the second ground,

Held: the award must be remitted to the umpire to reconsider the amount
of demurrage because—

(i) although the umpire had not exceeded his jurisdiction in his award,
since he was not precluded by the charterers' admission of liability from
determining differently from the parties the correct method of computing

demurrage which depended on the interpretation of the charterparty in its application to ascertained facts and so was a question of law, yet

(ii) the point taken by the umpire was a new one which should have been made clear to the parties and on which they should have had opportunity to make submissions, and, on the evidence, the point had not been made clear with the consequence that the shipowners had not had opportunity to submit contentions concerning it.

Appeal allowed.

[As to grounds for remission of an award to the arbitrator, see 2 HALSBURY'S LAWS (3rd Edn.) 56, para. 121; and for cases on the subject, see 2 DIGEST (Repl.) 695-698, 2088-2102.]

Case referred to:

North River Freighters, Ltd. v. H. E. The President of India, [1956] 1 All E.R. 50; [1956] 1 Q.B. 333; [1956] 2 W.L.R. 117; 3rd Digest Supp.

Appeal.

The appellant shipowners were the managing owners of the steamship *Massalia*, a vessel of five holds and eleven winches and carrying about 5,000 tons of dead-weight cargo which was the subject of a charterparty in the Gencon form, dated July 16, 1956, the respondent Government of Ceylon being the charterers. Under the charterparty the vessel was to load a part cargo of 4,450/4,700 long tons of flour in bags at Antwerp and Bordeaux and to proceed to Colombo (one good and safe berth) and deliver it on payment of freight on net weight (115s. per ton of 2,240lb.). The charterparty contained the following provisions:

"16. Cargo to be loaded and stowed, free of expense to the vessel, at the rate of 1,000 tons of 2,240lb. per weather working day, Sundays and holidays excepted, and to be discharged at receivers' risk and expense at the rate of 750 tons of 2,240lb. per weather working day, Sundays and holidays excepted.

"6. Time to commence at 2 p.m. if notice of readiness to discharge is given before noon, and at 8 a.m. next working day if notice given during office hours after noon. Time lost in waiting for berth to count as discharging time.

"7. Any demurrage at the rate of £250 per day or pro rata for any part of a day payable day by day, at ports of loading and discharging. Owners to pay charterers' despatch money for all working time saved at half demurrage rate at loading and discharging ports.

"25. Charterers' agents and stevedores at loading and discharging ports at customary rates. At discharging port, vessel to be consigned to Ceylon Shipping Lines, Ltd., as agents to attend to all ship's business.

"27. Arbitration clause. All disputes from time to time arising out of this contract shall, unless the parties agree forthwith on a single arbitrator, be referred to the final arbitrament of the two arbitrators carrying on business in London who shall be members of the Baltic and engaged in the shipping and/or grain trades, one to be appointed by each of the parties, with power to such arbitrators to appoint an umpire. Any claim must be made in writing and claimant's arbitrator appointed within six months of final discharge and where this provision is not complied with the claim shall be deemed to be waived and absolutely barred . . .

"30. Owners to have the liberty to complete cargo 'en route' with other goods, if shipped in same holds as flour cargo, these goods to be well separated of flour cargo to avoid mixing or damage to the said cargo. Cost of separation being for owners' account, and owners to be also responsible of damage, if any, done to the flour cargo."

In August, 1956, the ship loaded 4,338 long tons of flour in bags for the charterers' account at Antwerp and at Bordeaux, the cargo being distributed over

A the five holds. Disputes arose as to demurrage at both Antwerp and Bordeaux. On Oct. 1 and 2, 1956, when the ship was at Port Said, the shipowners loaded over 400 tons of other cargo for Colombo under the right conferred by cl. 30. The cargo was overstowed in three out of the five holds. The ship arrived at Colombo on Oct. 18, 1956, at 0612 hrs. and the master gave notice of readiness to discharge at 0900 hrs. But the ship was not able to berth until Oct. 24, and discharging lasted from 1730 hrs. on that day to 0300 hrs. on Nov. 3. Other disputes arose between the parties, including one as to the charterers' liability for demurrage at Colombo and the charterers decided to cover themselves in respect of the claims they were asserting by withholding freight.

C In January, 1957, the disputes between the parties were referred to arbitration under cl. 27 of the charterparty and the shipowners appointed Mr. Owen Ellis as arbitrator, and the charterers Mr. Malcolm Browne. The arbitrators failing to agree, Mr. John Chesterman was appointed umpire and all matters in dispute were referred to him. On Dec. 11, 1958, the arbitrators appeared before him and acted as advocates for their respective parties and each left with him a statement of his party's case containing the submissions made in respect of each item of the claims advanced.

D A time sheet prepared on Nov. 3, 1956, the date of completion of the discharge of cargo (it was presumed by Ceylon Shipping Lines, Ltd., as agents for the charterers) recorded that the ship was to discharge 750 tons per weather working day, Sundays and holidays excepted, that the ship arrived on Oct. 18, 1956, at 0612 hrs., and berthed on Oct. 24, 1956, and that notice (i.e., notice of readiness to discharge) was delivered at 0900 hrs. on Oct. 18. There followed the words: "Time to count from Oct. 18, 1956, 1400 hrs." It recorded that discharging started on Oct. 24, at 1730 hrs., and was completed on Nov. 3, at 0300 hrs. A calculation of the lay days recorded that they would amount to five days, eighteen hours, forty-seven minutes, and from recorded times lay time expired on Oct. 30, the additional time to Nov. 3 amounting to three days, nine hours and thirty-seven minutes. The time set down for Oct. 19, 20, 22, and 23, when the ship was not at berth, was nine hours, thirty-six minutes, being taken at two-fifths of twenty-four hours because only two of the five holds were free of overstowed cargo. The demurrage rate was given as £250 per day.

G A letter written in May, 1957, by the Food Commissioner of Ceylon, it was presumed on behalf of the charterers, supplying information apparently asked for by the shipowners, acknowledged that the charterers were liable for freight £24,943 18s. 1d. and for demurrage at Colombo £829 6s. 10d. calculated by reference to three days, seven hours, thirty minutes, totalling £25,773 4s. 11d. It stated that the charterers had paid over £22,000 freight, gave a figure for commission and included an item: "Less claims by the charterers against the ship submitted for arbitration £1,984 8s." These amounts totalled £25,506 6s. 1d., leaving a balance of £266 18s. 10d. The charterers paid this sum into Hambros Bank in such a way that the shipowners could have drawn it out, but the shipowners left it there, considering it unwise to draw it out when they considered they were entitled to a much larger sum.

I The charterers' case left by their arbitrator with the umpire stated: "The claims which the charterer submits for arbitration are" nine items with details and figures totalling to the £1,984 8s. specified in the letter, and: "As against the above claims the charterer admits liability to the owners for the following", i.e., freight £24,943 18s. 1d. less freight paid and commission, "balance freight due £1,442 14s. 7d." and "Demurrage incurred by the vessel at Colombo, £829 6s. 10d." the amount admitted in the letter.

The case left by the shipowners' arbitrator with the umpire contained their submissions on the claims of the charterers and their own claims. These claims included the difference in the freight claimed compared with that acknowledged by the charterers, a sum claimed for alleged wrongful arrest of the ship which arose out of a dispute at Colombo and the claim for demurrage in the following

terms: "At Colombo demurrage seven days, twelve hours, twenty-two minutes at £250 per day or pro rata £1,878 16s. 5d." This sum was computed by taking the difference between the period from when time commenced to when discharge was completed (Oct. 18, at 1400 hrs. to Nov. 3 at 0300 hrs.—fourteen days thirteen hours) and the discharge time (4,367 plus 394 tons at 750 tons per day, six days, eight hours, twenty-one minutes (cl. 16)) to give the time lost, eight days, four hours, thirty-nine minutes. Of this ninety-two per cent. representing the charterers' proportion of the cargo came to seven days, twelve hours, twenty-two minutes, which at £250 a day gave £1,878. It was recorded that the charterers had paid £266 18s. 10d.

The umpire made his award on Dec. 19, 1958. It stated:

"I award and determine that the amount of £266 18s. 10d. if still held by Hambros Bank London be returned forthwith to the [charterers] And I further award and determine that in addition to this sum as aforesaid the [charterers] are entitled to recover from the [shipowners] the sum of £127 12s. 5d. and I direct that the [shipowners] shall forthwith pay the [charterers] this sum or if the amount of £266 18s. 10d. has been encashed by the [shipowners] then I direct that the [shipowners] shall forthwith pay to the [charterers] the sum of £394 11s. 3d."

The umpire had sent to the arbitrators certain notes, expressly stated not to be part of his award, in order to explain to them how he had reached his decision.

On Jan. 17, the owners' solicitors wrote a letter to the umpire, in which they said:

"The parties' arbitrators argued their cases before you towards the end of last year and from a copy of the case to the charterers' arbitrator which we have seen, it is quite clear that he then reiterated charterers' admission that the sum of £829 6s. 10d. demurrage at Colombo was due to the owners. We understand moreover from Mr. Owen Ellis, the owners' arbitrator, that the only dispute over demurrage at Colombo at the arbitration was concerned with the owners' claim that they were entitled to a further £1,049 9s. 7d. beyond the £829 6s. 10d. admitted by the charterers. Bearing this in mind, the owners were surprised to read in your award that you had awarded the charterers not only the £266 18s. 10d. which the charterers had admitted they owed the owners in any event, but also a further sum of £127 12s. 5d."

The letter continued that the owners were advised to apply to the court to set aside the award and asked whether the umpire's notes could be made available. The umpire wrote in reply:

"I thank you for your letter of Jan. 19, and was surprised at its contents. It was my understanding at the time when the parties' arbitrators appeared before me for oral argument that I was required to review the respective time sheets at Colombo and to make the necessary adjustments. I have, of course, no objection to your making use of my notes as stated by you in connexion with any application which you may make to the court in connexion with my award."

He addressed copies of his letter to the two arbitrators. The notes were subsequently made an exhibit to an affidavit and so came before the court.

The umpire's notes revealed that he had disallowed any demurrage for the shipowners and had held that the charterers were entitled to despatch money because time was saved, and that his figures were calculated on that basis. The notes stated:

"Time at discharging port was to count at 2 p.m. if notice of readiness was given before noon. Again, as for the loading port, notice of readiness could not be given until the vessel was ready and, according to owners' own calculations, the vessel was not ready and with all five holds at charterers' disposal until 0000 Oct. 29, so that notice could not be given until that time

A and time therefore began at 1400 hrs. on that day . . . No blame attaches to Ceylon Shipping Lines for delay in berthing the ship. Although they were agreed agents under this charter, the owner could, had he wished, have consigned the ship to other agents for his own cargo."

B With the notes was incorporated the time sheet which the umpire had worked out, according to which there had been a saving of time by the charterers of one day, six hours, forty-five minutes, which at £125 per day came to £160 3s. 1d., and this sum the umpire awarded as despatch money.

In an affidavit sworn on Jan. 23, 1959, two months after the hearing before the umpire, the shipowners' arbitrator stated:

C "4. The [charterers'] contention relating to the said dispute [about demurrage] was that the [shipowners] were entitled to demurrage for a period of three days, nine hours, thirty-seven minutes and no more which, at the demurrage rate prescribed by the said charterparty, entitled the [shipowners] to £829 6s. 10d. The [charterers] said contention was based on a time sheet relating to the vessel's discharge at Colombo, a true copy whereof is now shown to me and exhibited hereto marked 'OE 2'. The [shipowners']
D contention in relation to the said dispute was that they were entitled to demurrage at Colombo for a period of seven days, twelve hours, twenty-two minutes, which entitled them to recover the sum of £1,878 16s. 5d. at the demurrage rate prescribed by the said charterparty.

E "8. As appears from para. 3 of the [charterers'] statement of case, there were nine heads of claim which the [charterers] submitted to the umpire for his determination and award. Further, as appears from para. 4 of the [charterers'] statement of case, the [charterers] admitted their liability to the [shipowners] in the sum of £829 6s. 10d. in respect of demurrage incurred at Colombo. It further appears from para. 7 of the [charterers'] statement of case that the [charterers] admitted the said demurrage as being due on the basis of the said time sheet which is exhibit 'OE 2' hereto. Further, the
F aforesaid tender by the [charterers] to the [shipowners] of £266 18s. 10d. is referred to at p. 6 of the [shipowners'] statement of case and was thereby brought to the notice of the umpire. Neither during the said hearing before the umpire nor at any other time did the [charterers] withdraw their said admissions in relation to the said sum of £829 6s. 10d. and £266 18s. 10d. and
G the [charterers] admitted liability to the [shipowners] in respect of the said sums was never in issue in the arbitration; nor did I at any time have any opportunity to make any submission to the umpire, or reason for making any submission to the umpire, in respect of the legal and factual position which would have been material if the aforesaid admissions had not been made on behalf of the [charterers]. The only matter relating to the vessel's discharge at Colombo which was in issue between the parties and referred to the umpire for decision was whether or not the [shipowners] were entitled
H to a further sum of £1,049 9s. 7d. by way of demurrage in addition to the said admitted sum of £829 6s. 10d."

In an affidavit sworn voluntarily by the umpire, it was stated:

I "3. The time sheet on which the [charterers] relied, disclosed a liability for demurrage at Colombo of £829 6s. 10d. The time sheet relied on by the [shipowners] disclosed a liability for demurrage at Colombo of £1,878 16s. 5d. Oral argument took place on the issues disclosed by these contrasting time sheets. It seemed to me at an early stage that neither time sheet was entirely accurate. I accordingly raised certain queries in this respect. In particular, it seemed to me that no time could begin to run until the vessel was ready to discharge, and that she could not be deemed to be so ready until she was in a condition in which she was able to make available all hatches to the [charterers] for the purposes of enabling them to discharge.

I suggested that the [shipowners] could not be heard to say that time was lost in waiting for a berth so long as the vessel herself would not have been ready to discharge had a berth been available. In saying this I had in mind the remarks of PARKER, L.J., in *North River Freighters, Ltd. v. H. E. The President of India* *. The [charterers'] time sheet had been computed on the basis of an allowance of lay time calculated by reference to the proportion of hatches at any time available for working, such proportion being applied notionally to the charterparty rate for discharging.

"4. It frequently happens in cases which are concerned with disputes about the calculation of lay time that neither of the time sheets relied on by the respective parties will be accepted in their entirety by the umpire. In the present case I made it clear to the respective arbitrators that in my view it was doubtful if either time sheet submitted by them was correct. After discussion I was left with the clear impression that both arbitrators expected me to recompute the time sheets on the basis which I considered to be accurate, and to make my award accordingly. I was aware that the [charterers] had originally submitted a time sheet showing demurrage due from them at Colombo of £829 6s. 10d. It was never suggested to me by either arbitrator that I was not to be at liberty to make an award, if I saw fit, in which the demurrage payable by the [charterers] might be a lesser sum or indeed in which an allowance might be made to the [charterers] in respect of despatch money at Colombo. I understood I was being asked to deal with the computation of lay time at, inter alia, Colombo, and that any award which I might ultimately make would take into account whatever amount (whether by way of demurrage or of despatch) I might find to be due from one party to the other as a result of the computation which I found to be correct on the true construction of the charterparty."

In a second affidavit, the shipowners' arbitrator stated:

"3. As regards para. 3 of the umpire's affidavit, to the best of my recollection and belief the umpire never suggested during the hearing, or at any other time, that the owners were not entitled to claim that any time was lost in waiting for a berth at Colombo because part of the charterers' cargo had been overstowed with cargo which the owners had loaded en route to Colombo pursuant to cl. 30 of the said charterparty. If the umpire had made any suggestion to this effect, or if he had ever indicated that, notwithstanding the charterers' admission that time under cl. 6 began to count at 1400 hrs. on Oct. 18, 1956, he might nevertheless award that the owners were to get no compensation whatever in respect of the time while the vessel was waiting for a discharging berth, then I should certainly have made a number of additional submissions on behalf of the owners. First, I should have submitted that this point was not in issue between the parties and that the umpire accordingly had no jurisdiction to deal therewith. Secondly I should have submitted that the owners' exercise of their rights under cl. 30 could not affect their rights under cl. 6 if the vessel was kept waiting for a discharging berth. Thirdly, I should have submitted that the time during which the vessel had to wait for a discharging berth was clearly 'lost' time to the owners, irrespective of whether the charterers' cargo in one or more of the vessel's holds was overstowed with cargo carried for the account of the owners. As regards the reference to the judgment of PARKER, L.J., in *North River Freighters, Ltd. v. H. E. The President of India* *, to the best of my knowledge and belief this was never referred to in the course of the hearing before the umpire, and I note it was also not referred to by the umpire in his 'notes' (exhibit OE 7 to my earlier affidavit) in which he set out the authorities which had guided him in making his award. If the umpire had referred to it, I should certainly have submitted to him that the remark at p. 59, letter D,

* [1956] 1 All E.R. at p. 59; [1956] 1 Q.B. at p. 350.

A was not an authority against the owners' contention, since the learned lord justice must there have intended to refer to a case where the vessel would have lost no time while waiting for a berth on the ground that she would not have been ready to load or discharge, as the case might be, even if a berth had been available for her, as would be the case, for instance, if she had had to carry out repairs to her cargo gear during the period which she spent waiting for a berth. However, none of these points became material during the hearing before the umpire both because the matter was covered by an admission on behalf of the charterers and because the umpire never sought to question the correctness of this admission. I therefore never had any reason or opportunity to make any submissions in relation to any of the foregoing points."

C The shipowners brought a motion for an order that the award be set aside, or, alternatively, be remitted, on the ground

"(i) that the said award was beyond the jurisdiction of the said umpire in that it included certain matters not in dispute between the parties and/or not submitted by them to arbitration; (ii) that the umpire misconducted himself in respect of the said reference in that he awarded to the [charterers] certain sums which the [charterers] admitted were due to the [shipowners] and/or were not claimed by the [charterers] in the arbitration and/or in that he exceeded his jurisdiction as aforesaid and/or in that he awarded certain sums to the [charterers] which were not in issue between the parties and in relation to which the [shipowners] had no opportunity of making submissions to him."

E On Apr. 9, 1959, McNAIR, J., held that the umpire had exceeded his jurisdiction in awarding despatch money, which had never been claimed by the charterers in accordance with the requirements of cl. 27 of the charterparty, but that he had not otherwise exceeded his jurisdiction and he did not accede to the motion on the second ground of appeal. He did not set aside the award but remitted the matter to the umpire with a direction to exclude the amount allowed by way of despatch money and to make consequential amendments. The shipowners appealed to the Court of Appeal.

F *M. R. E. Kerr* and *M. J. Mustill* for the shipowners.

R. Millner for the charterers.

G MORRIS, L.J., stated the facts, referring particularly to the documents which each arbitrator had left with the umpire as a statement of the party's case, and said: We have not before us many contemporary documents, but it seems to me that the extent and the nature of the disputes submitted to the arbitrators can be ascertained by looking at certain of the documents that we have. It is clear from the letter of the Food Commissioner that in May, 1957, the charterers were saying: "We admit liability for £25,773 odd which includes the sum of £829 for demurrage at Colombo. We have claims the total amount of which come to £1,948, and, if we add that sum to what we have already paid by way of freight, there is a balance of £266 odd; that is all we owe." So they made £266 18s. 10d. available for the owners. As late as the end of the hearing before the umpire, the charterers were allowing to remain in their written case an admission of liability for demurrage incurred at Colombo to the amount of £829 6s. 10d. That was computed as in May, 1957, on the basis of the charterparty figure of £250 a day for three days, seven hours, thirty minutes. The matters submitted by the charterers to arbitration were the nine items totalling £1,984 and coupled with their submission was this admission of liability for demurrage at Colombo.

The umpire's award was not a speaking award; it was not an award which contained any error of law on its face. The umpire's notes (1) are not part of the

(1) These are referred to at p. 28, letter I, ante.

award and so far as they give reasons for the decision those reasons are not part of the award. The learned judge looked at those notes, and this court can look at them, only because of the nature of the application made to the court. It is said that the umpire acted in excess of jurisdiction, that, in a technical sense, there was what is called misconduct and that the hearing before the umpire was not satisfactory, because among other reasons the shipowners had no opportunity of making their submissions to the umpire in regard to what was quite a new development in the case. There is no personal imputation against the umpire or the arbitrators, who are all skilled gentlemen of great experience. It is clear there had never been a claim for despatch money. A B

There is clearly a conflict between the recollections of the umpire and of the shipowners' arbitrator. The learned judge was disposed to accept the umpire's view as put forward in his affidavit. Mention has been made during the hearing of the fact that neither side thought of cross-examining either of these two gentlemen on their affidavits. C

The position is therefore rather unfortunate, for the conflict between the recollection of these gentlemen is considerable, both of them being experienced and trusted men accustomed to dealing with topics of this kind. The shipowners' arbitrator is saying that the award took him by surprise, and that it reflects a view of the case with which he had no real opportunity to deal. It must be plain that the point which the umpire says that he raised was a point that was new to all concerned. It was not a point that occurred to the charterers' arbitrator, who was making submissions on behalf of the charterers. The charterers' arbitrator, as I have said, has not sworn an affidavit: we are told that the reason was that his recollection was not such as would enable him to assist the court. It is clear that the point raised by the umpire was a very important point which cast an entirely new light on the matters which were in dispute: if the point had been really appreciated by the shipowners' arbitrator it would certainly have called for submissions from him. In the affidavit which I have read it is indicated that he might in the first place have said, "Well, this is not open at all"; but, in any event, he would have wished to deal with the legal position. D E F

We now have to consider whether there was an excess of jurisdiction beyond that which was held by the learned judge: there has been no cross-appeal—and there hardly could have been one—as it is beyond doubt that there was excess of jurisdiction in awarding despatch money. The issue which we have to consider is whether there was excess of jurisdiction depriving the owners of any right to receive demurrage. It is not for us to decide the legal issues that have emerged in this case. There is no error of law on the face of the award. There was no Case Stated. This is not the moment to express any opinion in regard to the quite difficult questions of law which may arise if there is a new consideration of any of the issues. We were referred to the decision in this court in *North River Freighters, Ltd. v. H. E. The President of India* (2). G

As to the issue of jurisdiction, there was a claim made by the shipowners for £1,878 demurrage. Both arbitrators appear to have considered the matter simply by considering whether the amount of demurrage should be something over £829, i.e., some greater sum up to £1,878. It did not occur to either of them that there should be no award of demurrage: the charterers had said "We admit we are liable." The arbitrators could not agree: so the matter went to the umpire and the umpire was called on to decide this issue. The issue was—Are the owners entitled to £1,878 by way of demurrage? Counsel for the shipowners submits that the issue was as I have stated, but with this qualification, that in any event the sum of £829 was to be awarded. The arbitrators both proceeded on the basis that time began to count from 2 p.m. on Oct. 18. The charterers then calculated the demurrage in one way—as I have indicated. They made a partial allowance of time in respect of certain days. The shipowners then proceeded to make a H I

A calculation in quite a different way, the way which was recorded in their case. But, it would appear that the basis on which the £829 was calculated is not really defended by anyone. Counsel for the shipowners says that cl. 30 of the charterparty (3) shows that the shipowners had liberty to carry cargo as they did. He further says that, under cl. 6 of the charterparty, time lost in waiting for a berth is to count as discharging time. Therefore, he submits that, when the decision of this court in *North River Freighters, Ltd. v. H. E. The President of India* (4) is regarded, he is entitled to say that all the time between Oct. 18 and Oct. 24 must count as discharging time. He says that, as to the period between Oct. 24 and Oct. 29, when all the owners' cargo was discharged, different considerations may arise. He recognises that not all the time between those two dates was occupied in discharging the charterers' cargo; but he submits that, nevertheless, because of the provisions of cl. 30, time was to count. After Oct. 29, all the time was spent in discharging the charterers' cargo. He submits that, on any correct approach, the charterers will in fact be shown to be liable for something much more than £829. Thus he does not contend that £829 is a figure which, on any basis that he defends, can be supported.

Counsel for the charterers submits that, because the five holds were not at the charterers' disposal and would not have been at the charterers' disposal till Oct. 29, the vessel was not ready to discharge, and so, according to his submission, time did not begin to run until all the overstowed cargo was discharged.

It is manifest that there are many important and difficult points which could be argued in this case, and that the decision in *North River Freighters, Ltd. v. H. E. The President of India* (4) does not cover all the points that can be raised. We are not called on to express any view as to the law which is applicable. We know what was in the umpire's mind but we only know it because, in the special circumstances, we have seen his notes, and we have seen them in order to decide this motion. It seems to me that, once there was before the umpire this claim for demurrage for £1,878, the umpire was not precluded from deciding what, in his judgment, was the correct legal approach.

I have reached the conclusion that, if it is a possible view in law (i.e., the law as applied to the facts of this case), that no demurrage became due to the owners, then the umpire ought not to be precluded from saying so. It is true that the arbitrators never thought of looking at the matter in the way in which the umpire states that he looked at it. If, however, his view is a possible view—again I express no opinion whether it is or is not—is he forbidden from giving expression to it and deciding what he believes to be correct in law merely by reason of what the charterers admitted? That is the question which is before us. I have reached the conclusion that the admission was really an admission based on a view as to the law. The facts were not really in dispute. It was not in dispute that the ship arrived on Oct. 18; it was not in dispute that she berthed on Oct. 24 and that she started discharging on that day; it was not in dispute that there was some overstowed cargo in three out of the five holds. When, therefore, the time sheet which came into existence on Nov. 3, 1956, is looked at, the words "Time to count from 1400 hrs. on Oct. 18, 1956" are words which, in my judgment, really represent a view of the law or a view based on an application of the law to certain stated facts.

The learned judge in his judgment on this part of the case said this:

"He [the umpire] did not, as I understand the position, disregard any admission of fact, but merely certain conclusions of law. I cannot believe that any umpire can be obliged to incorporate into his award a conclusion which he believes to be without legal foundation, even though one party has, in the course of the argument or in a document submitted to him, made an admission contrary to what the arbitrator believes to be the true position and contrary to the party's own interest."

(3) Clause 30 is printed at p. 26, letter I, ante.

(4) [1956] 1 All E.R. 50; [1956] 1 Q.B. 333.

It seems to me that that is a justifiable viewpoint, and I find myself in agreement with the learned judge in that expression of opinion. Counsel for the shipowners, in his very helpful argument, did not defend the figure of £829; he says that is wrong. Nobody now defends the calculation which yields the figure of £829. It seems to me that it would be very unsatisfactory if the court said that the umpire must be bound (although he is charged with the duty of deciding what he believes to be correct and proceeds to do that) to record and to commit himself to a figure which everybody says is incorrect and which is really based on a purported application of law to the agreed facts. I have, therefore, come to the conclusion that it would not be in excess of his jurisdiction for the umpire to come to the conclusion that no demurrage is payable, if that is a possible view in law.

On the other aspect of the case, the learned judge said:

“As to the submission that the umpire misconducted himself on the second ground which I have set out in my summary of the argument of counsel for the shipowners, I accept the umpire’s deposition in his affidavit that he did in the presence of [the shipowners’ arbitrator] expressly raise the vital point, namely, that the [shipowners] could not be heard to say that time was lost in waiting for a berth so long as the vessel herself would not have been ready to discharge had a berth been available. I accept in substance the accuracy of the umpire’s evidence as set out in paras. 3 and 4 of his affidavit. The raising of this point should have made it clear to the shipowners’ arbitrator that the umpire was proposing to consider the whole question of the Colombo discharge de novo. It may be that the shipowners’ arbitrator did not fully appreciate the force of the point which was being made, and accordingly has not a very clear recollection of what occurred. But I am quite unable to agree that, in proceeding to make his award on the basis of his own assessment of the Colombo discharge, having given that warning to the parties, and it having been passed in silence, the umpire was in any way failing to conduct the proceedings in accordance with natural justice.”

On this part of the case, I find myself diverging from the conclusion reached by the learned judge. A consideration of the whole of the evidence leads me to a different view. The view that I have formed involves no reflection on any one of these gentlemen who are concerned. The umpire says that he had in mind the remarks made by PARKER, L.J., in *North River Freighters, Ltd. v. H. E. The President of India* (5), but that case was never mentioned during the hearing. That case is not referred to in the umpire’s notes; though other cases are set out, that case is not.

It seems to me that the point that occurred to the umpire was a point that would bring about a dramatic development of the case, and I am satisfied that the import of it was not communicated to the shipowners’ arbitrator in such a way as enabled him to deal with it. I have no doubt that something was said, but it was essential, in view of the way in which the case had been presented and the way in which it had proceeded for very nearly two years, that, if some entirely new point was being taken, which was not taken by the charterers and ran quite counter to their willingness to pay a sum, it should be made quite clear. The new point which appealed to the umpire—it may be right or it may be wrong, it is not for me to say—involved a complete departure from the course followed in the litigation up to that moment. It had not been thought of by the charterers’ arbitrator. The charterers’ case was: “We admit we are liable for demurrage up to a certain amount.” That admission was left in the written case that was handed in by their arbitrator to the umpire. The new point was a very considerable gift to their arbitrator, if it was right, but it does not appear that it made any impact on his mind. Owing to lack of recollection he was not able to assist by any evidence; but he had completely overlooked the point if it

A was one that could be taken. It was certainly a point which required exploration. It has been stressed that the shipowners' arbitrator is an experienced man, as he doubtless is; but that reflection suggests to my mind that one of his experience would not have failed to probe and explore this new point had he really appreciated that it was being put forward. The umpire says that it was made clear. That must mean that it was only made clear to the shipowners' arbitrator; B but the shipowners' arbitrator said that it was not made clear. His recollection diverges completely from that of the umpire.

Counsel for the shipowners submits that, on a correct application of *North River Freighters, Ltd. v. H. E. The President of India* (6) and on a true application of what PARKER, L.J., said, the claim for demurrage on the part of the owners can be supported. It would have been very desirable to have given the shipowners' arbitrator an opportunity to present an argument on what the umpire C says was in his mind. Counsel for the shipowners submits that an argument can be presented, based on what PARKER, L.J., said, which would refute the line of reasoning thought of by the umpire. The shipowners' arbitrator has said in his affidavit what course he might have followed had he appreciated that the new point was being taken. Second counsel for the shipowners in his reply submitted D that the shipowners' arbitrator might have wanted an adjournment, or might possibly have wanted to call some evidence. Clearly there was a dramatic new turn to the case if this possible point had clearly emerged. I think that the present position is unsatisfactory, and I consider that, though the umpire acted with the best of intentions, he did decide the case on a basis which differed from that which the charterers were asserting and on a basis of which the shipowners did not E have satisfactory warning. Both parties had previously thought that the time began to count from 2 p.m. on Oct. 18, though they differed as to their calculations.

In my judgment, the umpire could not have made clear that he was proposing not to accept the starting time which both parties had accepted. Whether he was right in law is not for me to say in these proceedings. But, in my judgment, the owners ought to have had a real opportunity of dealing with the new point, and F of putting forward reasons for submitting that it was wrong. I accept fully that in cases of this kind the court will lean against disturbing the decision of a tribunal selected by the parties; but I feel that the present position is not satisfactory, and that there may be a grave risk of injustice if matters are left as they are.

In the course of his judgment the learned judge said this:

G "It is right, however, that I should say that, as at present advised, I feel that there is a very great deal to be said for the view that the decision of the Court of Appeal in the *Radnor* case [viz., *North River Freighters, Ltd. v. H. E. The President of India* (6)] (to which I have referred) was primarily based on the finding of fact by the umpire in that case that 'while awaiting berth the ship was completely ready in all respects', and that, had the facts been, H as here, that while awaiting berth the ship was not ready to discharge the charterers' cargo by reason of the overstowing of the owners' cargo, the decision of the court would have gone the other way."

Counsel for the charterers points out that all the learned judge says is that as at present advised he thought there was a good deal to be said for that view. Speaking for myself, I reserve the point entirely and express no opinion in regard I to it. I think that the umpire must deal with this matter as though this court has expressed no sort of conclusion in regard to the law.

In the result, I have reached the conclusion that this award should be remitted. It should be remitted not only in the way decided by the learned judge, i.e., with a direction to exclude any consideration of despatch money or the award of a sum in regard to despatch money, but it should be remitted further for reconsideration of the issue as to demurrage at Colombo. That will involve that the parties

should have the opportunity of making submissions to the umpire in regard to this issue. It seems to me further that the umpire should reconsider the question as to what award in the matter of costs should be made.

I will just mention one other matter. Two items were claimed by the charterers. I do not want to enter into detail in regard to them, but some sums had been paid to the shipowners by the shippers: there were proceedings in France and the shipowners may have to pay those sums to the shippers. The claims of the charterers included those sums. Obviously, it would be wrong if the shipowners were made to pay twice or to account twice for those same sums. Counsel for the charterers has very properly and very helpfully stated that he was instructed by the High Commissioner of Ceylon to offer an undertaking that, providing the claims of the shippers were shown to be satisfied, the charterers would not seek to recover the same amounts from the shipowners. I have no doubt that the full spirit of that undertaking will be honoured and that there will be no difficulty with regard to that matter.

PILCHER, J.: I agree entirely with what my Lord has said in regard to the background and history of the case.

The learned judge, against whose order this interlocutory appeal has been brought, decided that, in awarding despatch money amounting to £160 odd in all the circumstances of the case, in respect of the discharge of the vessel's cargo at Colombo, the umpire had exceeded his jurisdiction. Against that order by the learned judge there is no appeal. Accordingly, one approaches the case on the basis that the umpire, in acting in the way in which he did act, exceeded his jurisdiction and went outside the matters which had been submitted to him in regard to the question of despatch money.

My Lord has traced out very clearly through all the documents the dispute which appears to have existed between the parties in regard to demurrage at Colombo. It is perfectly clear that, when the charterers' time sheet was presented to the shipowners, a time sheet which showed that on the computation made by the charterers the owners were entitled to receive from them three days, nine hours, and thirty-seven minutes demurrage at the appropriate rate, the parties or the arbitrators right up to the hearing before the umpire proceeded on the basis that the only matter which was in dispute between them was whether the owners were entitled, as they said, to receive a sum of £1,858 in respect of demurrage, or whether they were only entitled to receive £829 for which the charterers had given credit in account and had in substance admitted liability (without using the words in a technical sense). That was the position until the arbitrators attended before the umpire and presented their cases. There the charterers' case again showed that they were prepared to concede this sum of £829 odd in respect of demurrage at Colombo. Up to then, it would seem that that was a matter which never had been in dispute between the parties or the arbitrators, who took up the attitude that this £829 was due from the charterers in account on the final statement. This £829 is based, as I have said, on the charterers' time sheet, which was a document made up on the last day of the discharging. The owners, on the other hand, contended that they were entitled by way of demurrage to a sum not less than £1,858 and this seems to have been the ambit of the dispute until the matter came before the umpire. The document on which the whole of this dispute is based is this charterers' time sheet, and, as my Lord has pointed out, the time sheet sets out a number of matters of fact such as dates and times. Most of these matters are admittedly questions of fact—when did the vessel arrive: when did she berth: when did the discharging start and when was it completed.

There is, however, this one other matter, which has given rise to dispute. In their time sheet the charterers have stated this; "Time to count from Oct. 18, 1956, 1400 hrs." which was the same day as the vessel arrived in port and long before she had got to her berth. If one looks at the charterparty one finds in cl. 6:

A "Time to commence at 2 p.m. if notice of readiness to discharge is given before noon, and at 8 a.m. next working day if notice given during office hours after noon. Time lost in waiting for berth to count as discharging time."

B Therefore, when the charterers inserted in their time sheet the words "Time to count from Oct. 18", they were stating the view which they had then formed on a matter which required very careful consideration of the terms of the clause in the charterparty which I have just set out.

C There have been countless cases in the past in which the dispute under the charterparty has been as to when the time began to run. That can only be determined by a consideration of the terms of the charterparty on their true construction. That is a matter of law. That is very important here because, as I understand, it is said by counsel for the shipowners in his argument and also by second counsel in reply, that it is clear there never was any dispute between the parties as to the charterers' liability to the owners for this sum of £829 based on time counting from Oct. 18. Consequently, it was not a matter which, in the circumstances, the arbitrators would ever have to consider, because there is no dispute about it and it was not a matter which, when they failed to agree, the arbitrators would place before the umpire except as an accepted fact. Consequently, it was said here and before the learned judge that the umpire, in depriving the owners of any demurrage, had acted outside his jurisdiction and outside the matters which were submitted to him, because what had been submitted to him was how much demurrage in excess of the admitted £829 were the charterers to pay.

E My Lord has expressed his view on that point, and I respectfully agree with it. It would be a great pity if we were constrained to hold that the umpire had exceeded his jurisdiction in depriving the owners of all demurrage on the ground that it had been agreed between the parties, and, I think, between the arbitrators, that at least £829 was payable under this head. There is no necessity to do that, because, in a case of this kind, where a dispute as to the amount of demurrage at the port of discharge is submitted to arbitrators and through them to an umpire, it is impossible to fetter the umpire in regard to the true construction of the charterparty and to say that he is bound to adopt a view of the law on its construction which he thinks is erroneous. After all, he is very experienced and the charterparty is a document with which no doubt he is extremely familiar. Consequently, I agree with my Lord that we cannot find that the umpire had exceeded his jurisdiction in depriving the shipowners of all demurrage because he has taken a view of the law which did not agree with the view of either party. In my view, therefore, the contention put forward by the shipowners that the umpire exceeded his jurisdiction in depriving the shipowners of all demurrage falls.

H I agree with the view which the learned judge took as regards the question of jurisdiction in regard to demurrage. I also agree with what the learned judge said, and with the order which he made, in directing that the award be remitted to the umpire to eliminate from it all questions of despatch money and to make such consequential amendments as are necessary. I agree with him that the umpire has not exceeded his authority in depriving the shipowners of all demurrage.

I I have the misfortune, however, not to agree with him on the next matter, which is the question whether this award was arrived at by the umpire in a satisfactory fashion. It is sought here by the shipowners to obtain from this court an order, which the learned judge was unwilling to grant them, directing that the award of the umpire be set aside, or that the question of demurrage be remitted to him for further consideration, because, to use the legal phrase, in all the circumstances, the proceedings before the umpire were not conducted in accordance with the principles of natural justice.

My Lord has referred to the two affidavits of the shipowners' arbitrator, and to the affidavit of the umpire, and to their recollection of what occurred when the matter was first submitted to the umpire, and there are no other passages in those affidavits which require, as I think, to be cited. I may put the matter briefly in this way. On Jan. 23, 1959, which was only some weeks after the hearing before the umpire, the shipowners' arbitrator raised this matter in his first affidavit of that date, and he makes it clear that, when he saw the award he was astounded—surprised is too mild a word—at what the umpire had done in his award. Whilst we in this court are taking the view that the umpire had jurisdiction to deprive the shipowners of all demurrage, their arbitrator said that the award technically amounted to misconduct and he gave his reasons. Then, on Mar. 17, 1959, having seen the shipowners' affidavit, the umpire gave his views on the matter. In substance he said this: "It became apparent [as no doubt it did] that one of the main issues in the case was the computation of lay time at the port of Colombo, which was the discharging port under the charterparty. Each side had submitted a time sheet setting forth the computation on which it relied". He then goes on to say:

"Oral argument took place on the issues disclosed by these contrasting time sheets. It seemed to me at an early stage that neither time sheet was entirely accurate. I accordingly raised certain queries in this respect."

This is the matter with which the shipowners' arbitrator did not agree. "I accordingly raised certain queries in this respect." That is a very general statement.

"In particular, it seemed to me that no time could begin to run until the vessel was ready to discharge, and that she could not be deemed to be so ready until she was in a condition in which she was able to make available all hatches to the [charterers] for the purposes of enabling them to discharge. I suggested that the [shipowners] could not be heard to say that time was lost in waiting for a berth so long as the vessel herself would not have been ready to discharge had a berth been available. In saying this I had in mind the remarks of PARKER, L.J., in *North River Freighters, Ltd. v. H. E. The President of India* (7)."

The only other point which the umpire seems to suggest is important is this (it is stated in para. 4):

"In the present case I made it clear to the respective arbitrators that in my view it was doubtful if either time sheet submitted by them was correct."

No doubt he did.

"After discussion I was left with the clear impression that both arbitrators expected me to re-compute the time sheets upon the basis which I considered to be accurate and to make my award accordingly."

In that sentence, he does not say that he put this point which he had in his mind to the arbitrators. I do not find that affidavit a very satisfactory one. It was answered on Apr. 3, 1959, by the shipowners' arbitrator, who in his second affidavit (8) categorically denied that the umpire ever made or indicated to him this rather surprising suggestion how the time sheets should be drawn up. I think that this was such a radical change in the position that it is one that the umpire should have made perfectly clear to both arbitrators. He says in his affidavit that he had in mind *North River Freighters, Ltd. v. H. E. The President of India* (9). He was asked soon after he published his award for a copy of his notes and he sent them to the parties but there is no mention of that case in any of the notes.

(7) [1956] 1 All E.R. at p. 59; [1956] 1 Q.B. at p. 350.

(8) See p. 30, letter F, ante.

(9) [1956] 1 All E.R. 50; [1956] 1 Q.B. 333.

A Having read the affidavits of these two gentlemen, and having regard to the probabilities of the case, if I have to believe or give preference to one party as against the other, my inclination is to prefer the account given by the shipowners' arbitrator in his second affidavit of Apr. 3 to the account given by the umpire. I have the misfortune to differ from the learned trial judge on this matter and that is a thing which I am naturally very reluctant to do. If, however, the

B umpire had made the matter completely clear to both arbitrators, as I think that he ought to have done, I cannot conceive how, in the first place, the charterers' arbitrator, who has not sworn any affidavit in the matter because he did not feel any recollection he had would be helpful, would not have appreciated the change in the situation arising from the observation which the umpire says he made in regard to what he was proposing to do or what he had in mind:

C because those observations meant that the charterers' arbitrator had been taking a wrong view of his clients' case and had presented a view which was entirely unfavourable to them as against the one which was appealing to the umpire. Similarly, if the umpire had said anything like what he says he said to the shipowners' arbitrator, it seems to me almost impossible that the shipowners' arbitrator would not at once have objected in the terms in which he said he would

D have objected in his second affidavit. The probabilities are overwhelmingly in favour of the view that, while the umpire no doubt had these things in mind, he never brought them clearly, if he brought them at all, to the attention of the two arbitrators. That being so, I cannot help feeling that the trial of this matter was unsatisfactory, because the shipowners' arbitrator might have presented an interesting and important argument to the umpire and might have invited the

E umpire to state his award in the form of a Special Case. On the view which I take of the facts he never had that opportunity. Consequently I think that the hearing before the umpire was of so unsatisfactory a nature that this court is justified in saying that the case must be remitted to the umpire to consider further the whole question as to the amount of demurrage, if any, which was due to the owners at Colombo.

F It is suggested that this court can incorporate a direction that the umpire be required to state his award in the form of a Special Case. I rather doubt whether we have power to do that, but, even if we had, I do not feel it is desirable. Having regard to what has occurred, it would seem to me almost inevitable that both parties or one of the parties will request the umpire to state his award in that form, and it is very much better that it should be done at the request of the

G parties rather than on a direction of this court.

I should like to associate myself with what my Lord has said about the decision in the *Radnor* case [*viz.*, *North River Freighters, Ltd. v. H. E. The President of India* (10)] and the observations, which I think were obiter, which were made on that case by the learned judge. I should like to reserve consideration of the point or argument because one thing which seems to me to be very clear in this matter

H is that, when the rather unusual circumstances of this case come to be considered on the particular terms of this charterparty, they will give rise to an interesting argument of law which might be determined in one way or another.

For these reasons I agree that the matter should be remitted to the umpire to carry out the order of the learned judge in regard to the question of despatch money, and also to reconsider the question of demurrage at Colombo.

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: *Holman, Fenwick & Willan* (for the shipowners); *T. L. Wilson & Co.* (for the charterers).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

R. v. MEDICAL APPEAL TRIBUNAL (NORTH MIDLAND REGION), *Ex parte* HUBBLE. A

[COURT OF APPEAL (Morris, Ormerod and Willmer, L.J.J.), June 9, 10, 11, 1959.]

Industrial Injury—Review of decision—Medical appeal tribunal's determination setting aside an assessment of loss of faculty—"Fresh evidence"—National Insurance (Industrial Injuries) Act, 1946 (9 & 10 Geo. 6 c. 62), s. 40 (1). B

On an appeal against a medical board's final assessment of five per cent. loss of faculty for industrial injury benefit as too small, a workman who had been injured in an industrial accident tendered to the medical appeal tribunal a report by a surgeon who, at the request of the workman's trade union, had examined him in hospital before an operation which had taken place eleven days previously. The report stated that the pain complained of had first been felt over six months before the accident, but that the workman was suffering from a condition affecting his spine which had resulted from his work; the surgeon further stated in the report that it was not possible then to give a definite estimate of life assessment, but that he would like to send another report later. The medical appeal tribunal found (on July 15, 1957) that any loss of faculty which might have resulted from the relevant accident was only an aggravation of a pre-existing condition, which aggravation had ceased. Accordingly it set aside the assessment of the medical board. Subsequently the workman was again examined by the surgeon, who reported on Aug. 2, 1957, that the operation had shown that a disc injury was present, that the workman was suffering from its effects, that the injury was probably caused by the type of work that he did and that he would have a permanent partial disability which was more than five per cent. The workman applied for a review of the medical appeal tribunal's decision under s. 40 (1)* of the National Insurance (Industrial Injuries) Act, 1946, which enabled the tribunal's decision to be reviewed by a medical board if satisfied by "fresh evidence" that the decision was given in consequence of the non-disclosure of a material fact. On review the medical board (on Aug. 28, 1957) made a fresh assessment of disablement, but, on a reference at the instance of the Minister under s. 39 (3) † to another medical appeal tribunal, that tribunal set aside (on Oct. 28, 1957) the decision of August, 1957, on the ground that there had been no fresh evidence before the medical board, as the surgeon's second opinion could have been obtained before the decision of July, 1957. On motion for certiorari to quash the second tribunal's decision of October, 1957, C

Held: "fresh evidence" in s. 40 (1) of the National Insurance (Industrial Injuries) Act, 1946, meant evidence which the claimant was unable to produce before the original decision was given or which he could not reasonably be expected to have produced in the circumstances of the case; there was no error of law on the face of the tribunal's decision of October, 1957, and accordingly certiorari would not be granted. E

Johnson v. Johnson ([1900] P. 19) applied. F

Decision of the QUEEN'S BENCH DIVISIONAL COURT ([1958] 2 All E.R. 374) affirmed. G

[For the National Insurance (Industrial Injuries) Act, 1946, s. 39, s. 40, see 16 HALSBURY'S STATUTES (2nd Edn.) 848, 849.] H

Cases referred to: I

Johnson v. Johnson, [1900] P. 19; 69 L.J.P. 13; 81 L.T. 791; 64 J.P. 72; 27 Digest (Repl.) 727, 6940.

Ladd v. Marshall, [1954] 3 All E.R. 745; [1954] 1 W.L.R. 1489; 3rd Digest Supp.

* Section 40 (1) is set out at p. 43, letter I, to p. 44, letter A, post.

† Section 39 (3) is set out at p. 44, letter I, post.

A Appeal.

The applicant, Horace Hubble, a coal miner, who had sustained an injury to his back while at work, appealed against an order of the Queen's Bench Divisional Court (LORD GODDARD, C.J., CASSELS and DIPLOCK, JJ.), made on May 16, 1958, and reported [1958] 2 All E.R. 374, dismissing a motion for certiorari (one of two brought by the applicant), to quash a decision of the Medical

B Appeal Tribunal (North Midland Region) given on Oct. 28, 1957. The decision of the tribunal was made under the National Insurance (Industrial Injuries) Act, 1946, s. 39 (3). There was no appeal against the dismissal of the motion for certiorari in relation to a prior determination of a medical appeal tribunal in July, 1957, which motion was also dismissed by the Divisional Court on May 16, 1958, as reported in [1958] 2 All E.R. 374.

C *F. W. Beney, Q.C.*, and *H. S. Ruttle* for the applicant.
J. R. Cumming-Bruce for the respondent.

MORRIS, L.J.: This is an appeal from a judgment of the Divisional Court, dismissing a motion on behalf of Horace Hubble, the applicant, for an order of certiorari to remove into the High Court a decision of the Medical Appeal Tribunal (North Midland Region), which was dated Oct. 28, 1957, and which was made pursuant to the National Insurance (Industrial Injuries) Act, 1946. The applicant is a coal miner. On July 14, 1955, while he was engaged on his work at the Hucknall Colliery in the county of Nottingham, he sustained an injury to his back. He was in the act of getting a tub or truck back on to some rails. His injury arose out of and in the course of his employment.

E He was away from work for certain periods and he drew injury benefit for such periods pursuant to the provisions of s. 11 of the Act. The injury benefit period expired on Jan. 12, 1956. Section 12 of the Act of 1946 defined the circumstances in which an insured person became entitled to disablement benefit. By the National Insurance (Industrial Injuries) Act, 1953, certain amendments were made to s. 12 of the earlier Act and sub-s. (1) of s. 12 in its substituted form

F reads:

“Subject to the next following subsection, an insured person shall be entitled to disablement benefit if he suffers as a result of the relevant accident from loss of physical or mental faculty such that the extent of the resulting disablement assessed in accordance with the following provisions of this section amounts to not less than one per cent; and for the purpose of those provisions there shall be deemed not to be any relevant loss of faculty when the extent of the resulting disablement, if so assessed, would not amount to one per cent.”

H Section 36 of the Act of 1946 provides for the manner in which questions arising under the Act are to be determined. Disablement questions are to be determined by medical boards or medical appeal tribunals. The appropriate medical board in this case made a number of successive provisional assessments in regard to the applicant, and ultimately, on Apr. 24, 1957, the medical board made a final assessment. They assessed the extent of his disability at five per cent. A few days thereafter, actually on Apr. 30, 1957, the applicant went off work. He was away until a date in November, 1957, with the exception of either one or two days in May, 1957. On June 5, he gave notice of appeal to the medical appeal tribunal. That was an appeal against the decision of the medical board. It is clear that he considered that the extent of his disability had been fixed at too low a percentage. On June 17 he was admitted to the Harlow Wood Hospital, where on July 4, 1957, he underwent an operation. Eleven days thereafter, on July 15, his appeal was heard by the medical appeal tribunal.

I The Act of 1946 contains many detailed provisions which not only prescribe the manner in which the questions arising under the Act are to be determined but also provide for certain appeals and certain reviews of decisions. Section 36

(1) (a) provides that certain defined questions are to be determined by the Minister. Section 37 provides for appeals in certain cases from the Minister's decisions and, subject to certain conditions, for a review by the Minister. Section 36 (1) (b) provides that other defined questions are to be determined in like manner

"subject to any prescribed modifications and adaptations, as a corresponding question arising in respect of an allowance under the Family Allowances Act, 1945."

Section 36 (1) (c) provides as follows:

"Subject to the provisions of this Part of this Act, any of the following questions arising under this Act shall be determined as provided by this subsection, that is to say— . . . (c) any question—(i) whether the relevant accident has resulted in a loss of faculty; (ii) whether a loss of faculty is likely to be permanent; (iii) at what degree the extent of disablement resulting from a loss of faculty is to be assessed, and what period is to be taken into account by the assessment; shall be determined by a medical board or medical appeal tribunal constituted in accordance with the following provisions of this Act."

Section 38 then provides for the constitution of medical boards and medical appeal tribunals. Section 39 deals with references to medical boards and appeals and references to medical appeal tribunals. Section 40, which falls specially to be considered in this case and to which I will later refer, provides that, in certain circumstances, there may be a review of a decision of a medical board or of a medical appeal tribunal.

Section 36 (2) is in the following terms:

"Subject to the foregoing provisions of this section, any claim for benefit and any question arising in connexion with a claim for or award of benefit shall be determined by an insurance officer, a local appeal tribunal or the commissioner appointed or constituted in accordance with the following provisions of this Act."

Then s. 42, s. 43 and s. 44 provide for the appointment of the commissioner and deputy commissioners, for the constitution of local appeal tribunals, and for the appointment of insurance officers. Section 45, s. 46 and s. 47 provide for the determination of claims by insurance officers and references to local appeal tribunals and for appeals to the commissioner. By s. 50, which has been amended by s. 4 of the Act of 1953, it is provided that in certain circumstances there may be a review of a decision of an insurance officer, a local appeal tribunal, or the commissioner. It will be seen, therefore, that, as laid down in the Act, different types of questions fall to be determined in different ways, that after determinations there are certain appeals and that, subject to certain stated conditions, there may be reviews.

Section 36 (3) provides as follows:

"Except as provided by this Part of this Act or by the Family Allowances Act, 1945, as applied by para. (b) of sub-s. (1) of this section, any decision of a claim or question as provided by the foregoing provisions of this section shall be final."

When the appeal of the applicant was heard by the medical appeal tribunal on July 15 the applicant was still in hospital. He was represented by a trade union official, Mr. Clarke of the National Union of Mineworkers. Mr. Clarke put before the tribunal a medical report which was in the form of a letter addressed to Mr. Clarke. It was dated June 28 and was written by Mr. Malkin and was in the following terms:

"Dear Sir, As requested by you I examined this man at Harlow Wood Hospital where he is an in-patient. *History*: He first attended Mansfield Hospital on July 15, 1955, complaining of pain in his back which he thought

- A had come on after work which involves pushing. The first pain he felt was at the end of December, 1954, and he did not improve. He said that the pain was on the left side of his back and down his leg and that it was made worse by coughing and sneezing. There was tenderness over the sacro-iliac joint. I saw him on July 22 and found there was limited movement of his spine and pain was referred to the left sacro-iliac region. He was given a course of physiotherapy and was seen again on Oct. 5 when he said he was not improving. He was then seen early in 1957. He complained of pain in his back. There was pain on stretching the left sciatic nerve and considerable limitation of movement of the spine. I thought there were some signs of a disc lesion and I recommended his admission to Harlow Wood where he now is. He is lying on a plaster bed preparatory to further treatment. *Opinion:*
- B This man is suffering from a condition affecting his spine which has resulted from his work and I consider that he requires in-patient hospital treatment. It is impossible at the present time to give a definite estimate of what his life assessment would be but I should like to send you another report later."

It will be seen that Mr. Malkin stated that the pain in the applicant's back was first felt by him at the end of December, 1954, which was over six months before the pain of which he complained on July 15, which he thought had come on after work which involved pushing. It will also be seen that the report was dated some seventeen days before the hearing before the medical appeal tribunal.

- D In some written observations to the tribunal presented on behalf of the Minister, it was submitted, having regard to the medical evidence (which evidently included certain hospital notes) that: (a) the applicant's back condition was only partly attributable to the relevant accident, and (b) the relevant loss of faculty had been correctly assessed. The decision of the medical appeal tribunal was notified to the applicant on either July 24 or July 31 in the following terms:

- "Dear Sir, With reference to your claim for disablement benefit the medical appeal tribunal which considered your case on 15.7.57 decided that
- F 1. from 13.5.57 there is no loss of faculty resulting from industrial accident on 14. 7. 55. The findings of the tribunal are summarised as follows:— [The applicant] is in hospital but we heard Mr. Clarke of the N.U.M. with the medical report of 28.6.57 by Mr. Malkin. It is clear from the medical evidence before us including the hospital notes that any loss of faculty which may have resulted from the relevant accident was only an aggravation of a
- G pre-existing condition, which aggravation had ceased by 12.5.57. We set aside the assessment of medical board of 24.4.57."

- It will be seen, therefore, that the result of the applicant's appeal was that, not only did he not succeed in getting anything he asked for, but he lost the modest measure of success that he had achieved before the medical board. The appeal tribunal decided that any loss of faculty which might have resulted from the relevant accident was only an aggravation of a pre-existing condition and that such an aggravation had ceased on May 12. That decision came as a disappointment to the applicant. As Mr. Malkin's letter of June 28 had stated that the applicant was lying on a plaster bed preparatory to further treatment, and as Mr. Malkin had said that he would like to send another report later, it may seem unfortunate that some postponement of a final decision, whether on request or
- H on offer, did not take place. But it may be that the tribunal considered that it would not be further assisted by seeing another report. The nature of the present proceedings, however, does not provide us with means of knowing whether some alternative course could helpfully have been followed.

- I Having lost on appeal the applicant sought to have a review. He sought it under the provisions of s. 40 (1) which reads as follows:

"Any decision under this Act of a medical board or a medical appeal tribunal may be reviewed at any time by a medical board if satisfied by fresh evidence

that a decision was given in consequence of the non-disclosure or misrepresentation by the claimant or any other person of a material fact (whether the non-disclosure or misrepresentation was or was not fraudulent)."

The applicant received a further report from Mr. Malkin. That was dated Aug. 2, 1957. It was also in the form of a letter addressed to Mr. Clarke and was in these terms:

"As requested by you I saw this man today. Since I last examined him he has had operative treatment in Harlow Wood Hospital for a disc lesion. As a result of the investigation, it was decided that there probably was an injury to an intervertebral disc and the operation which was carried out on July 4, 1957, showed that a disc injury was present. This was removed and a graft was applied to the spine. Since then, he has made good progress but he will require further treatment at Harlow Wood for at least another month before he commences to get up. *Opinion*: This man is suffering from the effects of an injury to an intervertebral disc which has probably been caused by the type of work he does which involves constant bending and twisting in a bent position. I consider that his present condition is due to the effects of an injury. He will have a permanent partial disability which will be more than 5%."

The applicant then asked for a review by the medical board pursuant to the terms of the section and on Aug. 28, 1957, the medical board decided that it could review under sub-s. (1). Its decision takes the form of answers to two questions on a printed and prepared form which has the heading:

"Disablement benefit. Medical board report. Review on the ground of non-disclosure or misrepresentation of a material fact."

Under the heading "Decision of the medical board on application for review", there is first this question:

"Are you satisfied by fresh evidence that the decision under review was given in consequence of the non-disclosure or misrepresentation by the claimant or any other person of a material fact?"

Their answer was "Yes".

"(2) If the answer to 1 is yes, please state the nature of the fresh evidence and the material fact."

Then they are required to go on and complete other portions of the document relating to the review which they could then make. The answer to question (2) was:

"The [applicant], Mr. Hubble, was admitted to Harlow Wood Hospital on June 17, 1957: operation July 5, 1957, for prolapsed intervertebral disc, bone graft from left ilium followed by plaster of paris and now confined in strict bed and still a patient at Harlow Wood. Also a further report confirming the above from Mr. Malkin's letter Aug. 2, 1957."

Following on this decision, the medical board proceeded to make certain provisional assessments (1) (as to that see s. 40 (4)). The next step was that, pursuant to s. 39 (3), the Minister directed the insurance officer to refer the decision of the medical board to a medical appeal tribunal. Section 39 (3) is in these terms:

"If the Minister notifies the insurance officer within the prescribed time that he is of opinion that any decision of a medical board ought to be considered by a medical appeal tribunal, the insurance officer shall refer the case to a medical appeal tribunal for their consideration, and the tribunal may confirm, reverse or vary the decision in whole or in part as on an appeal."

(1) These were assessments of 10% from May 13, 1957, to June 17, 1957, and 100% from June 17 to Oct. 17, provisional.

A So the matter went to a medical appeal tribunal. Its decision was dated Oct. 28, 1957, and it is in reference to that decision that the application for an order of certiorari was made.

It has been necessary to state the history of the matter so as to explain the point that arises and the scheme and provisions of the Act.

The decision of the medical appeal tribunal of Oct. 28 was in these terms:

B "Having considered the decision of the above-mentioned medical board [that is stated to be the medical board held at Mansfield on Aug. 28, 1957] on the case of the person named (who was represented by Mr. Clarke of the National Union of Mineworkers) the tribunal have decided as follows: There is no fresh evidence to show that the decision under review was given in consequence of the non-disclosure or misrepresentation by the [applicant] or any other person of a material fact."

C Then follow the reasons for the decision including the findings on all questions of fact material to the decision. Under that heading come the following sentences:

D "When the medical appeal tribunal gave its decision on July 15, 1957, it had Mr. Malkin's report of June 28, 1957, before it, and the [applicant] had already undergone the operation of July 4, 1957. The [applicant] obtained a second report from Mr. Malkin on Aug. 2, 1957. Our attention has been drawn to a decision (No. R (1) 16/57) of the commissioner who held that 'Fresh evidence means some evidence which the [applicant] was unable to produce before that decision was given or which he could not reasonably be expected to have produced in the circumstances of the case'.

E It was, in our judgment possible for the [applicant] to have obtained a second opinion from Mr. Malkin before the medical appeal tribunal gave its decision. The claimant could have asked the medical appeal tribunal to grant an adjournment if they had had insufficient time to get a second report from Mr. Malkin, but we think that eleven days (viz., from July 4,

F 1957 when the [applicant] had the operation to July 15, 1957 when the medical appeal tribunal heard the case) was sufficient time. In the circumstances we must allow this reference, and set aside the decision, dated Aug. 28, 1957, of the review board."

The applicant then sought and obtained leave to move for two orders of certiorari: the first was in reference to the decision of the medical appeal tribunal of July.

G It was contended that the medical appeal tribunal, when determining the appeal of the applicant against the decision of the medical board dated Apr. 24, assessing his disablement at five per cent. final for life, had no jurisdiction to set aside such assessment by holding that there was no relevant disability. That application for an order of certiorari in respect of the decision of July, 1957, was dismissed by the Divisional Court and no appeal is brought against such dismissal.

H The Divisional Court also dismissed a motion for an order of certiorari in respect of the decision of the medical tribunal dated Oct. 28. The contention in support of such motion was that the tribunal was wrong in law on the face of its award in holding, and so directing itself, that fresh evidence under s. 40 (1) of the Act meant some evidence which the applicant was unable to produce before the decision notified on July 31 was given, or which he could not reasonably have

I been expected to have produced in the circumstances of the case.

Appeal is now brought to this court and the question which arises is whether there is any error of law on the face of the decision of Oct. 28. If there is not, then no case for making an order of certiorari is made out. Though we are only concerned with the decision of Oct. 28, it has been agreed for the purposes of this case, and very helpfully agreed, by counsel for the respondent that it is appropriate, having regard to the references in the decision of Oct. 28, that we should look at the two medical reports, the decision of the medical appeal tribunal of July and the decision of the medical board of Aug. 28. Counsel for

the respondent stated expressly that it was in the circumstances of this case, and having regard to the features of this case, that we were entitled to look at those other documents. A

It is clear that a review under s. 40 (1) may only take place if the medical board is satisfied that the decision to be reviewed was given in consequence of the non-disclosure or misrepresentation by the applicant or any other person of a material fact (whether or not there was fraud) and that the medical board is so satisfied by fresh evidence. The decision of the medical appeal tribunal of Oct. 28 recorded in terms what view it held as to the meaning of the words "fresh evidence". The decision was made on the basis of the interpretation which was followed as to what those words mean. If those words were correctly construed, then there is no error of law on the face of the award. There is no statutory provision for an appeal from the decision of a medical appeal tribunal and the jurisdiction of the Queen's Bench Division in its control of inferior courts cannot be enlarged so as to give an appeal in the ordinary sense. B C

Counsel for the applicant has submitted that, in their context, the words "fresh evidence" mean no more than further or additional evidence or further or additional information. He submits that any evidence additional to that which was before the medical appeal tribunal on July 15 would qualify to be called "fresh evidence", even though it was evidence that could then readily have been given. But, in my judgment, this submission gives no real or satisfactory meaning to the word "fresh". D

It is interesting to contrast the ways in which certain reviews may take place. Thus, in regard to decisions of the Minister, s. 37 (6) provides:

"The Minister may, on new facts being brought to his notice, review a decision given by him of any such question as is mentioned in para. (a) of sub-s. (1) of the last foregoing section." E

Then follows a proviso which I need not read. In the case of any matters coming under s. 36 (1) (b), there is a provision in s. 5 (3) of the Family Allowances Act, 1945, as follows:

"The Minister may at any time and from time to time revise any award made or decision given by him under this Act, if it appears to him that the award or decision was erroneous either in view of further information which has been brought to his notice since the date on which it was made or given as to the circumstances existing at the time by reference to which it was made or given, or by reason of some mistake having been made with respect to those circumstances or to the law." F

Then follows a proviso which I need not read.

In the case of decisions of insurance officers, local appeal tribunals, or the commissioner, it was provided by s. 50 (1) of the Act of 1946 as follows:

"Any decision under this Act of an insurance officer, a local appeal tribunal or the commissioner may be reviewed at any time by an insurance officer, or, on a reference from an insurance officer, by a local appeal tribunal, if—(a) he or they is or are satisfied by fresh evidence that the decision was given in ignorance of, or was based on a mistake as to, some material fact; or (b) there has been any relevant change of circumstances since the decision was given; or (c) the decision was based on the decision of a special question and the decision of the special question is revised under this Part of this Act or the Family Allowances Act, 1945: Provided that a decision that an accident was not an industrial accident shall not be subject to review, and a decision that an accident was an industrial accident shall only be subject to review where the insurance officer or local appeal tribunal, as the case may be, is or are satisfied by fresh evidence that the decision was given in consequence of any wilful non-disclosure or misrepresentation of a material fact." G H I

That section has in certain ways been amended by s. 4 (4) of the Act of 1953, but it is to be observed that twice in that section are the words "fresh evidence"

A used. All those provisions to which I have referred, which are in differing terms, denote careful and deliberate drafting. The reviews that may take place are limited by the requirements of the particular words that are used. It seems to me that the words "fresh evidence" bear the same meaning in s. 40 as they do in s. 50. They are words which have been considered by the courts and as Parliament has employed them in certain contexts in this legislation, it is reasonable
B to give them due and proper meaning. If a term with a legal meaning is employed, it is reasonable to consider that the term is employed with its accepted meaning.

If an appellant had knowledge of some material fact at the time when he was appearing before a medical appeal tribunal, but if for some reason he decided not to disclose the material fact, and if a decision were given, I cannot think that he could then seek to review the decision by bringing the material fact
C before the medical board and asserting that he had "fresh evidence". In my judgment, he would not have "fresh evidence". "Fresh evidence", it seems to me, must have the quality of newness, or the feature of having become newly available and obtainable.

Johnson v. Johnson (2) was a decision concerning the meaning of the words "fresh evidence", which were used in the Summary Jurisdiction (Married
D Women) Act, 1895, s. 7, which reads as follows:—

"A court of summary jurisdiction acting within the city, borough, petty sessional or other division or district, in which any order under this Act or the Acts mentioned in the schedule hereto, or either of them, has been made, may, on the application of the married woman or of her husband, and upon
E cause being shown upon fresh evidence to the satisfaction of the court at any time, alter, vary, or discharge any such order . . ."

SIR FRANCIS JEUNE, P., said (3):

"The question raised in this case is of general interest, but, to my mind, absolutely free from doubt. The Summary Jurisdiction (Married Women) Act, 1895, s. 7, provides that a court of summary jurisdiction, acting as
F therein specified, may, upon fresh evidence, alter, vary, or discharge an order previously made. But it is necessary that magistrates should clearly understand what 'fresh evidence' means, though, in my view, there is no real doubt about it. It means practically the same sort of evidence as that upon which a new trial would, in the ordinary course, be granted: it must relate to something which has happened since the former hearing or trial, or it must
G be evidence which has come to the knowledge of the party applying since that hearing or trial, and which could not by reasonable means have come to his knowledge before that time. It must amount to what was called in the old forms of pleading *res noviter ad notitiam perventa*. It is altogether a mistake to suppose that 'fresh evidence', within the meaning of the Act of 1895, means or includes evidence which could have been called, but which
H was not in fact adduced, at the first hearing. It would be monstrous to suppose that a party could abstain from calling evidence, and could thereafter proceed to make application upon application, based on evidence which might have been tendered in the first instance. I have no hesitation in saying that to the words 'fresh evidence' in s. 7 must be assigned the limited meaning and scope which I have indicated."

I The judgment of GORELL BARNES, J., was to the like effect.

The definition adopted by the medical appeal tribunal was this: Fresh evidence means some evidence which the claimant was unable to produce before the decision was given, or which he could not reasonably be expected to have produced in the circumstances of the case. In my judgment, that definition is in no way erroneous. In the context of s. 40 (1) I consider that "fresh evidence" does have the meaning which was accepted by the medical appeal tribunal.

For these reasons, I am of opinion that no error of law on the face of the decision is shown, and that, accordingly, the decision of the Divisional Court was correct. I would dismiss the appeal.

ORMEROD, L.J.: I agree that the appeal should be dismissed. The issue before this court in the end resolved itself into a comparatively short point. The only way in which the matter could come first before the Divisional Court and then this court was by way of an application for an order of certiorari. That application, as **MORRIS, L.J.**, has already pointed out, could only succeed if the applicant could satisfy the court that there was a manifest error on the face of the record which would justify the court exercising its discretion in favour of the applicant.

As the matter came before this court, the only question to be considered was whether the medical appeal tribunal was in error in construing the term "fresh evidence" in s. 40 (1) of the National Insurance (Industrial Injuries) Act, 1946, as meaning some evidence which the applicant was unable to produce before that decision was given, or which he could not reasonably be expected to have produced in the circumstances of the case. If that is the proper construction of the words of the subsection, then it is an end to this appeal, with the exception that counsel for the applicant raised the question that, even if the construction put on those words by the medical appeal tribunal was the correct one, there was still a question, on the face of the documents before the court which constituted the record, whether the report of Mr. Malkin of Aug. 12 should not be regarded as "fresh evidence" even in the light of that construction. It was pointed out, however, in the course of the argument that this was substantially a question of fact, and the point was virtually abandoned by counsel for the applicant in his reply.

Had that question been answered in the affirmative, it might well have been that a further question, whether there had been non-disclosure and whether that non-disclosure had been of a material fact, would have had to be considered, as indeed it was considered by the Divisional Court. But that question in the circumstances does not arise and I say nothing about that part of the judgment of the Divisional Court.

So far as the construction of the words "fresh evidence" is concerned, I agree with the view expressed by **MORRIS, L.J.** We are considering a term which has been used, and deliberately used, by the draftsman in the section, which has already received judicial interpretation in the construction of an earlier statute. Reference has been made to the Summary Jurisdiction (Married Women) Act, 1895, and the judgment of **SIR FRANCIS JEUNE, P.**, in *Johnson v. Johnson* (4) has been cited, and I need not repeat it. It is sufficient to say that, since that decision, there has been no question as to what is the proper interpretation of the words "fresh evidence", at least as far as that statute is concerned.

R.S.C., Ord. 58, r. 9 (2) gives this court full discretionary power to receive further evidence on a question of fact by ordinary evidence in court, by affidavit, or by deposition taken before an examiner or commissioner. Although the term there used is "further evidence", not "fresh evidence", it is of some assistance to note the interpretation which has always been put by the court on those words, and I read, for convenience from the current edition of the *ANNUAL PRACTICE*, some words of **DENNING, L.J.**, in *Ladd v. Marshall* (5):

"First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial,"

and he then went on to describe other necessary factors to be considered. That is the position as it was for a considerable number of years before this particular Act was placed on the statute book. It would seem to me to be sufficient to warrant putting on the words "fresh evidence" the construction which has already been placed on them in the context of another statute.

- A Counsel for the applicant submitted that so to construe the words in question was taking much too strict a view of the language of the section, having regard to the fact that this inquiry was not an action inter partes but was an application by an individual for certain benefits from a fund which had been established by statute. His submission was that "fresh evidence" meant nothing more than evidence which was not considered by the tribunal at the hearing. Of course,
- B that would imply that an applicant could hold back evidence or information which was in his possession and produce it at a later stage, if he wished so to do for any reason, either because he did not think that it was important or because he wished to keep something in reserve. If he could do that once, there is no reason why it should not be done on a number of occasions, and there would be no end to proceedings which could conceivably arise as a result. I think that must
- C be a possibility which the legislature had in mind, something which it was their intention not to allow. I think that is made clear by the careful use of the language which has been adopted by the legislature in this statute in relation, not only to reviews under s. 40, but to reviews under s. 50 and under other sections. The various forms of language used have already been pointed out by MORRIS, L.J., and I do not propose to repeat them; but they have the effect of
- D strengthening the view which I have formed of the construction of the words which we have been considering.

In my view, therefore, the medical appeal tribunal was right in adopting the construction which it did adopt, which was set out in its decision of Oct. 28, 1957, and, if that be so, it is clear that the appeal must be dismissed.

- E WILLMER, L.J.: I have reached the same conclusion, and I am of opinion that the application for certiorari was rightly dismissed by the Divisional Court. The medical appeal tribunal held that there was no "fresh evidence" to show that the decision under review was given in consequence of the non-disclosure or misrepresentation by the applicant or any other person of a material fact. In
- F so holding, they followed the decision of a commissioner in an earlier case to which my Lord has already referred, where it was held that "fresh evidence" in this context means some evidence which the claimant was unable to produce before the decision under review was given, or which he could not reasonably be expected to have produced in the circumstances of the case. The medical appeal tribunal concluded on the facts that the applicant (or his representative, Mr. Clarke) could have obtained what was claimed to be fresh evidence, viz., the second
- G report from Mr. Malkin, the surgeon, before the medical appeal tribunal gave its previous decision.

- H It was, as I understood, conceded by counsel for the applicant that, if the medical appeal tribunal was right in its view as to the meaning of "fresh evidence" in the context of s. 40 (1) of the Act, he could not in these proceedings challenge its conclusion that Mr. Malkin's second report did not amount to "fresh evidence" as so construed. But counsel for the applicant contended that the
- I expression "fresh evidence", as used in s. 40 (1), should not be construed in so narrow a sense, especially bearing in mind that the inquiry before a medical board or a medical appeal tribunal is a somewhat informal proceeding, and in no sense a *lis inter partes*. He argued that, in relation to such a proceeding, the words "fresh evidence" are wide enough to cover any new information which has come to light since the decision under review, and on which the tribunal might see fit to rely. I feel myself unable to accept counsel's submission and for three reasons.

First, the words "fresh evidence", which are used in s. 40 (1) of the Act, are words with a long history behind them. They have frequently been considered and have been construed in connexion with their use in the Summary Jurisdiction (Married Women) Act, 1895. My Lord has already referred to the judgment of the learned President in *Johnson v. Johnson* (6) and I do not repeat the extract



quoted from the judgment. So far as I am aware, the definition of "fresh evidence" therein laid down has been consistently followed ever since. It seems to me that, when adopting this particular expression in enacting the Act of 1946, Parliament must be presumed to have used those words in the well-defined sense in which they have been judicially construed for so many years.

Secondly, Mr. Cumming-Bruce, in the course of his very forceful argument, persuaded me, by reference to the words used in other sections of the same statute, that the words "fresh evidence" as used in s. 40 (1) were very carefully chosen. My Lord has already referred to the different forms of words used in relation to different kinds of review which are open to dissatisfied parties under various sections of the Act. I do not go over again what my Lord has already said. In the light of the phraseology used in other sections of the Act, I find it difficult to resist the argument that the use of the well-worn phrase "fresh evidence" in s. 40 (1) was deliberate, and that those words were carefully chosen so as to restrict the powers of review available under that section.

Thirdly, I am disposed to agree with the submission of counsel for the respondent that, if the words "fresh evidence" were to be construed as counsel for the applicant contends, they would practically be robbed of any meaning, and might as well have been omitted from the section altogether. I would agree with and adopt this passage from the judgment of the Divisional Court, where it is said (7):

"If counsel were right, it would mean that any claimant—or presumably any insurance officer—if dissatisfied by a decision of a medical appeal tribunal could go and get an opinion from another doctor, and, relying on this or anything contained in it as a material fact, apply for a review. If unsuccessful, the process could be repeated any number of times by obtaining fresh opinions from fresh medical men."

I am satisfied that such a thing could not possibly have been intended by Parliament when this statute was enacted.

On the contrary, as was submitted by counsel for the respondent, it is clear that the policy of the Act was to ensure that these purely medical questions, which are the questions referred to medical boards and medical appeal tribunals, should be dealt with once and for all, subject to a very strictly limited right of review in exceptional cases. If that were the policy, as it seems to me it must be, there was good reason to provide that, in such exceptional cases, the power to review should be exercised only on the production of "fresh evidence" in the previously accepted sense of those words.

In those circumstances, it seems to me that the unfortunate applicant in this case did not bring himself within s. 40 (1), for his application for a review was not, in my judgment, supported by "fresh evidence" as I understand those words. In my judgment, it follows that the medical appeal tribunal was guilty of no error of law in rejecting his claim and reversing the decision of the medical board, and the application for certiorari was rightly refused.

The further question, much discussed by the Divisional Court, whether there was, in the circumstances of this case, a non-disclosure by the applicant (or by his representative, Mr. Clarke), and, if so, whether he was entitled to rely on it, does not, in my opinion, arise and I therefore express no view about it.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Taylor, Jelf & Co.*, agents for *Hopkin & Sons*, Nottingham (for the applicant); *Solicitor, Ministry of Pensions and National Insurance* (for the respondent).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

A GRAINGER v. GRAINGER AND CLARK.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sachs, J.), June 8, 11, 12, 1959.]

[COURT OF APPEAL (Lord Evershed, M.R., and Romer, L.J.), July 6, 7, 1959.]

Divorce—Custody—Jurisdiction—Re-marriage of parties—Discretion not to make order—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 26 (1).

B The husband was granted a decree nisi of divorce on the ground of the wife's adultery with the co-respondent and this decree was made absolute in June, 1958. On July 25, 1958, an application by the husband under s. 26 (1) of the Matrimonial Causes Act, 1950, for custody of the child born to himself and the wife during the marriage was adjourned for a welfare officer's report, no order for custody being made. On Feb. 4, 1959, the husband and wife re-married and on Feb. 16, 1959, an order was made by consent giving the husband and wife joint custody of the child and discharging the order of July 25, 1958. By Mar. 7, 1959, the wife had returned to the co-respondent, leaving the child with the husband. The husband and wife each now applied for an order for custody of the child. These applications were made under s. 26 (1) of the Act of 1950, by which "In any proceedings for divorce . . . the court may . . . after the final decree" make provision for the custody of children "the marriage of whose parents is the subject of the proceedings. . ."

C

D

Held (by SACHS, J.): (i) the court had no jurisdiction to make a fresh order under s. 26 (1) regulating the custody of the child of the marriage after the parties to the marriage had re-married, since the Matrimonial Causes Act, 1950, like the legislation preceding it, was not intended to deal with the period that supervened when parties had re-married and were again husband and wife; moreover the words "proceedings for divorce" at the beginning of s. 26 (1) referred only to proceedings concerning a marriage that was the existing marriage at the time of the proceedings.

E

(ii) the order of Feb. 16, 1959, should accordingly be treated as having been made per incuriam and neither it nor the order of July 25, 1958, remained operative.

F

(iii) if, however, the court had jurisdiction, it would generally remit parties who had re-married to pursue such proceedings as were normally applicable to couples who were married and between whom no matrimonial cause was pending, and the present case was one which should, on this hypothesis, be so remitted.

G **Held** (by the COURT OF APPEAL): without expressing a concluded view that there was no jurisdiction under s. 26 (1) of the Matrimonial Causes Act, 1950, after the parties to the marriage had re-married, the order of the judge of first instance should stand because there was no ground for interfering with the discretion that he had exercised in the circumstances of this case not to use any jurisdiction that might reside in him.

H Appeal dismissed.

[As to application for custody of children after decree, see 12 HALSBURY'S LAWS (3rd Edn.) 355, para. 756 and Supplement; and for cases on the subject, see 27 DIGEST (Repl.) 663, 664, 6282-6292.]

For the Matrimonial Causes Act, 1950, s. 26 (1), see 29 HALSBURY'S STATUTES (2nd Edn.) 413.]

I Case referred to:

Sugden v. Sugden, [1957] 1 All E.R. 300; [1957] P. 120; 121 J.P. 121; [1957] 2 W.L.R. 210; 3rd Digest Supp.

Adjourned Summons.

In this case the husband and the wife each applied for a custody order.

On Mar. 25, 1958, the husband was granted a decree nisi of divorce on the ground of the wife's adultery with the co-respondent. On June 25, 1958, the decree was made absolute. Pursuant to s. 26 (1) of the Matrimonial Causes Act,

1950, the husband applied for custody of the child born to the husband and the wife during the marriage, a young girl, and on July 25, 1958, DAVIES, J., adjourned the husband's application for a welfare officer's report and ordered that meanwhile the child should stay with a third party, the husband's sister. No order for custody was made on that date. On Feb. 4, 1959, the husband and wife re-married. On Feb. 16, 1959, DAVIES, J., by consent ordered the child to remain in the joint custody of the parties and discharged the order of July 25, 1958. On Mar. 7, 1959, the wife returned to the co-respondent, and the child had ever since that date remained with the father and was looked after by him with the assistance of his mother. On Apr. 16, 1959, the husband gave notice of application in the original divorce proceedings for custody of the child and on May 25, 1959, the wife made a cross-application for custody. These applications came before SACHS, J., in chambers and were adjourned by him into open court for argument by the Queen's Proctor on the question of the court's jurisdiction to make an order after the re-marriage of the parties.

I. S. Hill for the husband.

H. E. L. McCreery and *J. W. Miskin* for the wife.

J. P. Comyn for the Queen's Proctor.

SACHS, J., stated the facts and continued: In that state of affairs the question arose whether after a re-marriage to each other an application purporting to be made in the old divorce proceedings falls within the ambit of the court's jurisdiction and, if so, whether the court should in its discretion deal with it or decline so to do. The questions are of some importance and are not without difficulty. In the present case only a few months have passed since the re-marriage to each other but the same question of continuing proceedings in relation to the previous marriage could arise if there was a dispute between the parties many years after such re-marriage. On being informed that there was no authority on this point I adjourned the application for argument in open court and asked for the assistance of the Queen's Proctor. Counsel has on his behalf appeared as *amicus curiae*, and my expression of appreciation for the way in which he presented his submissions is no mere formality.

The commencing words of s. 26 (1) of the Matrimonial Causes Act, 1950, so far as relevant, read (1):

"In any proceedings for divorce . . . the court may from time to time, either before or by or after the final decree, make such provision as appears just with respect to the custody, maintenance and education of the children the marriage of whose parents is the subject of the proceedings . . ."

It seems to me right first to assume (though the accuracy of the assumption depends on the exact meaning of the words "proceedings for divorce" to which I will later refer) that this is an instance where, on the literal and grammatical meaning of the words, they would, if taken by themselves, be construed as if they do not limit the period "after the final decree" by reference to any specific event, and in particular as if on such a literal construction the re-marriage thus would not affect the position. Such literal and grammatical constructions of general words do not, however, of themselves solve the problem. It is axiomatic that words and phrases used in a statute must, as stated by MAXWELL ON INTERPRETATION OF STATUTES (10th Edn.), p. 52:

"be construed not according to the mere ordinary general meaning of the words, but according to the ordinary meaning of the words as applied to the subject-matter with regard to which they are used".

To quote another apt phrase (*ibid.*, at p. 18):

"General words admit of indefinite extension or restriction, according to the subject to which they relate, and the scope and object in contemplation".

(1) For the extension of the court's jurisdiction under this section, see s. 1 of the Matrimonial Proceedings (Children) Act, 1958.

- A These canons of construction have been applied more than once to provisions of Matrimonial Causes Acts on questions relating to the general jurisdiction of the court and to the court's powers to make ancillary orders in particular. The result of their application to some novel but broad point which has not previously been construed is, however, not infrequently a matter of broad impression formed on looking at the wording of the particular section against the background of the contents of the Act as a whole. Thus authorities on other specific words in other sections may prove of little help. That seems to me to be the position here.

The present case simply concerns the court's powers to make variable ancillary orders regulating the day-to-day affairs of the parties: by "variable" I mean capable of variation from time to time. The relevant provisions of the Matrimonial Causes Act, 1950, in that behalf must obviously be read in relation to the

- C Act as an entirety, having due regard, of course, to its history. Against that background it seems clear that so far as divorce proceedings are concerned, the subject-matter with which the legislature was dealing in that Act, as in its predecessors, was the provision of powers to make in relation to those day-to-day affairs appropriate orders during the period whilst the cause is pending, and then, where a decree absolute results, during the further period whilst the parties are no longer husband and wife. The legislature does not appear either to have contemplated or intended to deal at all with that quite different position and period, which for convenience I will call the third period, that supervenes when the parties have re-married each other and are once more husband and wife. The general scheme of the relevant provisions is, indeed, not apt to deal with that third period, which to my mind simply is not its subject-matter.

- E On that broad ground the Matrimonial Causes Act, 1950, does not in my view confer on the court by s. 26 (1) power to make in the old divorce proceedings fresh orders regulating the day-to-day affairs of the parties and their children when once a re-marriage has taken place as between the parties. It is a ground that may perhaps also be properly expressed by stating that where a man and woman are husband and wife the relevant ancillary provisions of the Matrimonial Causes Act depend for their application on the existence of a matrimonial cause concerning the marriage that made them husband and wife. The fact that orders of a different nature, be they in relation to status or property, made in the periods between the initiation of the divorce proceedings and the re-marriage are unaffected by that re-marriage does not touch the point whether thereafter fresh day-to-day orders can be made.

- G Arguments in support of jurisdiction were bound to concede, and for the most part did concede, that the third period was thus obviously one which the legislature has not in mind: that one could not hold that the court had the suggested jurisdiction without producing a situation that flew in the face of common sense: and that the anomalies which would result are numerous. As regards those anomalies, to take an example, it was conceded that of all husbands only those that had re-married the same wife either once (or more than once) could be ordered by this court under jurisdiction conferred by the Matrimonial Causes Act, 1950, to pay to their wives or infant children maintenance without proof of wilful neglect and without there being any proceedings in this court touching the existing marriage. Moreover, orders made in the old divorce proceedings for the maintenance of the wife and infant children could, it was conceded, and in the absence of fresh orders normally would, continue in force after the re-marriage and, indeed, could thereafter still be freshly made in the old divorce proceedings. Counsel for the Queen's Proctor further pointed out that the continued existence of a pre-re-marriage order against a parent in favour of a child would result in the parent and child both continuing to obtain tax benefits—a revenue point which may be of doubtful relevance to the issue before me, but one to which counsel very properly drew special attention in view of the fact that the court has no power of its own motion to bring back to itself an order of this kind.

In general it was in effect conceded in the argument that if the suggested

jurisdiction existed the Matrimonial Causes Act, 1950, gave power to the court to treat this particular husband and this particular wife in relation to day-to-day matters as if they were not in fact husband and wife. All these absurdities, it was submitted, must be held to be produced because of the literal and grammatical construction of the words. The court's duty, it was argued, was to hold that the jurisdiction existed and then to mitigate the positions by refraining from exercising it save on limited occasions. It was also pressed on me that the benefit in certain exceptional cases to an infant of continuity in the court's control was such that the literal construction should be adopted. If I do not refer in turn to each of the other parallel points addressed to me in favour of jurisdiction I am sure that counsel will not infer that they have been overlooked. I would, however, mention as regards such of the submissions as were founded on the inconvenience in certain exceptional events of holding that there was no jurisdiction, that where the court has to consider two opposing constructions of a section, one of which produces a particular inconvenience and the other a general absurdity, then the arguments founded on the particular inconvenience must normally give way to those founded on the general absurdity.

On the broad ground already stated the arguments in favour of jurisdiction were not accepted by the court. One narrower point against jurisdiction is, however, also worth mentioning—albeit with some hesitation because of the confusingly different expressions (to which counsel for the Queen's Proctor helpfully directed my attention) used in the various sections and subsections of the Act to indicate exactly in what circumstances the court's power to make orders arises. For myself, I would doubt if the words "proceedings for divorce" in the initial phrase governing the whole of s. 26 (1) could, in any event, refer to proceedings between two parties who are husband and wife other than proceedings which concern an existing marriage between them. I would accordingly not in any event be disposed so to construe them in the present case as to cover the proceedings which form the subject of the present application.

If, however, the construction of the statute which I have adopted is not correct the question arises how the court, in its discretion, should deal with applications in the old proceedings to make fresh orders regulating the day-to-day affairs of the parties and their children. In the circumstances it seems desirable to refer further to that point in so far as it concerns the present applications. In relation to such a discretion matters of general policy were expressed. On the one hand, emphasis was again laid on the possible interests of the child, and on the other hand there was stressed the evil of it being possible for the parties, for a decade or more during the second marriage, to be able to raise as between each other on a variety of matters the threat of reviving the old proceedings.

In relation to the interests of the child it seems to me that they are well provided for by the ability of the parties to resort, if any necessity arises, in the normal way as parents to various courts, which include those to which the legislature has provided access under more statutes than one; of those courts some are relatively inexpensive in comparison with the High Court: though if for some reason it was considered of special advantage to come to the High Court and to this Division of it in particular then proceedings of one type or another could easily be initiated. As regards the relationship between the husband and wife, however, the idea that the re-marriage should remain bedevilled by the continued existence of the old proceedings, or possible threats of reviving them at any moment, is overwhelmingly repugnant to my mind. Accordingly the court should in my view lean heavily towards letting that re-marriage start with the clean slate which propriety demands, which alone can as a rule provide a foundation for the hopes of any re-marriage being successful, and which, so far as the parties are concerned inter se, must be implicit in their very re-marriage. The court could thus generally remit husband and wife to such procedure as would normally be applicable to a married couple.

- A The present applications are made by legally aided parties who live in Hampshire. The judge who dealt with the matter in July, 1958, is no longer a member of this Division and, moreover, made the interim order simply on reading affidavit evidence and hearing arguments thereon. The affidavits filed in the applications now before me very properly do not pray in aid any earlier affidavits, the contents of which relate almost entirely to past history that cannot be usefully revived, and moreover could, if necessary, only be dealt with by aid of cross-examination if revived. Having read all the papers it seems to me that this must prove to be one of those relatively clear-cut matters which will be decided in substance on facts which are common ground—coupled, of course, with the help of welfare officers' reports, existing or future. There is no question here of continuity of judicial control and no overriding reason why one court rather than another should deal with the present issue. On the basis of the above indicated approach to the question of discretion I would, had there been jurisdiction, have thus been disposed to remit the parties in the present case to such normal procedure as would be taken between a married couple when no matrimonial cause was pending, and I would also have been much disposed to say that they should adopt some less expensive method of dealing with the issue between them than resorting to the High Court.

- D There remains the question what course could be adopted as regards the order of July 25, 1958—and nothing I am about to say is intended to refer to other orders drawn differently or dealing with other matters. Prima facie this order should, if practicable, be so construed as to ensure that it is in conformity with and does not exceed the jurisdiction of the court (cf. DENNING, L.J., in *Sugden v. Sugden* (2)). It may well thus be that the order of July 25, 1958, should be so read as to cease to be operative after re-marriage; but whether or not that order thus ceased to have effect on the date of the re-marriage or alternatively so ceased by virtue of the order of discharge made by DAVIES, J. (to which I am about to refer) it seems desirable that there should be embodied in the order now to be drawn as of today a recital that the old order is no longer operative.
- E As regards the order of DAVIES, J., of Feb. 16, 1959, giving the parties joint custody after the re-marriage, this was a consent order made on an occasion when no point was raised as regards the court's powers. In so far as it is on the face of it a fresh order for custody after re-marriage it seems to me that it should be treated as made per incuriam and should also be recited as being no longer operative. In those circumstances and with those additions to the normal form of order these two applications should, accordingly, be dismissed.

Applications dismissed.

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

- H The husband appealed.
I. S. Hill for the husband.
J. B. S. Edwards for the wife.

- I LORD EVERSHED, M.R., stated the facts and continued: Notionally (if I may use that adverb), the husband has appealed; but the wife, as respondent, appears to support the view of the husband, so that we have not had the advantage of any argument in the other direction on the question of jurisdiction or the question of discretion.

Section 26 (1) of the Matrimonial Causes Act, 1950, reads (3):

"In any proceedings for divorce . . . the court may from time to time, either before or by or after the final decree, make such provision as appears just with respect to the custody . . . of the children the marriage of whose

(2) [1957] 1 All E.R. 300; [1957] P. 120.

(3) See footnote p. 52, ante.

parents is the subject of the proceedings, or, if it thinks fit, direct proper proceedings to be taken for placing the children under the protection of the court."

It was the argument of counsel for the husband in this court that there is *ex facie* no limit imposed by the formula:

"In any proceedings for divorce . . . the court may from time to time . . . after the final decree . . ."

Therefore, says counsel, it follows that, even though it strikes one at first sight as startling since the marriage which was the subject of the proceedings when they started has not only been dissolved but has been superseded by a re-marriage between the same parties, one may, nevertheless, invoke jurisdiction in the proceedings for an order as to custody, the parties being then husband and wife—father and mother of the child—in respect of whose marriage at the time of the application no proceedings whatever are pending.

The learned judge, in a careful judgment, came to the conclusion that, although at first sight the language of s. 26 (1), read grammatically, might confer jurisdiction, the general sense and tenor of the subsection denied it. He said (4):

"It is a ground that may perhaps also be properly expressed by stating that where a man and woman are husband and wife the relevant ancillary provisions of the Matrimonial Causes Act depend for their application on the existence of a matrimonial cause concerning the marriage that made them husband and wife."

For my part, I am strongly disposed to agree with the general view of the scope and purpose of the legislation. The learned judge went on to point out that, if the jurisdiction existed, anomalies of a somewhat startling character would arise. He observed (for example) that an order in what he called "the old divorce proceedings" might be made against the husband for maintenance; and he pointed out also (though counsel for the wife in this court questions whether it is right) that before him it was conceded that maintenance might be ordered as respects infant children without any proof of wilful neglect or there being any proceedings before the court touching the existing marriage. He referred to other apparent absurdities, and the existence of those anomalies and absurdities confirmed his general view of the scope and purpose of the Act so as to lead him to conclude that there was now no jurisdiction in these proceedings under the Act to make the orders which both parties sought.

In the course of the argument I felt myself also somewhat influenced in the same direction by the use of the language "the children the marriage of whose parents is the subject of the proceedings"; for it seemed to me that, if one looked at the relevant date when the application for the order was made, it could not be said that the marriage of the child's parents "is the subject of the proceedings", because there are no proceedings whatever touching the marriage now existing between the parents of the child. Counsel for the husband, on the other hand, pointed out that the use of the present tense should not be taken as indicating that the test was to be applied by looking at the date when the application was made and at the marriage then subsisting. It is true to say that these proceedings (assuming that they are still for any purpose on foot) certainly did relate to the then existing marriage between the parents of the child.

My present inclination favours the view—on this point—of the learned judge. But I am content not to express, and do not express, any concluded opinion on it because I am quite satisfied that there is no good ground shown for this court interfering with the learned judge's discretion, which was exercised adversely to the use of any jurisdiction which might reside in him. It was said by counsel for the husband that the discretion was, so to speak, coloured by the view which

A the judge had already taken about jurisdiction; but I see no ground for so supposing. The learned judge began this part of his judgment by saying (5):

“ If, however, the construction of the statute which I have adopted is not correct the question arises how the court, in its discretion, should deal with applications in the old proceedings to make fresh orders regulating the day-to-day affairs of the parties and their children.”

B A little later his language was as follows (6):

“ As regards the relationship between the husband and wife, however, the idea that the re-marriage should remain bedevilled by the continued existence of the old proceedings, or possible threats of reviving them at any moment, is overwhelmingly repugnant to my mind.”

C That is a ground for the exercise of the discretion which is in no sense coloured by the decision on the question of jurisdiction, and it is a ground which I heartily indorse. It is contrary to common sense and public policy that, if there is jurisdiction, it should be exercised in this case. I, therefore, agree with the judge that, if jurisdiction does exist, nevertheless all that he should do was to make the order which he made, expressing the fact that the existing orders made by DAVIES, J., on July 25, 1958, and Feb. 16, 1959, should be treated as no longer effective. The order made by SACHS, J., reads:

“ It is declared that the orders [of the dates which I have mentioned] are no longer operative.”

E For those reasons, therefore, I would dismiss the appeal. I only add that, as the learned judge pointed out (and it is obviously relevant if this unhappy state of affairs between the two people should continue), the order which we make, affirming the decision of SACHS, J., is by no means a negation of rights to go to other places to obtain relief. Both parties before us are legally aided; but on that matter I make no further comment. I would dismiss the appeal.

F ROMER, L.J.: I agree, and have very little to add. I think that the question of jurisdiction is a difficult one, depending primarily, as it does, on the construction of s. 26 of the Matrimonial Causes Act, 1950. It seems to me that the words, in s. 26 (1), “ the marriage of whose parents is the subject of the proceedings ”, were manifestly directed primarily to the marriage which subsisted between the parties when the proceedings were initiated; and the question is G really whether they were exclusively so directed. It could be said that there is now a new marriage subsisting and that “ the proceedings ” cannot really be regarded as applying to that marriage—that the existing marriage is no longer the marriage which was “ the subject of the proceedings ”.

In the course of his judgment the learned judge said (7):

H “ For myself, I would doubt if the words ‘ proceedings for divorce ’ in the initial phrase governing the whole of s. 26 (1) could, in any event, refer to proceedings between two parties who are husband and wife other than proceedings which concern an existing marriage between them.”

I content myself by saying that I share that doubt. It is not necessary to arrive at or express any conclusion on the matter, because I entirely agree with the manner in which the learned judge dealt with the exercise of the discretion which, on the hypothesis that he had jurisdiction, was vested in him and which led him to refuse to make an order. In his judgment LORD EVERSHED, M.R., dealing with that aspect of the matter, referred to the passage in which the judge said (6):

“ . . . the idea that the re-marriage should remain bedevilled by the

(5) Ante, at p. 54, letter F.

(6) Ante, at p. 54, letter I.

(7) Ante, at p. 54, letter E.

continued existence of the old proceedings, or possible threats of reviving them at any moment, is overridingly repugnant to my mind.” A

That passage carries great conviction, and I cordially and entirely agree, on that and on other grounds, in relation at all events to this particular case, with the approach which the learned judge made to this question of discretion. Accordingly, basing myself on the question of discretion and leaving the question of jurisdiction open until a case arises in which it may become necessary to decide it, I agree that this appeal fails. B

Appeal dismissed.

Solicitors: *Batchelor, Fry, Coulson & Burder*, agents for *Foster, Wells & Coggins*, Aldershot (for the husband); *Waterhouse & Co.*, agents for *Dutton, Makin & Williams*, Winchester (for the wife); *Queen's Proctor*. C

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

Re AN APPLICATION OF THE NATIONAL COAL BOARD. D

[CHANCERY DIVISION (Upjohn, J.), June 5, 8, 9, 10, 11, 12, 1959.]

Coal Mining—Working facilities—Subsidence—Application to work and to let down surface—Deep mining—Basis of compensation to surface owners—Compensation for consequential damage—Costs—Mines (Working Facilities and Support) Act, 1923 (13 & 14 Geo. 5 c. 20), s. 6 (1), (5)—R.S.C., Ord. 54.o, r. 12. E

Costs—Mines—Working facilities—Application for rights including right to let down surface—Compensation for subsidence in future years—Mines (Working Facilities and Support) Act, 1923 (13 & 14 Geo. 5 c. 20), s. 6 (1), (5)—R.S.C., Ord. 54.o, r. 12.

The National Coal Board desired to exploit high quality coal which was to be found at depths of from two thousand to four thousand feet in certain seams in the North Staffordshire coal-field. The proposed works would be at a much greater depth than previous works had been, and the extraction of coal would continue for very many years. Part of the area under which these seams of coal were situated was highly industrialised. The extraction of coal would necessarily cause subsidence, which might affect the surface at some distance from the workings. On an application by the board under the Mines (Working Facilities and Support) Act, 1923, for a right to work these seams of coal under an area of land (called “the application area”) and by such working to let down the surface of the application area, there were many objectors, the questions in issue ultimately before the court being what was the proper measure of compensation (if any) payable to various classes of objectors for damage from subsidence and how the costs of determining that question should be borne. F

Held: (i) an obligation to pay for damage that might arise in the future from subsidence should be treated as a term or condition on or subject to which a right might be granted under s. 6 (1)* of the Mines (Working Facilities and Support) Act, 1923, but such a payment should not be regarded as compensation within s. 6 (2); therefore, the question whether an obligation to make such a payment should be imposed must be determined on the principle enacted by s. 6 (5)*, namely, by having regard to all the circumstances of the case. G

Re Beckermeth Mining Co., Ltd.'s Application ([1938] 1 All E.R. 389) not followed. H

* The terms of s. 6 (1) and s. 6 (5) are printed at p. 63, letters E and H, post. I

A (ii) on that basis, or indeed if the true basis were that payment for such damage was compensation within s. 6 (2), an objector who owned part of the surface of the application area was entitled to be compensated for future damage by subsidence, including consequential damage such as loss of profits, and the measure of compensation was not limited to physical damage to land and buildings.

B (iii) an objector having land partly within and partly outside the application area was not entitled under the Act of 1923 to any compensation in respect of land outside the application area.

(iv) an objector whose land was wholly outside the application area was not entitled to compensation under the Act of 1923.

C (v) local authorities were not entitled to compensation under the Act of 1923 for damage to sewers under the surface of the application area unless the authorities were also the owners of the surface.

Held, further: under R.S.C., Ord. 54.o, r. 12* and R.S.C., Ord. 65, r. 1, the court had a complete discretion in awarding costs in cases under the Act of 1923, and, in the circumstances of this case, the National Coal Board should pay the costs, as between party and party, of objectors who had appeared before the court.

D [As to compensation on the grant of an ancillary right, where a right to work minerals is granted, see 26 HALSBURY'S LAWS (3rd Edn.) 471, para. 974.

For the Mines (Working Facilities and Support) Act, 1923, s. 6 and s. 9, see 16 HALSBURY'S STATUTES (2nd Edn.) 196, 199.

E For the Coal Industry Nationalisation Act, 1946, s. 1, see 16 HALSBURY'S STATUTES (2nd Edn.) 278.

For the Coal-Mining (Subsidence) Act, 1957, s. 6, see 37 HALSBURY'S STATUTES (2nd Edn.) 769.

For R.S.C., Ord. 54.o, and R.S.C., Ord. 65, r. 1, see the ANNUAL PRACTICE, 1959, pp. 1466, 1821.]

F Cases referred to:

Beckermert Mining Co., Ltd.'s Application, Re, [1938] 1 All E.R. 389; Digest Supp.

Friedeberg, The, (1885), 10 P.D. 112; 54 L.J.P. 75; 52 L.T. 837; 1 Digest 219, 1447.

G *Hilton v. Granville (Earl)*, (1844), 5 Q.B. 701; 13 L.J.Q.B. 193; 2 L.T.O.S. 419; 114 E.R. 1414; *subsequent proceedings*, (1848), 12 Q.B. 737, n.; 116 E.R. 1047; 34 Digest 703, 923.

National Coal Board's Application, Re, [1952] 1 All E.R. 678, n.; sub nom. *Re Wolstanton Ltd.'s Application*, [1952] Ch. 519; 3rd Digest Supp.

National Coal Board's Application, Re, (June 22, 1955), unreported.

H *Newcastle-under-Lyme Corp'n. v. Wolstanton, Ltd.*, [1947] 1 All E.R. 218; [1947] Ch. 427; [1947] L.J.R. 1311; 176 L.T. 242; 111 J.P. 102; 2nd Digest Supp.

New Hucknall Colliery Co., Ltd., Re, (1925), 41 T.L.R. 383; 34 Digest 747, 1213.

Wolstanton, Ltd. & A.-G. of Duchy of Lancaster v. Newcastle-Under-Lyme Borough Council, [1940] 3 All E.R. 101; [1940] A.C. 860; 109 L.J.Ch. 319; 163 L.T. 187; 2nd Digest Supp.

I *Young Sid, The*, [1929] P. 190; 98 L.J.P. 97; 141 L.T. 234; Digest Supp.

Adjourned Summons.

By an originating summons under R.S.C., Ord. 54.o, the applicants, the National Coal Board, applied for an order granting them the rights specified in an application dated Sept. 3, 1957, and made under the Mines (Working Facilities and Support) Acts, 1923 and 1925. The application was made by the National

* The terms of r. 12 are printed at p. 68, letter H, post.

Coal Board to the Minister of Power and was referred by the Minister to the High Court, pursuant to s. 1 (1) (a) of the Railway and Canal Commission (Abolition) Act, 1949. A

By their application the National Coal Board applied (a) for the right to work certain seams of coal and by such working to let down the surface of certain lands in or in the vicinity of the city of Stoke-on-Trent, the borough of Newcastle-under-Lyme and the rural district of Stone, Staffordshire; and (b) to vary an order made by the court on Feb. 20, 1952, on the application of the National Coal Board. B
Objections to the application were put in by a large number of objectors, the objections being mainly in regard to the proposed method of working and the compensation payable for damage by subsidence.

The facts are stated in the judgment.

Sir Andrew Clark, Q.C., and J. C. Leonard for the applicants, the National Coal Board. C

B. J. M. MacKenna, Q.C., and D. A. Grant; Charles Russell, Q.C., and J. W. Brunyate; R. D. Stewart-Brown, Q.C., and J. S. Daniel; J. L. Arnold, Q.C., and Charles Sparrow; Peter Foster, Q.C., and John Bradburn; G. R. Rougier, Q.C.; D. A. Grant; G. T. Hesketh; E. W. Griffith; Charles Sparrow; Michael Browne; and H. A. P. Fisher for objectors. D

June 11. **UPJOHN, J.:** This is an application by the National Coal Board under the Mines (Working Facilities and Support) Act, 1923, for the right to work certain seams of coal and by such working to let down the surface of certain lands in or in the vicinity of the city of Stoke-on-Trent, the borough of Newcastle-under-Lyme and the rural district of Stone, Staffordshire, the lands in question being coloured green on a certain plan and referred to as "the described lands". There is also an application to vary in certain respects an order (1) made by this court on Feb. 20, 1952, under the same Act. The application relates to three contiguous areas: the Wolstanton area, the Deep Pit area, and the Stafford area. I shall call them the application areas. A detailed description of them is unnecessary, but, in broad outline, the application seeks to get liberty to work and to let down the surface in these areas by works proposed at much greater depth than hitherto. The earlier orders relating to the Wolstanton area related to comparatively shallow seams, but it is now sought to work at depths of over two thousand feet, down to four thousand feet, and to employ the most modern methods of extracting coal by driving what are known as horizon roads at these very considerable depths. Horizon roads, as I understand them, are horizontal; they do not follow the strata. Their object is to enable locomotives to haul underground coal extracted at very considerable distances from the pit head—much longer distances than was possible when coal was extracted through a number of private colliery companies. The reason for the application is that the coal in this coal-field, the North Staffordshire coal-field, is carbonising coal of a very high quality, and, according to the application, the reserves of this type of coal are rapidly diminishing in other coal-fields, and so it is desired, in the national interest, to exploit the high quality coal to be found in this coal-field. It is hoped to extract something over a hundred and nineteen million tons of coal under the application areas. It is proposed to expend large sums—something over £30,000,000. The plan is essentially a long-term plan and liberty is asked to work for a hundred years from the date of the order. E
F
G
H
I

When the application was made, in the usual way advertisements were directed, and this brought no less than ninety-five objectors. However, that number has been whittled down, and sixty-four, I think, entered an appearance. Most, but not all, of those have appeared before me. The objections range round two main points. First, there was opposition to the proposed method of working. It was proposed to work by the longwall method, which involves the total

(1) In *Re National Coal Board's Application* (3) ([1952] 1 All E.R. 678, n.: see p. 61, letter H, post.

- A abstraction of the coal with an inevitable subsidence of the superadjacent surface, without leaving any support. There was great opposition to the proposed method of working. The second point, which is the only point with which I am really concerned in this judgment, is: What is the right measure of damages that the National Coal Board should pay when the surface is let down? With regard to the first main point, that is, the method of working and the
- B protection to be afforded to the owners of the surface, there have been lengthy discussions, and a large number of affidavits (about a hundred, I believe) has been filed. Ultimately, after many concessions, no doubt, on both sides, the proposed method of working has been modified and objection thereto withdrawn, and, therefore, I propose to say no more about it than that I have seen sufficient of the evidence to satisfy me that it is quite plainly in the national interest that
- C a right to work these coals and to let down the surface should be granted. Indeed, that is not disputed.

- I turn, then, to the second question, but before I propound the problem which I have to solve, I must say a little about the history. These three areas all lie in the manor of Newcastle-under-Lyme. The lord of the manor has from ancient times been the Crown in right of the Duchy of Lancaster. For very many
- D years the Duchy have claimed by custom the right to work the subjacent minerals without paying any compensation for subsidence caused to the surface, and they have for many years granted mining leases on the footing that the person extracting the minerals was entitled to do so without paying any damage for subsidence. In 1844, in *Hilton v. Earl Granville* (2), it was held that such a custom was unreasonable and, therefore, void. Undeterred, however, by that
- E decision the Duchy continued to grant mining leases on the same terms as formerly, and apparently no one disputed that. Just before the war the lessee was Wolstanton, Ltd., a colliery company. The company's workings caused subsidence to a fire station belonging to the borough of Newcastle-under-Lyme, who brought an action against the company and against the Duchy of Lancaster. In 1940, in *Wolstanton, Ltd. & A.-G. of Duchy of Lancaster v. Newcastle-under-*
- F *Lyme Borough Council* (3), the House of Lords upheld the view which had been expressed some hundred years before that the alleged custom was void as being unreasonable. Accordingly, an injunction was granted against Wolstanton, Ltd., without prejudice to the company's right to make application under the Mines (Working Facilities and Support) Act, 1923. As it was then war time, it was essential to get this high quality coal, and, therefore, an order of the
- G Railway and Canal Commission was made on Dec. 17, 1943, entitling the company to work certain seams. That order contained a very wide clause in regard to payment by the company of compensation for subsidence. I shall not read it because it was in substantially the same terms as the order which was made in 1952, and to which I shall refer in greater detail. Neither of those orders affected the Stafford area or the Deep Pit area.
- H In 1952, in *Re National Coal Board's Application* (4), the National Coal Board, as the successors of Wolstanton, Ltd., made another application for extended powers to work certain seams in the Wolstanton area, and DANCKWERTS, J., made an order on Feb. 20, 1952. Schedule 1, cl. 13, to the order dealt with the question of compensation and reads:

- I "The applicants shall (subject to the provisions of para. 12 hereof so far as applicable) pay full compensation for all damage (including consequential loss and depreciation in value) whether occurring before or after Mar. 25, 1952 (but not before Dec. 17, 1943), and resulting from the mining operations of the applicants or of Wolstanton, Ltd. in the Red Mine ironstone seam or any of the seams mentioned in para. 2 hereof prior to Mar. 25, 1952, and

(2) (1844), 5 Q.B. 701.

(3) [1940] 3 All E.R. 101; [1940] A.C. 860.

(4) [1952] 1 All E.R. 678, n.; [1952] Ch. 519.

from such operations in any of the described minerals on or after Mar. 25, 1952, within the area surrounded by a purple verge on the said plan No. 1 to property (including gas mains electricity mains or lines water mains and sewers belonging to any of the objectors or the Midland Electricity Board) now or hereafter within the said area and in the case of the lands coloured pink on the said plan No. 1 notwithstanding the terms of any enfranchisement deeds."

Some argument has been addressed to me to the effect that, as the order was made in those terms in 1943 and again in 1952, so it should be made in the year 1959. I am, however, unable to accept that argument. The National Coal Board cannot be prejudiced by earlier orders in that way, and they are fully entitled to come to this court and to say that for the future, when dealing with deeper and different seams, it would be right and proper to have a different provision as to compensation put in the order that I shall make.

The position then today is this: in the Wolstanton area there is a right to work certain shallow seams on the terms as to compensation for subsidence that I have just read. Apart from that, as the custom alleged is invalid, it is common ground that there is no right to work other seams and to extract other minerals so as to let down the surface; and, as it is well known that the extraction of minerals is bound to cause subsidence, it necessarily means that, unless some order is granted, these minerals are sterilised; for an injunction would plainly lie at the instance of any owner of the surface. The rights now sought, however, are limited as to the damage through subsidence. What is proposed by the National Coal Board is set out in para. 5 of Sch. 2 to the proposed minutes of order:

"The [National Coal Board] shall make good or pay compensation for all actual damage caused by their working of the described minerals to the surface of the described lands and to any existing or future building works and things erected constructed or growing thereon, including actual damage to any plant machinery fixtures fittings or chattels in or upon any such buildings or works, provided that this obligation shall not apply to any sewers, gas or water mains or electricity cables in respect of which there is no right of support, in which case the [National Coal Board] shall only be liable to pay compensation in accordance with their statutory obligations."

Now the whole kernel of the point which I have to determine is that on the one hand the objectors seek to have a wide order for compensation for subsidence which would include consequential damage; on the other hand the National Coal Board seek to restrict compensation to physical damage to the land and buildings, including future buildings, and fixtures and fittings and chattels. The reason for the importance of the difference is that the application areas, particularly the Deep Pit area, lie in a highly industrialised area. It is, in fact, the heart of the Potteries District, and there are on the surface above the application areas many industrial concerns, particularly pottery concerns. The method of making pottery now involves long and heavy kilns, and it is not really in dispute that the result of working might be to cause damage to these kilns. That might upset the production of these companies on the surface and lead to a loss of orders, with consequential damage to goodwill, and so on. I say no more about that, because counsel for the National Coal Board has admitted that it is possible that in each case consequential damage of some kind may be suffered; secondly, that such consequential damage might very well be substantial, especially in cases of commercial undertakings if it were to include loss of profits and damage to goodwill; and, thirdly, that that sort of consequential damage would not be recoverable under the form of order for which the National Coal Board ask.

The question, therefore, is one of great importance. It is a question of the construction of the Mines (Working Facilities and Support) Act, 1923, as to what

A terms in regard to compensation I should insert. I must, therefore, look at a number of sections of the Act, some of them, however, briefly. Section 1 gives the right to make application to work minerals which are in danger otherwise of being unworked. Section 3 gives power to the court to grant what are called ancillary rights. I need not read the section in detail, but it is plain, having regard to sub-s. (2) (a), that one of the ancillary rights which may be granted

B is a right to let down the surface. Section 4 (1) is in these terms:

“Neither the right to work minerals nor an ancillary right shall be granted under this Act unless it is shown that it is not reasonably practicable to obtain the right in question by private arrangement for any of the following reasons: (a) that the persons with power to grant the right are numerous or have conflicting interests . . .”

C That is plainly satisfied in this case. I do not think that I need read para. (b) or para. (c) of the subsection. Paragraph (d) is in these terms:

“that the person with power to grant the right unreasonably refuses to grant it or demands terms which, having regard to the circumstances, are unreasonable.”

D Then s. 5 provides the machinery for launching applications: under the section as originally enacted an application was made to the Board of Trade, but now it is made to the Minister of Power (5). He considers the application, and, if he thinks that there is a *prima facie* case, refers it to this Division of the High Court, which now exercises the functions of the Railway and Canal Commission (6) under Part I of the Act of 1923. Section 6 deals with references to the commission and I

E must read part of the section:

“ (1) Where a matter is so referred to the commission, the commission, if satisfied that the requirements of this Part of this Act are complied with in the case of the applicant, and that it is expedient in the national interest that the right applied for should be granted to him, may, by order, grant the right on such terms and subject to such conditions, and for such period, as the commission may think fit, and upon such an order being made, the right specified in the order shall, subject to the provisions hereinafter contained, vest in the applicant.

F “ (2) Where such a right is granted, such compensation or consideration as in default of agreement may be determined by the commission shall be paid or given by the applicant in respect of the acquisition of the right to such persons as the commission may determine to be entitled thereto.”

G Subsection (5) is a very important subsection. It is in these terms:

H “In determining whether any right should be granted or the conditions upon which any such right should be granted the commission shall have regard to all the circumstances of the case, and in particular to the extent to which the retention of any minerals is required for the protection of any mines or other works from flooding, or for any other mining purpose, and (so far as relevant) to the royalties, covenants, and conditions reserved by or contained in the applicant's existing mining lease or leases (if any), or customary in mining leases in the district.”

I Section 9 is in these terms:

“ (1) Where a right to work minerals or an ancillary right is granted or any restriction on the working of minerals is imposed under this Part of this

(5) The functions exercisable by the Board of Trade under the Act were transferred to the Minister of Fuel and Power by the Ministers of the Crown (Minister of Fuel and Power) Order, 1942, who was re-styled Minister of Power by the Minister of Fuel and Power (Change of Style and Title) Order, 1957 (S.I. 1957 No. 48).

(6) The commission was abolished and its functions transferred to the High Court by the Railway and Canal Commission (Abolition) Act, 1949, s. 1.

Act, the commission may determine the amount and nature of compensation or consideration to be paid or given and the persons to whom it is to be paid or given, either at the time when they determine whether the right should be granted or the restrictions imposed or at any subsequent time.

"(2) The compensation or consideration in respect of any right, including a right to enforce restrictions, shall be assessed by the commission on the basis of what would be fair and reasonable between a willing grantor and a willing grantee, having regard to the conditions subject to which the right is or is to be granted.

"(3) Where the person to whom any compensation or consideration is payable cannot be found or ascertained, the compensation or consideration shall be paid into court."

Here I am concerned with the grant of an ancillary right. The first question which arises is whether the term as to compensation ought to be treated as a term or condition referred to in s. 6 (1), in which case the relevant considerations which I must bear in mind are to be found set out in s. 6 (5); or whether this right to compensation on damage should be treated as a compensation clause coming under s. 6 (2), to which s. 9 is applicable. The point is not, I think, of great importance, because in either event the court must do what, in its discretion, it thinks fair and reasonable in all the circumstances of the case. In *Re Beckermat Mining Co., Ltd.'s Application* (7), the Railway and Canal Commission considered that the clause providing for compensation for subsidence was a clause which fell within s. 9, but it is plain that the point there was never really argued. On the whole, I think that s. 6 (2) and s. 9 are really dealing with the monetary consideration which is to be paid as a term of the order, and I think that payment for damage which may or may not arise in the future cannot be regarded as compensation for the purposes of s. 6 (2). I think that it is a condition or a term which falls within s. 6 (1), and, therefore, the relevant considerations which I must bear in mind are to be found in s. 6 (5).

Since the constitution of the Railway and Canal Commission, some sixty-two orders granting liberty to let down the surface have been made either by the commission or by this court, and in only four cases has an order been made giving a right to consequential damage, two of those orders being the orders made in 1943 and 1952 already referred to (8). But I cannot gain any assistance one way or the other from those orders. As is well known, these matters are negotiated, as in this case, even while the case is being debated, and the parties come to terms and agreements which satisfy them; and, therefore, one can get no assistance from looking at extracts—for that is all I have—from orders which satisfied the parties and in none of which, it is admitted, was the point that I have to consider argued.

The objectors' case is a simple one. They say that the right to support is a valuable right of property which can be protected by injunction. It is not in dispute that, if damage does result, compensation for consequential damage can be recoverable by law, that is to say, consequential damage for loss of profits, loss of goodwill and so on; and they submit that to limit the compensation in the way sought by the National Coal Board is to expropriate without paying full compensation, and that, therefore, it amounts to a partial confiscation of the objectors' property, and a confiscation which in individual cases may in the future turn out to be very serious. They submit that it is contrary to the principles of this court to make such confiscatory orders, unless the terms of the statute plainly entitle the court to do so. They point to s. 4 (1) (d) of the Act of 1923, and say: Supposing that there was one objector and one only, and his objection was that he wanted to have compensation for consequential damage, could he be regarded as being unreasonable so as to give this court jurisdiction

(7) [1938] 1 All E.R. 389.

(8) See p. 61, letters F to I, ante.

- A to make some less order? They suggest—and I agree with them—that the plain answer to that must be that it would not be unreasonable, for the simple reason that he is asking only for that to which he is entitled at law; and, indeed, he might, not unreasonably, ask for a little more for giving up his right to claim an injunction to prevent any subsidence to his property; and they say that, if that be so in cases coming under para. (d) of s. 4 (1), so also it must be the same
- B if there is an application under para. (a) of the subsection.

The argument of the National Coal Board is this: they say that the statutes in the past have shown that, when it is in the national interests, Parliament has thought it right to put some limitation on the compensation to be recovered; and they refer to the provisions in para. 6 of Sch. 2 to the Coal Act, 1938, the Act which, as it is usually said, nationalised royalties and vested in the Coal Commission the minerals underlying the surface. Paragraph 6 (1) (a) of Sch. 2 provided that, where there had been no severance, so that the owner of the surface also owned the minerals and enjoyed both in possession, the compensation due to him should be determined on the footing that he would be entitled to have compensation for damage arising from the working of that land. That, it was said, meant physical damage and physical damage only. I am not going to determine whether that is right or not, for counsel for one of the objectors was prepared to argue before me that the provision of compensation to be found in that paragraph was wider than had been assumed by the National Coal Board. But, assuming that the view of the National Coal Board is right, it does not seem to me to go any distance to support their submission. Where a man owns minerals under the land and is notionally going to sell them, he must, of course, grant a right to win, get and carry away, and he must, as a practical measure, also grant a right to let down the surface on some terms. If he is content to accept compensation for damage only to the land, he will be able to get a larger royalty. Therefore, as it was put, what he loses on the swings he gains on the roundabouts; and I can see nothing in the Act or in para. 6 (1) which entitles me to assume that I ought to limit in any way the compensation which the objectors may justly claim.

F That paragraph merely deals with the machinery for ascertaining the true and proper compensation.

Then reliance was placed on a recent Act, the Coal-Mining (Subsidence) Act, 1957, which gives a right in very broad terms to persons who had no right of support to claim damages or compensation for subsidence in certain cases. But s. 6 of that Act made it quite plain that, where a person had a legal right to make a claim, he would not in any way be prejudiced: he merely had to elect whether he would proceed under that Act or rely on his legal rights. That Act, again, does not support in any way the argument of the National Coal Board. It was then said, and said truly, that the National Coal Board were not operating for private gain, but in the national interest. Their duties, as they are set out in s. 1 (1) (c) of the Coal Industry Nationalisation Act, 1946, are:

H “making supplies of coal available, of such qualities and sizes, in such quantities and at such prices, as may seem to them best calculated to further the public interest in all respects, including the avoidance of any undue or unreasonable preference or advantage.”

I Under s. 1 (4) (c) they are bound to try to secure that their revenues shall be sufficient to meet all their outgoings properly chargeable to revenue account. It is said, therefore, that it would be wrong, when one is considering the national interest, to place too onerous a burden on the National Coal Board, because they are under this duty to make coal available to the public reasonably cheaply, and, incidentally, to try to make their revenues and outgoings meet.

It was said in particular that, even if some measure of compensation should be payable for consequential damage, it would be wrong for the National Coal Board to pay private concerns for loss of profits, because that would be paying

to the companies profits which would be available for the companies' shareholders; and that, therefore, any compensation payable for consequential damage should not include compensation for consequential damage related to profits or gains. I confess that I am quite unable to understand that argument, unless it be jealousy on the part of the National Coal Board at seeing others making profits which they have shown themselves so far quite unable to earn. Then it is said that it would be very difficult to assess damages for loss of profits, goodwill, and so on; that there would be an unknown and large number of claims, great difficulty in finding out whether they were justified; and that, in a heavily built-up industrial area like this, it might be almost impossible, commercially (at any rate, in the Deep Pit area), to work the coal at all, and it would, in effect, be sterilised.

I look on the matter in this way. First, I have to be satisfied under s. 6 (1) of the Act of 1923 whether it is in the national interests that a right of mining should be granted. The answer to that I gave at the beginning of this judgment. It is plainly Yes. I then have to see on what terms this right, the right to let down, should be granted, and for that I turn to s. 6 (5). I must have regard to all the circumstances of the case,

“ . . . and (so far as relevant) to the royalties, covenants, and conditions reserved by or contained in the applicant's existing mining lease or leases (if any), or customary in mining leases in the district.”

It is common ground, for reasons which I have already given, that there are no such mining leases, because they were all void, so far as relevant to this application; and I go further, and I say that I do not think, even if there had been some mining leases available in the district, that they would have any relevance for the purpose that I have to consider. A mining lease essentially gives a right to get coal, and royalties are to be paid for it; and quite different considerations may come into play when one is considering what it is right to insert as compensation for damage due to subsidence when no lease is being granted. I agree that in some cases the surface owner may be different from the person granting the mineral right; but in many cases he will not be. I have quite a different case to consider.

The National Coal Board, as successors to the Coal Commission (9), own the minerals. All they want is a right to let down, and that is the right for which they have to pay. I cannot see any answer to the objectors' claim. Why should they be expropriated and have part of their property, their valuable rights, confiscated without compensation? I do not see how the court could properly make such an order unless the Act of 1923 clearly imposed on the court an obligation so to do; and I think that it is quite clear that it imposes no such obligation. Even if I accede to the argument to regard this question of compensation as all part of the national interest, I cannot see that it is in the national interest that the owners of the surface above the application areas should have their property confiscated for the general benefit of the public at large. It seems to me right that the public at large should pay through the medium of the National Coal Board full and proper compensation for the rights of which the objectors are being deprived. Accordingly, it seems to me that the order for which the objectors are asking, that is to say, substantially as in the order of 1952, subject to the amendments with which I shall deal in a moment, must be made. I only desire to add that, if I am wrong in my view that the relevant considerations are to be found in s. 6 (5) of the Act of 1923 and if this is to be regarded as a question of compensation under s. 6 (2), thereby bringing s. 9 into play, the objectors would have an a fortiori case, for one would have to consider,

(9) The Coal Commission, which was created by s. 1 of the Coal Act, 1938, was abolished by the Coal Industry Nationalisation Act, 1946, s. 38 (5) and the Coal Commission (Dissolution) Order, 1947 (S.R. & O. 1947 No. 396), and the commission's interests and assets vested in the National Coal Board.

A under s. 9 (2), what would be termed reasonable between a willing grantor and a willing grantee; and why a willing grantor should be prepared to surrender his property, or part of it, without payment, I do not understand.

I pass, then, to certain subsidiary points. The first relates to sewers. The corporations of Newcastle-under-Lyme and Stoke-on-Trent are the sewerage authorities for their respective areas, and they have a large number of sewers embedded just under the surface of the application area. It is inevitable that during mining there will be subsidence, and, no doubt, cracks will appear and damage may be done; and the question is: What provision should be inserted in the order in regard to that? In 1947 it was decided by the Court of Appeal, in *Newcastle-under-Lyme Corpn. v. Wolstanton, Ltd.* (10), that local authorities have no rights to support of the sewers vested in them unless they also own the surface of the land. Therefore, the position until the Coal-Mining (Subsidence) Act, 1957, was that local authorities had no right to support for their sewers, and, therefore, the National Coal Board could work without paying any compensation; but under the Act of 1957 local authorities were given the right to claim for damages to their sewers, but not for consequential damage. The National Coal Board say, therefore, that unless the local authorities prove in any particular case that they are the owners of the surface, they should be left to their statutory rights under the Coal-Mining (Subsidence) Act, 1957. The corporations, however, say that they have given up a good deal in connexion with the many public buildings which they own or for which they are responsible, and, to use modern political parlance, the whole thing should be treated as a package agreement, and they should be allowed this extra consequential damage as a term of consenting to the order or, at any rate, of withdrawing their opposition and entering into some agreement. The short answer to that seems to me that they have not in fact entered into an agreement which deals with the question of these sewers. It seems to me plain that they should have full and fair compensation, no more and no less. It does not seem to me that, in respect of these sewers, they have any rights for which they are to be compensated, and, therefore, to that extent I propose to put in something to the effect of the last four lines (11) of para. 5 of Sch. 2 to the proposed minutes of the National Coal Board.

There are one or two matters which also remain to be dealt with. One class of objector is wholly outside the application area. The evidence was that, through these deep workings going down ultimately, perhaps, to four thousand feet, the subsidence will be less, but it may be over a greater area; and one mining expert has estimated that the surface will be affected perhaps up to 520 yards outside the application area. It is submitted on behalf of a number of these persons, all of whom are completely outside the application area and yet within 520 yards of it, that some provision should be made for their benefit to ensure that they have some rights as to consequential damage. But I accept the submission of counsel for the National Coal Board on this point. It seems to me that persons who are wholly outside have no locus standi under the Act of 1923. They may, indeed, be able to make some bargain, and that was done by one of the objectors, Michelin Tyre Co., but that is an agreement which is wholly outside the order which I am proposing to make. The position seems to me to be this: first, the National Coal Board are not asking to work any minerals under these persons' lands. Secondly, they are not asking to let down their land. They are only asking for liberty to let down the land within the application areas. If anyone outside that area has a right of support from adjacent lands and can prove their title to it, they can, of course, obtain an injunction against the National Coal Board to prevent them working, it matters not where, so as to disturb their rights. If they have no such right, then they will not get an injunction. It seems to me

that nothing that I say in any order I make can affect the position at law of those who are wholly outside, because my order does not affect that land at all. It is true that, in the order made in 1952 in *Re National Coal Board's Application* (12) DANCKWERTS, J., included in the order provisions for the protection of a school which was outside the area; but, reading the judgment as a whole, it is quite plain that he was only dealing with the matter as part of some general agreement which had been reached between the National Coal Board and the Staffordshire County Council, who were the owners of a number of schools in the area; and it is quite plain that the point with which I have had to deal was not before him at all. Therefore, there is nothing in that authority which either helps or hinders me from coming to the conclusions to which I have come, namely, that the objectors whose lands are outside, but near to, the application area have no locus standi in the matter.

Certain of the objectors own land partly in and partly without the application area. [HIS LORDSHIP referred to two such objectors, and continued:] They submit that they should be entitled to have consequential damage in respect of that part of their factory which is outside the application area as well as that which is within it. In neither case that I have mentioned was any agreement made. They must, therefore, be compensated fairly and fully—not too little and not too much. In respect of such part of the factory as is outside the application area, they have no rights and, therefore, they get no compensation.

That, I think, deals with all matters of principle. I propose to stand this matter over for one month until July 9, as one or two agreements have not yet been put into final shape. I hope that the parties will then come before me with an order on every part of which they are all agreed, consistently with the judgment which I have just delivered.

[HIS LORDSHIP then heard argument on costs.]

June 12. UPJOHN, J.: I have now to deal with the costs of this application, and it is a question which has been fully argued before me. It is quite plain, having regard to the provisions (13) of s. 10 (1) (c) of the Mines (Working Facilities and Support) Act, 1923, that the Railway and Canal Commission had a full discretion with regard to costs; but they did, in fact, adopt a rule of convenience in normal cases, as appears from their decision in *Re New Hucknall Colliery Co., Ltd.* (14). In his judgment SANKEY, J., said:

"I think we have power to give costs, but I also agree with him [counsel for the objectors, who submitted that no costs should be given] that it must be a very exceptional case in which we do give costs, and although I do not wish in any way to be a prophet, or in any way to bind either ourselves or our successors, I too think that the occasions on which we do give costs will probably be very rare occasions."

The learned judge then went on to say that that was in fact one of those very rare occasions, and he ordered the objectors to pay the costs.

The Railway and Canal Commission was abolished in 1949, and the jurisdiction was transferred to this court. R.S.C., Ord. 54.0, deals with the jurisdiction conferred on this court. By r. 12 it is provided:

"The ordinary practice and rules of the Chancery Division so far as they are not inconsistent with this order shall apply to proceedings under this order."

So far as costs are concerned, therefore, R.S.C., Ord. 65, r. 1, applies, and it is

(12) [1952] 1 All E.R. 678; [1959] Ch. 519.

(13) Section 10 (1) of the Act of 1923 was repealed by the Railway and Canal Commission (Abolition) Act, 1949. By para. (c) of the repealed subsection, the discretion of the commission with respect to costs was not to be limited by s. 2 of the Railway and Canal Traffic Act, 1894.

(14) (1925), 41 T.L.R. at p. 384.

A quite plain that this court has a complete discretion as to awarding costs in cases under the Act of 1923, and that, indeed, is not disputed.

B A number of orders has been made, but in only one of them, so far as I am aware, has there been any judicial decision on the matter, and that is *Re National Coal Board's Application* (15) in 1952 in the Wolstanton area, an application which I discussed fully in my main judgment. There, apparently, it was argued by the National Coal Board that the practice of the Railway and Canal Commission in not granting costs should be followed; and DANCKWERTS, J., said:

C "On the question of costs it was suggested by counsel on behalf of the applicant that the practice of the Railway and Canal Commission in not granting costs (as a general rule) be followed, although he (HIS LORDSHIP) had full discretion in the matter. Certain objectors submitted that they ought to be granted costs. The jurisdiction which he had seemed to him to be sui generis and was not to be compared with any of the other jurisdictions of the Chancery Division. The rule normally would be that costs should not be awarded, and he proposed to abide by that rule in the present case."

D I am not quite clear whether the learned judge was attempting to lay down a rule or not. That matter was discussed in *Re National Coal Board's Application* (16) before ROXBURGH, J., when, in the course of what I think was an interlocutory judgment, having cited the passage which I have just read from the judgment of DANCKWERTS, J., the learned judge said this:

E "I am not quite sure whether he means that somebody else had laid down a rule which he proposed to follow or that he was tentatively suggesting that he was laying down a rule. But I will not believe that he was intending formally to lay down a rule. First of all, I am not clear what jurisdiction he has got to lay down that rule. He has, of course, every possible jurisdiction to decide the case before him, but if I remember rightly, though it has not been fully explored before me, my duties in regard to costs are dealt with by statute."

F However, in the result it became unnecessary for ROXBURGH, J., to come to any conclusion on the matter.

G With great respect to DANCKWERTS, J., if he was attempting to lay down any "normal" rule, he did so per incuriam, and I do not think that he would have done so had his attention been drawn to the authorities which have been cited to me. I refer in particular to *The Friedeberg* (17) and *The Young Sid* (18). I will cite only a passage from the judgment of SANKEY, L.J., in *The Young Sid* (18). He said (19):

H "If those are correct statements as to the practice in the Admiralty Court, they do not convey to my mind that there is a hard and fast rule upon the subject which can be treated as a rule of practice. If there were I think it would be wrong. Personally I rather think it is a list of instances in which the court has or has not given costs in the particular case, which may serve as a guide to a court trying subsequent cases, but which is not binding upon such a court. To begin with, if there were such a hard and fast rule, it would contravene Ord. 65, r. 1, as to costs, which has statutory authority, and which expressly provides that the costs shall be in the discretion of the court or judge."

I A number of orders has been made by this court since the transfer of the jurisdiction in 1949, but, as I have said, in none of them, I think, has the question of costs been argued except in the cases which I have mentioned. I have been told about all these orders, but, in my view, nothing has yet emerged which makes it safe to express any judicial view whether ultimately a settled practice

(15) [1952] 1 All E.R. 678; [1952] Ch. 519.

(16) June 22, 1955, unreported.

(17) (1885), 10 P.D. 112.

(18) [1929] P. 190.

(19) [1929] P. 190 at p. 201.

will or will not appear. That can be seen only in the future as and when more and more cases are decided by this court. I propose, therefore, to deal with this case solely as a matter of discretion on its own particular facts, without attempting to lay down any general or normal rule, or anything of that sort. A

I am not going to review the facts here at any length. The matter started in this way. In their application the National Coal Board were seeking to let down, particularly in the Deep Pit area, without any restriction on method of working, and with no other restrictions as to leaving support or providing for packing, and so on. As they state at the end of para. 15 of the application: B

"They accordingly request that the rights applied for should be granted subject to no restrictions other than that they should work the described minerals in this area in skilful and workmanlike manner by such methods and to such extent as they consider to be suitable to the conditions prevailing and necessary to preserve the unimpeded functioning of manufactories and public utility undertakings on the surface." C

The same request was expressed in relation to other areas.

Such wide and unfettered powers of working and letting down without any restriction were calculated to bring energetic objection from the mildest and most unlitigious of surface owners, and it is not in the least surprising that there was this large number of objectors. Ultimately agreement was reached which made it unnecessary for me to go into the question of working or to hear any of the many witnesses cross-examined. But that the National Coal Board had to make valuable concessions is shown by para. 4A of Sch. 2 to their proposed minutes of order, where they have given an undertaking that the roof shall be supported with not less than fifty per cent. of packing; that the voids or wastes shall not exceed ten yards in width; and D

"that the interval to be allowed to elapse between the termination of the working of any seams in any area and the commencement of the working of any overlying or underlying seam in the same area shall be not less than three years." E

No doubt there had been substantial argument whether the period should be three or five years. Not only that, but a number of agreements have been reached which give valuable protection to particular local authorities and to particular large firms and companies engaged in trade on the superadjacent land. Moreover, some important matters of law have had to be decided. F

Let me make it plain at once that, in making the order which I am going to make, I do not in the least do so because the National Coal Board have failed on this main point of compensation. The question of fair compensation had to be determined. That was to the benefit of the National Coal Board. It was also to the benefit of the public. This case has decided other matters of importance. It decided whether outside owners had any *locus standi*. It decided the rights of those who have works partly within and partly without the area. In those matters I decided in favour of the National Coal Board, and also in relation to questions of support for sewers and pipes. All those are matters of importance, particularly to the National Coal Board and to those who have the misfortune to sit above valuable coal seams. On the other hand it is to the benefit of the National Coal Board that the objectors have behaved extremely reasonably in this case and have not incurred unnecessary expense. All that they have done is to protect their rights. In the circumstances of this particular case, I propose to order the National Coal Board to pay the costs, as between party and party, of the objectors who appear before me. G H I

The only other effective order which I shall make today is that the matter will stand over until July 16. The provision as to costs which will go into the order, which will be made at the adjourned hearing, will operate as of that day, so that objectors will be entitled to their proper costs incurred between today and the adjourned hearing.

A [During the course of the hearing, the National Coal Board made an agreement with one of the objectors, Michelin Tyre Co., Ltd., whose property was wholly outside the application areas. Counsel for Michelin Tyre Co., Ltd. did not ask for costs and costs were not granted. Other objectors whose properties were outside the application areas, and who had applied for costs, were granted their costs.]

B *Order accordingly.*

Solicitors: *Donald H. Haslam*, agent for *F. W. Dawson*, Dudley (for the National Coal Board); *Sherwood & Co.*, agents for *Knight & Sons*, Newcastle-under-Lyme; *Wedlake, Letts & Birds*; *Cunliffe & Mossman*; *Wedlake, Letts & Birds*, agents for *Kent, Jones & Done*, Alsager; *Sharpe, Pritchard & Co.*; *Kennedys*; *Cunliffe & Mossman*, agents for *Knight & Sons*, Newcastle-under-Lyme; *W. Usher*; *Doyle, Devonshire & Co.*; *Kingsford, Dorman & Co.*; *Gibson & Weldon*; and *M. H. B. Gilmour* (for objectors).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

D NARCISSI v. WOLFE.

[CHANCERY DIVISION (Roxburgh, J.), June 15, 16, 1959.]

E *Landlord and Tenant—New tenancy—Business premises—Holding—Occupation of part of premises resumed by tenant after date of application for new tenancy—Occupation for purpose of extending right to new lease—Whether colourable—Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2 c. 56), s. 23 (3), s. 32 (1).*

F A tenant of business premises, where he carried on the business of a restaurant, sub-let (furnished) the first, second and third floors of the premises for residential purposes. He occupied the remainder of the premises, viz., the ground floor and basement, for business purposes. His lease expired on Dec. 25, 1958. On June 3, 1958, the tenant issued a summons for a new lease under the Landlord and Tenant Act, 1954, s. 24. On Feb. 21, 1959, the sub-tenancy of the first floor terminated, and by an affidavit dated Feb. 23, 1959, the tenant stated that he now retained possession of the first floor (which comprised two rooms and a kitchen and bathroom), which he used partly for his own accommodation (if he wished to stay overnight on the premises), partly for office and administrative purposes and partly for the storage of food. The basement had been condemned as unsuitable for the storage or preparation of food, except for storage in sealed, vermin-proof containers and except for the initial preparation of root vegetables subsequently cooked. The tenant in cross-examination indicated that he wished to acquire a lease of the whole premises, and to secure contribution from the landlord to the cost of the renovation of the basement; and that, if he could achieve these objects, he would cease the use of the first floor for the purposes of his business. The first floor contained articles of furniture belonging to the tenant. He had only used the first floor rooms for sleeping for one night, and their use for office purposes would be in breach of a covenant in the original lease. There was no conflict of evidence that the tenant used the first floor to some extent for storage of food. It was conceded by the landlord that a new tenancy of some part of the premises should be granted. Under s. 29 of the Act of 1954 the new tenancy to be granted was a tenancy of "the holding", and by s. 23 (3) "the holding" was the property comprised in the former tenancy excluding any part thereof not occupied by the tenant. By s. 32 (1) the court was to designate in the order the property that constituted the holding "by reference to the circumstances existing at the date of the order."

Held: (i) the tenant was not entitled to a new lease of the second and third floors because at the date of the order they were not occupied by the tenant within s. 23 (3) of the Act of 1954. A

(ii) although the occupation of the first floor by the tenant was for the purpose of assisting his obtaining a new lease of that floor, his occupation was not merely colourable, because he was genuinely in need of storage accommodation for food, and at the date of the order he was in occupation of the first floor within s. 23 (3); accordingly the holding, for the purposes of the grant of the new tenancy, would be designated as comprising the first floor, ground floor and basement. B

SEMBLE: occupation within s. 23 (3) of the Landlord and Tenant Act, 1954, cannot be based on acts that are in breach of covenant (see p. 76, letter H, post). C

[As to the holding for the purposes of Part 2 of the Landlord and Tenant Act, 1954, see 23 HALSBURY'S LAWS (3rd Edn.) 885, para. 1707, text and notes (k)-(m); and for cases on the subject, see 3rd DIGEST Supp.]

For the Landlord and Tenant Act, 1954, s. 23 and s. 32, see 34 HALSBURY'S STATUTES (2nd Edn.) 408, 417.] D

Case referred to:

Bagettes, Ltd. v. G. P. Estates Co., Ltd., [1956] 1 All E.R. 729; [1956] Ch. 290; [1956] 2 W.L.R. 773; 3rd Digest Supp.

Adjourned Summons.

The applicant, Celeste Narcissi, who was the tenant of business premises No. 5, Panton Street, Haymarket, London, applied by originating summons dated June 3, 1958, under the Landlord and Tenant Act, 1954, s. 24, for the grant of a new tenancy. The business carried on at these premises by the tenant was that of restaurateur. The respondent, Henry Lucien Wolfe, who was the landlord, owned the freehold of the premises. The current tenancy of the premises arose under a lease dated Jan. 6, 1938, between Barlington Property Co., Ltd., and Luigi Tozzi (predecessors in title of the landlord and the tenant respectively) for a term of twenty-one years from December, 1937 (which expired on Dec. 25, 1958), at the yearly rent of £500, subject to certain covenants. E

The tenant served on the landlord a notice dated Feb. 20, 1958, which proposed the terms on which a new lease should be granted. The landlord served on the tenant a counter-notice, dated Apr. 18, 1958, of his intention to oppose the application for a new lease. It was conceded that a new lease should be granted but the question was whether the new lease should be of the whole or part of the premises comprised in the original lease. The original lease stated that the original tenant was a restaurant proprietor and contained a covenant on his part F

"Not to use the demised premises otherwise than for the trade or business of a restaurant proprietor including the sale of tobacco confectionery and other similar produce and/or as offices and showrooms for such business to be first approved by the landlord in writing such approval not to be unreasonably withheld or as to the floor of the said premises above the ground floor without any such consent for private residential purposes . . ." G

The premises comprised a basement containing several storerooms, a room containing air-conditioning plant, a room containing a boiler for central heating, and vaults; the ground floor, containing a shop, behind which, and separated by a partition, was a kitchen; and the upper floors, containing living accommodation. The tenant carried on the business of a restaurant on the ground floor and in the basement using the storerooms and air-conditioning and boiler plants as ancillary to the business and the tenant sub-let the three upper floors as furnished flats to persons not employed by him in his business. H

The tenancy agreements of the sub-lettings on the second and third floors I

A came to an end on Dec. 25, 1958 and the sub-tenants signed new tenancy agreements which continued in force. Except as to rent, the sub-tenancy agreements of the second and third floors were similar. The first floor had also been sub-let furnished but whereas the second and third floors still continued to be sub-let, the sub-tenancy of the first floor came to an end on Feb. 21, 1959 (i.e., after the commencement of these proceedings) and the tenant obtained and retained possession thereof. The first floor consisted of two rooms, a kitchen and a bathroom. In his affidavit, which was dated Feb. 23, 1959 (i.e., two days after the determination of the sub-tenancy of the first floor), the tenant stated:

C “As regards the first floor the previous tenant left on Feb. 21, 1959, and I have thereafter retained and now retain possession of the rooms thereon. I use the rooms partly for accommodation for myself should I wish to stay overnight at the premises; partly for office and administrative purposes in connexion with my restaurant business on the ground floor and partly for the storage of food. The latter purpose has become essential as the medical officer of health for the City of Westminster has recently condemned the basement as wholly unsuitable for the preparation and service of food in its present condition.”

D The landlord inspected the first floor on Apr. 21, 1959, and in his affidavit, on which he was not cross-examined, he deposed:

E “The said first floor which consists of the two rooms and a kitchen and a bathroom contained in the front room a sofa and two armchairs, a bed with mattress but no bed clothes, curtains, a writing table with drawers upon which there were two box files, one of which was in a wire letter basket. No writing materials of any kind were visible. The mantelshelf had on it two earthenware jampots, four linen packages apparently containing flour and two cardboard boxes. In the back room there was a bed with mattress but without bed clothes. There was no evidence that this room was used either as office or store. The kitchen and bathroom appeared to be fitted for use as such and contained no evidence that they were used in any other way. In the hall there was a table on which there was a quantity of packaged food-stuffs. No fresh or open food was visible. The space required to accommodate the said packages would amount to about five or six feet in my estimation. In the basement there was a refrigerator working noisily. The applicant opened it without being required to and showed that it was empty. There was also a bath with a machine at one end. There were some lengths of hose in the bath. The machine is one for washing or peeling potatoes. Judging by the water on the floor and in the bath, the machine had been used that morning. There was also a large locked store, which contained a quantity of packaged foodstuffs much larger in volume than the amount which I saw in the first floor flat. From what I saw the store in the basement is the main store. To the best of my knowledge the basement has not been used for the preparation or service of food except for washing and peeling potatoes.”

H The landlord ascertained from the relevant medical officer of health that the tenant had not been required to do any specific work of repair or alteration to the basement, provided that it was not used other than for the storage of food in sealed and vermin-proof containers and for the initial preparation of root vegetables subsequently cooked.

I L. A. Blundell, Q.C., and H. Lester for the applicant, the tenant.

R. F. G. Ormrod, Q.C., and J. D. F. Moylan for the respondent, the landlord.

ROXBURGH, J., after stating the nature of the application and the facts regarding the lease, continued: Two questions were referred to me by the master. The first was whether a new lease should be granted, and the second was, if so, whether the new lease should be of the whole or part of the premises comprised in the former lease. On the first question it is conceded that a new lease

should be granted of something and accordingly, with the consent of the parties, I order today the grant of a new tenancy in pursuance of the Landlord and Tenant Act, 1954. The second question is by no means a matter of consent and on that I now have to deliver judgment.

I must read the relevant sections of the Landlord and Tenant Act, 1954, and then discuss the evidence. Section 23 (3) provides as follows:

"In the following provisions of this Part of this Act the expression 'the holding', in relation to a tenancy to which this Part of this Act applies, means the property comprised in the tenancy, there being excluded any part thereof which is occupied neither by the tenant nor by a person employed by the tenant and so employed for the purposes of a business by reason of which the tenancy is one to which this Part of this Act applies."

It is conceded that Part 2 of the Act applies to the tenancy, and the property comprised in the tenancy is the whole of No. 5, Panton Street. I am not concerned in this case with occupation by a person employed. The question with which I am concerned is whether some part of the premises should be excluded on the ground that it is not occupied by the tenant. That is the only question which I have to decide today. Section 29 (1) provides:

"Subject to the provisions of this Act, on an application under s. 24 (1) of this Act for a new tenancy the court shall make an order for the grant of a tenancy comprising such property, at such rent and on such other terms, as are hereinafter provided."

It will be observed that it appears there that only one order is contemplated. Section 32 (1) provides:

"Subject to the next following subsection, [which has no application to the present case] an order under s. 29 of this Act for the grant of a new tenancy shall be an order for the grant of a new tenancy of the holding; and in the absence of agreement between the landlord and the tenant as to the property which constitutes the holding the court shall in the order designate that property by reference to the circumstances existing at the date of the order."

Section 33 provides:

"Where on an application under this Part of this Act the court makes an order for the grant of a new tenancy, the new tenancy shall be such tenancy as may be agreed between the landlord and the tenant, or, in default of such an agreement, shall be such a tenancy as may be determined by the court to be reasonable in all the circumstances, being, if it is a tenancy for a term of years certain, a tenancy for a term not exceeding fourteen years, and shall begin on the coming to an end of the current tenancy."

Section 34 deals with rent in the same sort of phraseology:

"The rent payable under a tenancy granted by order of the court under this Part of this Act shall be such as may be agreed between the landlord and the tenant or as, in default of such agreement, may be determined by the court . . ."

Section 35 is somewhat similar:

"The terms of a tenancy granted by order of the court under this Part of this Act (other than terms as to the duration thereof and as to the rent payable thereunder) shall be such as may be agreed between the landlord and the tenant or as, in default of such agreement, may be determined by the court; and in determining those terms the court shall have regard to the terms of the current tenancy and to all relevant circumstances."

[HIS LORDSHIP read the tenant's covenant relating to user, which is set out at p. 72, letter H, ante, and, after commenting on its language and rejecting

A constructions based on falsa demonstratio, continued:] I can construe it in this way: that the tenant, who was a restaurant proprietor, was able to use the whole premises for the trade or business of a restaurant proprietor if he wanted to; and that he could, without any permission, use the first and second and third floors, but not the ground floor or basement, for private residential purposes.

B Until Feb. 21, 1959 (i.e., after the issue of these proceedings), there was, in my judgment, no doubt of what the holding consisted, viz., the ground floor and the basement, because all the other three floors were let to sub-tenants, furnished. The tenancy of the second floor is in these terms, written by the first tenant:

C "As my tenancy agreement came to an end on Dec. 25, 1958, I confirm that I now occupy the three furnished rooms on the second floor of 5, Panton Street as weekly tenant at [a certain rent.] I understand that if you are required to give up your own lease of the building at any time, I am immediately to leave my rooms and any rent will be adjusted. I agree not to sub-let any of the rooms or take any lodgers or remove any of the furniture, carpets, curtains, crockery, cutlery or other effects. I will not use the rooms for any immoral or illegal purpose. I am to pay for all gas and electricity consumed according to the check meters and I agree to supply and launder my own bed linen. All furniture and effects and the rooms will be kept by me in good and clean condition. You are to maintain a supply of constant hot water and to clean the entrances passages and staircases. You will supply any breakfasts I require in your restaurant at ordinary prices, less 25 per cent. You are entitled to enter the rooms at any time for inspection and to remove or replace any of the furniture or other effects, provided the rooms always remain adequately furnished. For my convenience, you have supplied a street door key which I will return on demand."

The tenancy of the third floor was of a different rent but otherwise the terms were similar.

F The sole question with regard to the second and third floors is whether they are occupied by the tenant. That is the phraseology of s. 23 (3). I do not think that anything which has been said to me throws any real light on the meaning of the word "occupied" in this case. There is much law about the word "occupied" but that does not appear to me to be applicable to this Act. There is a decision of the Court of Appeal in *Bagettes, Ltd. v. G. P. Estates Co., Ltd.* (1) that certain flats, which had been sub-let unfurnished, were occupied by the sub-tenants and not by the sub-lessors. I do not think that that case throws any light on the question whether a furnished flat, let in terms which I have indicated, is occupied by the sub-lessor or by the sub-tenant, but, applying common sense, it seems to me that the second and third floor flats are occupied by the sub-tenants and not by the tenant, and I so decide.

H The first floor stands in quite a different position. It is to be noted again that the date at which the holding is to be designated is the date of this order and not the date of the issue of the application. It is suggested that an occupation for colourable purposes of the premises is indicated by the evidence in this case. In my view, it cannot be said that the transactions were colourable though they were pretty near the line. [His LORDSHIP referred to the evidence on affidavit (which is stated at p. 73, letters B to H, ante), and to the cross-examination of the tenant, whom he regarded as a truthful witness. His LORDSHIP continued:] I The tenant really made no bones about the fact that there were two things that he was interested in and hoped to achieve: one was a new lease of the whole of the premises and the other was the renovation and to some extent reconstruction of the basement to the cost of which, in his view, the landlord ought to contribute, and he made no secret of the fact that if he could achieve both these objects he would cease the use of the first floor himself for the purpose of his business and

although he did not say so he was intending to let it either as a furnished flat or for some other purpose. I think that he was doing this in part to try to take advantage of the opening which Parliament has accorded to him by the nature of s. 32, and I can see nothing against it when Parliament has provided him with the opportunity. A

The question is whether there was or was not a real occupation, however conditional, or whether it was a merely colourable occupation, and in that connexion, as I have said, the tenant made some rather striking admissions. B
As regards the storage he said this:

"I did use the first floor for the storage of food: flour, custard, tea, sugar, butter, dried fruit, jam, marmalade, dripping, lard, etc. All those things are there today."

Then he said something about the refrigerator (2) to which I really need attach no importance except that it was in that connexion that the tenant indicated quite plainly that his purpose was a temporary purpose until this case was over and until, so he added, some work had been done in the basement. Then he was asked about spending a night in the first floor and he made some important concessions. He said that he had not spent a night there until Feb. 21 or Feb. 22, 1959, and if one looks carefully at his affidavit he does not say that he had only spent one night there, and he could not say when he last spent a night there. D
He said that there were no sheets; he had no pyjamas and he slept in his clothes. He said that he had only done it once. Then he dealt with the so-called office. He said: "I sometimes use the dining room table for writing out cheques and making out bills and that sort of thing", and he said that he kept his invoices downstairs and that he kept his stationery downstairs. He certainly did not gild his case at all in the witness-box. It was worse when he left it than when he went there, and in respect of matters on which he really could not have been seriously cross-examined—for instance, nobody could have said that he had not got any pyjamas there if he had chosen to say that he had. E

The purpose was obvious enough. It was to try to get a new lease and to try to get the first floor as well as the basement and the ground floor; and the occupation of the first floor was with a temporarily designed object. I do not think that it is my business to investigate his purpose; it seems to me that Parliament has really invited something of this sort and I understand that I have to see whether there is a real occupation or whether it is simply colourable. F
I cannot say that it is simply colourable. It may be that what remained of his in the flat was enough to make the occupation revert to him when the last tenant left. I deliberately refrain from deciding that question. It is a point, however, which I cannot entirely ignore. There was this furniture and while it might not be enough in itself (I do not decide that), it is an item in the schedule of points. G

One thing which I propose to eliminate altogether is the use of the premises as office accommodation which seems to me to have been almost negligible and a breach of covenant, and I am inclined to accept counsel's argument that under the Act occupation cannot be based on acts of occupation which are in breach of covenant. That does not apply either to the one night when he slept in the place or to the use for storage. It does not seem to me that either of these acts was a breach of covenant. Again, I do not decide whether the use of the first floor for one night's residence in several months would be enough. The really important matter, in my judgment, is one about which so far as I can see there is no real conflict of evidence and that is the use of the first floor for purposes in connexion with his business as a restaurateur. I am quite satisfied as to that on the evidence as a whole, and in particular on the letter from the medical officer of health which says that he had been warned that he must not use the basement for any purpose "other than for the storage of food in sealed and vermin-proof containers and for the initial preparation of root vegetables subsequently I

(2) The refrigerator was in the basement, see p. 73, letter F, ante,

- A cooked". That meant that, if he stored food otherwise than in such containers, he had to store it in some other part of the premises. It is perfectly true that until Feb. 21, 1958, he managed to store on the ground floor enough to carry on his business but I have no doubt that that caused him some inconvenience and that although he had other purposes in mind, as I have already said, I think that he found it convenient for his business to store food on the first floor.
- B asked how he managed before the first floor became vacant, he said that he more or less bought goods day by day. That is not an economical way of carrying on a restaurant and I accept the evidence that he was in real need of storage accommodation and will continue to be in such need until the basement is put into a condition in which it can be used for storing any food. It is that aspect of the case which makes me think it is impossible to say in this case that the occupation
- C was merely colourable.

Therefore so far as the first floor is concerned today (although the evidence is to some extent out of date, but I do not see how I can get nearer than that now) I hold that today, the date of the order which I propose to make, the tenant is in occupation of the first floor. Accordingly I designate the holding at the date of this order as being the basement, the ground floor and first floor, but excluding

D the second and third floors.

Order accordingly.

Solicitors: *Lesser, Fairbank & Co.* (for the tenant); *Arthur Hunt & Hunt* (for the landlord).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

E

FREDERICK LAWRENCE, LTD. v. FREEMAN HARDY & WILLIS, LTD.

- F [COURT OF APPEAL (Lord Evershed, M.R., Romer and Pearce, L.JJ.), June 3, 4, 5, 8, July 2, 1959.]

Landlord and Tenant—New tenancy—Business premises—Opposition by landlords—Intention to occupy premises for own business—Acquisition of interest by landlords under contract made in June, 1954—No pecuniary consideration from landlords—Tenancy expiring in March, 1959—Landlords' notice not having effect for certain purposes until three months after application disposed of—Whether landlords' interest purchased after beginning of the period of five years ending with the termination of the current tenancy—Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2 c. 56), s. 25 (1) proviso, s. 30 (2), s. 64.

- By an underlease dated Dec. 30, 1933, J. S. & Co., Ltd. demised business
- H premises to F. J. C., Ltd. for a term of twenty-five years (less three days) from Mar. 25, 1934. On Nov. 29, 1934, the underlease was assigned to the applicants and it remained vested in them until the expiry of the term on Mar. 22, 1959. By a lease dated Mar. 10, 1952, the premises were demised to J. S. & Co., Ltd. for a term of ninety-nine years subject to the tenancies affecting the same. By contract dated June 30, 1954, J. S. & Co., Ltd. agreed to sell the goodwill of their business, and certain premises (including the demised premises), to the landlords, no pecuniary consideration being
- I allocated in the contract to the transfer of the premises. Pursuant to that contract these demised premises were assigned to the landlords on Nov. 1, 1954, by registered transfer. The consideration for the transfer was the implied covenants for indemnity therein. The transfer was registered on Nov. 13, 1954, whereupon the landlords became entitled to the reversion expectant on the termination of the applicants' underlease. On Mar. 28, 1958, the landlords served notice on the applicants under the Landlord and

Tenant Act, 1954, s. 25 (1), terminating the applicants' tenancy on Mar. 22, 1959, and intimating that the landlords would oppose an application for a new tenancy on the ground that they intended to occupy the premises for the purposes of business carried on by them. On July 18, 1958, the applicants applied for a new tenancy and on the evidence filed it was not disputed that the landlords established their ground of opposition (viz., that specified in s. 30 (1) (g) of the Act); but the applicants contended that the landlords were precluded from opposing the application by s. 30 (2) of the Act of 1954, on the ground that the landlords had purchased their interest within a period of five years ending with the termination of the applicants' current tenancy. Under s. 64 of the Act of 1954, the effect of a landlord's notice under s. 25 (1) was to terminate the tenancy at the expiration of three months beginning with the date when the application for the new tenancy was finally disposed of. It was agreed that in order to ascertain the nature of the assignment of the leasehold interest to the landlords it was permissible to consider the contract preceding the transfer.

Held: the landlords had purchased their interest after the beginning of the period of five years ending with the termination of the applicants' current tenancy, within s. 30 (2) of the Landlord and Tenant Act, 1954, and were precluded thereby from relying on the ground of objection to the grant of a new tenancy specified in s. 30 (1) (g) for the following reasons—

(i) having regard to the terms of the contract preceding the transfer of Nov. 1, 1954, the transfer was part of a single transaction and constituted a purchase, i.e., a buying for money, within the meaning of s. 30 (2) of the Act of 1954, although no pecuniary consideration was allocated to the transfer of the leasehold interest in the premises.

H. L. Bolton (Engineering) Co., Ltd. v. T. J. Graham & Sons, Ltd. ([1956] 3 All E.R. 624) followed.

Dictum of BUCKLEY, L.J., in *Inland Revenue Comrs. v. Gribble* ([1913] 3 K.B. at p. 218) applied.

(ii) the date on which the landlords purchased the leasehold interest for the purposes of s. 30 (2) was June 30, 1954, viz., the date of the signing of the contract with J. S. & Co., Ltd.

(iii) the provisions of s. 64 of the Act of 1954 were not to be regarded as incorporated in s. 30 (2) for the purpose of ascertaining the date of the "termination of the current tenancy", and that date for the purposes of s. 30 (2) was the date specified in the landlords' notice served under s. 25 (1), viz., Mar. 22, 1959.

Re 88, High Road, Kilburn ([1959] 1 All E.R. 527) considered.

Per CURIAM: the effect of the proviso to s. 25 (1) [namely that s. 25 (1) took effect subject to, among other provisions, those of s. 64] was that the termination of the tenancy, which was determined by the landlords' notice, was without prejudice to its interim continuance for relevant purposes, which did not include, however, the ascertainment of the period specified in s. 30 (2) (see p. 87, letter B, post).

Appeal dismissed.

[As to the landlords' intention to occupy a holding, see 23 HALSBURY'S LAWS (3rd Edn.) 894, para. 1718.

For the Landlord and Tenant Act, 1954, s. 30 and s. 64, see 34 HALSBURY'S STATUTES (2nd Edn.) 414, 441.]

Cases referred to:

Bolton (H. L.) (Engineering) Co., Ltd. v. Graham (T. J.) & Sons, Ltd., [1956] 3 All E.R. 624; [1957] 1 Q.B. 159; [1957] 3 W.L.R. 804; 3rd Digest Supp.

Coutts & Co. v. Inland Revenue Comrs., [1953] 1 All E.R. 418; [1953] A.C. 267; [1953] 2 W.L.R. 364; 3rd Digest Supp.

- A *Emberson v. Robinson*, [1953] 2 All E.R. 755; [1953] 1 W.L.R. 1129; 3rd Digest Supp.
High Road, Kilburn, Re 88. Meakers, Ltd. v. D. A. W. Consolidated Properties, Ltd., [1959] 1 All E.R. 527; [1959] 1 W.L.R. 279.
Inland Revenue Comrs. v. Gribble, [1913] 3 K.B. 212; 82 L.J.K.B. 900; 108 L.T. 887; 42 Digest 735, 1582.
- B *Lysaght v. Edwards*, (1876), 2 Ch.D. 499; 45 L.J.Ch. 554; 34 L.T. 787; 43 Digest 704, 1430.

Appeal.

This was an appeal by the landlords, Freeman Hardy & Willis, Ltd. from an order of ROXBURGH, J., made on Feb. 6, 1959, on an originating summons taken out by the tenants. ROXBURGH, J., declared that by virtue of the provisions of the Landlord and Tenant Act, 1954, s. 30 (2), the landlords were not entitled to oppose the tenants' application for a new tenancy of certain premises on the ground specified in s. 30 (1) (g) of the Act.

L. A. Blundell, Q.C., and *Ronald Bernstein* for the landlords.

J. L. Arnold, Q.C., and *A. Heyman* for the tenants.

Cur. adv. vult.

- July 2. ROMER, L.J., read the following judgment of the court: This appeal arises out of an application by Frederick Lawrence, Ltd., who are the tenants of No. 167 and the upper floors of No. 169, High Street, Camden Town, Middlesex, for a grant of a new tenancy of those premises for a period of fourteen years from Mar. 22, 1959. The application was made under the Landlord and Tenant Act, 1954, s. 24, and the respondents to the application were Freeman Hardy & Willis, Ltd. (hereinafter referred to as "the landlords"). The landlords opposed the application on the ground specified in s. 30 (1) (g) of the Act. The matter came before ROXBURGH, J., and by his order dated Feb. 6, 1959, the learned judge declared that by virtue of s. 30 (2) of the Act the landlords were not entitled to oppose the tenants' application. The landlords appeal against that order.

- The facts are not in dispute. By an underlease dated Dec. 30, 1933, J. Sears & Co. (True Form Boot Co.) Ltd. (hereinafter referred to as "Sears Ltd.") demised the aforesaid premises to F. J. Cartwright, Ltd. for a term of twenty-five years (less the last three days) from Mar. 25, 1934. On Nov. 29, 1934, that lease was assigned to the applicants, the tenants, and remained vested in them on the expiry of the term on Mar. 22, 1959. By a lease dated Mar. 10, 1952, the said premises were demised to Sears Ltd. for the term of ninety-nine years, subject to the tenancies affecting the same, and on Nov. 1, 1954, the premises so demised were transferred (being registered land) to the landlords for the unexpired residue of the said term. On the registration of this transfer on Nov. 13, 1954, the landlords accordingly became entitled to the leasehold reversion in the premises expectant on the termination of the tenants' underlease and were still so entitled on Mar. 22, 1959. On Mar. 28, 1958, the landlords served on the tenants a notice under s. 25 of the Act of 1954 terminating their tenancy on Mar. 22, 1959, and intimating that they would oppose an application to the court for the grant of a new tenancy on the ground that on the termination of the current tenancy they (the landlords) intended to occupy the premises for the purposes of a business to be carried on by them. On July 18, 1958, the tenants applied for a new lease, and affidavit evidence was filed by both parties. As a result of this evidence it was plain that the landlords had established their ground of opposition as stated in the notice which they had served on the tenants (which was in fact the ground specified in s. 30 (1) (g) of the Act) and the tenants did not contend to the contrary. The tenants objected, however, that the landlords were precluded from opposing their application by the provisions of s. 30 (2) of the Act, which are in the following terms:

"The landlord shall not be entitled to oppose an application on the ground specified in para. (g) of the last foregoing subsection if the interest of the landlord, or an interest which has merged in that interest and but for the merger would be the interest of the landlord, was purchased or created after the beginning of the period of five years which ends with the termination of the current tenancy, and at all times since the purchase or creation thereof the holding has been comprised in a tenancy or successive tenancies of the description specified in s. 23 (1) of this Act."

The tenants' contention was that the interest of the landlords was (in the formula of the subsection) purchased or created after the beginning of the period of five years which ended with the termination of the tenants' current tenancy. Their case was that the relevant five-year period commenced in November, 1954, when the landlords took a transfer of the reversionary interest, and that their own current tenancy terminated on Mar. 22, 1959, which was the date of termination specified in the notice which the landlords had served on them pursuant to s. 25 of the Act.

The learned judge decided the question in the tenants' favour. He did so on the ground that whether or not the landlords had "purchased" their interest within the five-year period (a point which he found unnecessary to decide) the interest had been "created" within that period and that s. 30 (2) accordingly applied. On the appeal coming on before this court counsel for the tenants intimated that he desired to support the judge's order on the ground that the landlords had "purchased" their interest within the five-year period rather than on the ground that it had been "created" within that period. He conceded that the "interest" of the landlords, viz., the reversion expectant on the termination of the tenants' tenancy, had been "created" by the lease, hereinbefore referred to, of Mar. 10, 1952, and in our opinion this concession was rightly made. It is true that the landlords did not acquire this interest until 1954 but that seems to us to be irrelevant. In our judgment the word "created" in s. 30 (2) is referable to the creation of a landlord's interest and not to the creation of the landlord's title to it. The contrary view would appear to render the word "purchased", which appears as the alternative to "created", wholly redundant. The arguments before us were accordingly addressed to the question whether the landlords were disqualified from opposing the tenants' application on the ground that their interest was purchased after the beginning of the period of five years which ended with the termination of the tenants' current tenancy, and that is the issue with which we have to deal.

The first question which arises on this issue is whether the acquisition by the landlords from Sears Ltd., in 1954 of the leasehold interest in the premises dependent on the expiration of the tenants' tenancy constituted a "purchase"; for if it did not, the disqualifying provisions of s. 30 (2) do not apply. If this question were *res integra* there would, we think, be much to be said—particularly having regard to the dictionary definition of the word "purchase", to an example of which we later refer—for the view that the word "purchase" in the section under review should not be confined to a transaction of buying for money or (strictly) money's worth. For the limited construction of the word appears to involve serious anomalies. Thus, on this limited construction, it might make all the difference to a case like the present whether the landlord, in acquiring his relevant interest, had in addition to giving covenants to his vendor paid also a monetary consideration however small. Moreover, in a case where the landlord's interest had been "created" rather than "purchased" it would be immaterial whether the landlord had or had not, on the creation of his interest (e.g., by the grant of a lease), paid a cash consideration or its equivalent. But the question is not *res integra*; for this court in *H. L. Bolton (Engineering) Co., Ltd. v. T. J. Graham & Sons, Ltd.* (1) defined the word "purchased" in the Act of 1954 in a

A way which is, in our opinion, binding on us. DENNING, L.J., in whose judgment HODSON and MORRIS, L.J.J., concurred, expressed the conclusion that the word in s. 30 (2) of the Act of 1954 (2)

“ . . . has the same meaning as in the Rent Restrictions Acts. It has its popular meaning of buying for money, and not the technical legal meaning of acquisition otherwise than by descent or escheat.”

B What then is the popular meaning of “ buying for money ”? One of the definitions of “ buy ” in the SHORTER OXFORD ENGLISH DICTIONARY is “ to get possession of by giving an equivalent, usually in money; to obtain by paying a price ”. In *Inland Revenue Comrs. v. Gribble* (3), BUCKLEY, L.J., said:

C “ ‘ Purchaser ’ may, as it seems to me, mean any one of four things. First, it may bear what has been called the vulgar or commercial meaning; purchaser may mean a buyer for money. Secondly, it may include also a person who becomes a purchaser for money’s worth, which would include the case of an exchange. Thirdly, it may mean a purchaser for valuable consideration, which need not be money or money’s worth, but may be, say, a covenant, or the consideration of marriage. Fourthly, it may bear that which in the language of real property lawyers is its technical meaning, namely, a person who does not take by descent.”

BUCKLEY, L.J.’s judgment was a dissenting judgment but the passage which we have quoted was in no way at variance with the judgments of the other members of the court. It is clear, we think, from what was said in *Bolton’s* case (2) that “ purchased ” in s. 30 (2) of the Act of 1954 falls within the first of BUCKLEY,

E L.J.’s four categories, to the exclusion of the other three, and means “ bought for money ”. “ Money ” in this context is not confined to cash in its strict sense, for a man who bought something and paid for it by cheque would popularly be said to have bought it for money. It would, however, exclude a covenant, for the acquisition of property in consideration of giving a covenant falls within BUCKLEY, L.J.’s third category. The relevance of this is that in the transfer to

F the landlords of the property in question (together with other properties) the only consideration moving from the landlords to Sears Ltd. were the covenants implied under s. 77 (1) (c) of the Law of Property Act, 1925, and which were incorporated in the transfer. If, therefore, the only relevant document for present purposes was this instrument of transfer it would not be possible, in our judgment, having regard to *Bolton’s* case (2) and *Inland Revenue Comrs. v. Gribble* (3), to

G say that the landlords “ purchased ” the reversion in the premises. Both counsel for the landlords and counsel for the tenants, however, were agreed that in order to ascertain the true nature of the transaction between Sears Ltd. and the landlords under which the latter acquired their interest in the premises it is permissible to look to the contract which preceded the transfer for the purpose of seeing whether the interest was “ purchased ” by the landlords. This agreement was dated H June 30, 1954, and is a document of somewhat special character. The third recital in the agreement is that

I “ Sears have agreed to sell and Freeman have agreed to purchase the goodwill and certain assets used by Sears in connexion with (Sears’) business and certain freehold and leasehold premises and interests in certain other premises short particulars of which are set out in Sch. 1 and Sch. 2 hereto (such properties hereinafter sometimes collectively called ‘ the said properties ’) on the terms and conditions hereinafter set forth.”

In conformity with this recital, cl. 1 of the agreement is expressed in terms of sale and purchase:

“ Sears sell and Freeman purchase as at Jan. 1, 1954 (hereinafter called ‘ the sale date ’).”

(2) [1956] 3 All E.R. 624 at p. 628; [1957] 1 Q.B. 159 at p. 170.

(3) [1913] 3 K.B. 212 at p. 218.

The clause then describes the items of property which are to be transferred and these include as the third item the leasehold interests in the properties particularised in Sch. 2, amongst which are the interests now in question. Clause 2 provides that

“the consideration for the sale and purchase hereby agreed shall be in respect of the properties First to Eighthly in cl. 1 hereof the amounts respectively attributable to such properties in such order as follows.”

There then follow sums of money ascertained or ascertainable in respect of items 1 and 2 and items 4 to 8. Two of these sums are purely nominal amounts of £1 each. To the leasehold interests comprised in Sch. 2, however, no “amount” is attributed at all. The consideration for those interests is expressed to be the covenant by Freeman to pay the rents reserved and to observe and perform the covenants and conditions contained in the leases under which the properties were held and to indemnify Sears Ltd. in respect of any breach thereof. Apart from this covenant and indemnity no cash consideration, even a nominal one, was attributed to the leasehold interests comprised in Sch. 2. Accordingly, just as the subsequent transfer of these interests could not, as already stated, be regarded as a “purchase” of the interests if the instrument were taken by itself, so also the agreement to transfer them could scarcely be regarded as an agreement by Freeman to “purchase” them if it were to be divorced from the other terms of the contract. Perhaps indeed the most attractive way of putting the landlords’ case on this point, as counsel for the landlords in fact put it, was as follows: Look first, as one naturally would look, to the instrument of transfer of these legal interests and one finds that it was not a transfer for money. Look then to the agreement for the transfer of the interests to see whether the consideration was intended to be money. One finds that the agreement is in precise accordance with the transfer in point of consideration. There is therefore no ground for suggesting that the consideration stated in the transfer was at variance with the intention of the parties. The landlords, said counsel, were buying the business and paying for it, but were merely taking over the relevant leasehold interests.

We fully appreciate the force of the submission of counsel for the landlords on this question, but we are of opinion that it ought not to prevail. The third recital of the agreement and cl. 1 and the opening words of cl. 2 seem to show quite clearly that the transaction embodied in the agreement was intended by the contracting parties to be one of sale and purchase and nothing else. It is quite true that it would be difficult to say how much the landlords “paid” for the relevant interests if the amount had to be assessed in terms of money. But to an inquiry whether Freeman bought Sears Ltd.’s leaseholds along with its business and other assets the answer, we think, must surely be “Yes”. This would, in our judgment, be the ordinary commercial view of the transaction and it could only be negatived by splitting up what is one single and indivisible agreement into different parts and treating each part as having an existence independent of the others. This would appear to us to be an illegitimate approach to the matter. If at the instance of either contracting party the court had been asked to decree specific performance of the agreement, and had done so, the subject of the decree would have been the contract as an entirety; and the contract as a whole is, in our judgment, a contract of sale. That the ordinary or “business” view of the transaction is that which we have indicated is, we think, supported by the terms of cl. 9 (b) of the contract, which, as regards the property in Sch. 2, expressly stated that Freeman “shall be deemed to *purchase* with full notice of the terms contained in the leases under which such properties are held”; and by cl. 10 of the contract, which reads: “Sears are *selling* and will convey grant transfer and assign as beneficial owners”. We cannot refrain from adding on this part of the case that the (by no means easy) question involved may, if this case should go to the House of Lords, have then become wholly

A academic if counsel for the landlords' argument be accepted on the last question with which we later deal.

If, therefore, as we think, the landlords did purchase their interest in the Camden Town leaseholds, the next question which arises is, when they did so. As to this, there would seem to be three possible dates, viz.: June 30, 1954, when the agreement between Sears, Ltd. and the landlords was signed; or
 B Nov. 1, 1954, when the instrument of transfer was executed; or Nov. 13, 1954, when the transfer was registered under the Land Registration Act, 1925. The "interest of the landlord" with which s. 30 (2) of the Act of 1954 is concerned is presumably the interest by virtue of which the landlord opposes a tenant's application for a new lease. That interest in the present case was a legal interest in reversion expectant on the termination of the tenancy, and in our opinion
 C the landlords "purchased" this interest on the date when the agreement with Sears Ltd. was signed, viz., June 30, 1954. They did not acquire the position or status of landlords until Nov. 1 (or perhaps more strictly, Nov. 13), 1954, when the purchase was completed and registered; but it seems to us that the relevant date for the purposes of s. 30 (2) is when a landlord purchased his interest and not when he filled the character of landlord. If so, the only question in the present case is as to the date on which the landlords, as between them and Sears Ltd., became the purchasers of the interest. It is well settled (see, e.g., *Lysaght v. Edwards* (4)) that in equity a purchaser is treated for all practical purposes as the owner of the property sold on the signing of the contract of sale and the vendor becomes a trustee for him of the legal estate. There is nothing in the agreement of June 30, 1954, to displace this conception; and indeed it is
 E expressly provided by cl. 12 (a) thereof that until Sears Ltd. should obtain licence to assign the relevant interest (amongst others) they would "hold and retain the legal possession thereof upon trust for Freeman". We are accordingly of opinion that the landlords "purchased" the relevant interest on June 30, 1954. We would add that this view is consistent with the conclusion at which this court arrived on a similar point under the Rent Acts in *Emberson v. Robinson* (5).

The third and final question which was argued before us was as to the date of the termination of the current tenancy for the purposes of s. 30 (2). The tenants' contractual tenancy expired by effluxion of time on Mar. 22, 1959, and inasmuch as that was also the date specified in the notice which the landlords served on the tenants on Mar. 28, 1958, terminating the tenancy, one would suppose prima
 G facie that that was the date on which the current tenancy terminated. Having regard, however, to the provisions of s. 64 of the Act the position is by no means as simple as that. The landlords served their notice under s. 25 (1) of the Act and that subsection provides in effect that the notice is subject to the provisions of s. 64 as to the interim continuance of tenancies pending the disposal of applications to the court. Under those provisions, where a landlord has served a notice
 H terminating a tenancy and the tenant makes an application to the court for a new tenancy (and both those elements exist in the present case) and

"(c) apart from this section the effect of the notice . . . would be to terminate the tenancy before the expiration of the period of three months beginning with the date on which the application is finally disposed of, the effect of the notice . . . shall be to terminate the tenancy at the expiration
 I of the said period of three months and not at any other time;"

Section 64 (2) goes on to explain what is meant by "the date on which an application is finally disposed of" and it does so in language which suggests that an application may not be finally disposed of until it has at the end of all been adjudicated on by the House of Lords. In view of these provisions and especially of the words "and not at any other time" counsel for the landlords submits

that the tenants' current tenancy cannot have terminated on the date specified in the landlords' notice under s. 25 (1), viz., Mar. 22, 1959. If the impact of s. 64 on s. 30 (2) is that for which counsel for the landlords contends, the result would be truly remarkable, as the following illustration will show. A (a landlord) serves on B (the tenant) a notice terminating the tenancy on a specified date, and stating that he would oppose an application by the tenant for a new tenancy on the ground mentioned in s. 30 (1) (g). B thereupon applies to the court under s. 24 (1) for the grant of a new tenancy. On the matter coming before the court it is shown that A only purchased his interest four years previously, and is, therefore, disqualified from opposing the tenant's application because of s. 30 (2). An order for a new lease is made, against which A appeals. The appeal is heard six months later, that is to say four years and six months after A purchased his interest. By reason of this (and in spite of the period of three months added by s. 64 (1)) A is still precluded by s. 30 (2) from opposing and his appeal is therefore dismissed. A appeals to the House of Lords and his appeal comes on for hearing one year later. By that time five years and six months will have elapsed since A purchased his interest, and accordingly s. 30 (2) no longer presents an obstacle to his opposition. If such a result as this emerges from the relevant sections of the Act of 1954 the court has no option but to give effect to it; but it is hardly one that commends itself to common sense. Counsel for the landlords sought to mitigate this absurdity to some extent. He said that for the purpose of fixing the date of termination of a current tenancy the court should only deal with the known position and with certainties as distinct from possibilities. That principle, if sound, as applied to the present case would result in the termination of the Camden Town leases three months after the judgment of this court has been delivered on this appeal and without regard to the possibility of a further appeal being taken to the House of Lords. We cannot accept this suggestion, which seems to us to distort the language of s. 64 (2) beyond recognition. If s. 64 has, as it were, to be incorporated for all purposes in s. 30 (2) it is clear that the possibility of all appeals and further appeals has to be taken into account. The question is, however, whether in fact the provisions of s. 64 do so apply to s. 30 (2). A point which is of some cogency at first sight in favour of the view that they do emerges from s. 37 of the Act. That section provides for the payment of compensation to a tenant in cases where the court is precluded from making an order for the grant of a new tenancy by reason of certain of the grounds specified in s. 30 (1). The amount of such compensation depends on whether or not the premises have been occupied for business purposes "during the whole of the fourteen years immediately preceding the termination of the current tenancy" (s. 37 (3)) and by sub-s. (7) it is provided that

"In this section—the reference to the termination of the current tenancy is a reference to the date of termination specified in the landlord's notice under s. 25 of this Act or, as the case may be, the date specified in the tenant's request for a new tenancy as the date from which the new tenancy is to begin."

Counsel for the landlords fastened on this as showing that where the legislature in a particular case wished to displace the general application of s. 64 they expressly did so; and that as they did not do so for the purposes of s. 30 (2) then s. 64 applies. There is some force in this argument, but it appears to us that there is a sufficient answer to it. The tenant is to be entitled to the compensation "on quitting the holding". That event might occur either as a result of the landlord terminating the tenancy or as the result of the tenant asking under s. 26 for a new tenancy (which ex hypothesi the court is precluded from ordering) to start from a date which he specifies in his request. The expression, therefore, in s. 37 (7) "the date of termination specified in the landlord's notice" is, we think, no more than a convenient and natural introduction to the alternative "or, as the case may be, the date specified in the tenant's request for a new

A tenancy"; it is indeed difficult to see how else the first limb of the alternative could have been expressed. In our opinion accordingly s. 37 has not the importance in this respect which counsel for the landlords sought to attribute to it.

Then counsel for the landlords says that whenever the words "the current tenancy" appear in s. 30 of the Act they are to have the meaning assigned to them by s. 46, which is referential to s. 26 (1). In that subsection the phrase is defined as meaning the tenancy under which the tenant holds for the time being. That tenancy, however, cannot be brought to an end by the landlord except subject to the proviso in s. 25 (1), which incorporates, in effect, the provisions of s. 64. It follows, therefore, on this argument that in each instance in which reference is made in s. 30 to the "termination of the current tenancy" those provisions are to be regarded as also operating. Consequently, so counsel for the landlords contends, in each of the grounds of opposition stated in s. 30 (1) (e), (f) and (g) the "termination of the current tenancy" means when the tenancy in fact comes to an end, that is after the termination of the current tenancy as extended by s. 64: in other words, the expression is referable to some future point of time, after all litigation has been exhausted, when the landlord in fact succeeds in recovering possession of the property. We are unable, however, to accede to this submission.

In our judgment there are sufficient indications to be found in s. 30 and s. 31 of the Act, and in certain other provisions as well, that the phrase in s. 30 (2) "the termination of the current tenancy" is referable to the date specified in the landlord's notice served under s. 25 and to that alone. It appears to us that the opening words of s. 30 (2), "The landlord shall not be entitled to oppose an application", are directed to a particular point of time, viz., the time when the tenant makes his application for a new lease. If at that time the landlord can establish any of the grounds specified in s. 30 (1), then, subject to s. 30 (2), the court is precluded from ordering the grant of a new tenancy (s. 31 (1)). One of the grounds of opposition specified in s. 30 (1) is (f), "that on the termination of the current tenancy" the landlord intends to demolish or reconstruct the demised premises as therein mentioned; and it is well settled that he must establish that he entertains that intention at the time when the tenant's application is heard (6). It is by no means easy to see how he could establish such intention, or take any immediate and effective steps to implement it, if by reason of an appeal to this court and a possible further appeal to the House of Lords the current tenancy will or may not terminate until some two years later. Accordingly it seems to us that the words "the termination of the current tenancy" in para. (f) are referring to a definite and certain point of time and not a point of time which is indefinite and uncertain; and that that point of time can only be the date specified in the notice which the landlord has served on the tenant or (at the latest) the date of the original hearing of the tenant's application. Very similar considerations apply to para. (g) and we can only conclude from them that in neither of those paragraphs were the provisions of s. 64 of the Act intended to be incorporated so as to postpone the termination of the tenancy. But otherwise it seems to us that the terms no less than the general sense of para. (f) and para. (g) (and equally of para. (e)) of s. 30 (1) postulate that the landlord, when he formulates the grounds (as he must) on which he will oppose the tenant's application for a new tenancy, must intelligibly express his intention as referable to a certain or ascertainable point of time. If we are right in that view it would be inconsistent with elementary principles of construction to attribute a different meaning to the words where they appear in sub-s. (2) of the same section; from which it follows that the words in that subsection also fall to be construed without reference to s. 64.

The matter does not, however, rest there. Section 31 (2) provides (inter alia)

(6) See *Betty's Cafés, Ltd. v. Phillips Furnishing Stores, Ltd.*, [1958] 1 All E.R. 607.

that if a landlord opposes on the ground specified in s. 30 (1) (f) but does not establish it to the satisfaction of the court A

"then if the court would have been satisfied of [that ground] if the date of termination specified in the landlord's notice . . . had been such later date as the court may determine, being a date not more than one year later than the date so specified,—(a) the court shall make a declaration to that effect, stating of which of the said grounds the court would have been satisfied as aforesaid and specifying the date determined by the court as aforesaid, but shall not make an order for the grant of a new tenancy; (b) if, within fourteen days after the making of the declaration, the tenant so requires the court shall make an order substituting the said date for the date specified in the said landlord's notice . . . and thereupon that notice . . . shall have effect accordingly."

It seems plain that in this subsection the draftsman was focussing his attention on the date specified in the landlord's notice, "the date of determination" under s. 25, as being for the purposes of s. 30 (1) (f) the termination of the current tenancy. This must be so; for if the current tenancy would not, by reason of s. 64, terminate until after the tenant's application for a new tenancy had been finally determined (possibly by the House of Lords) the court could not substitute a date not more than one year later than the date specified in the landlord's notice which would be the subject of a declaration and, if the tenant so required, the termination of the current tenancy. The intention was that in the circumstances contemplated by s. 31 (2) the current tenancy should determine in accordance with the landlord's notice subject to the substitution of a deferred date for that specified in the notice. This, as we think, affords further ground for the view that the expression "the termination of the current tenancy" in s. 30 is to be read without regard to the provisions as to the interim continuation of tenancies pending determination by the court which are to be found in s. 64. Those provisions would, of course, operate whenever a question arose, for example, as to a landlord's right to recover possession of the demised premises after he had served a notice under s. 25; but they have no relevance, in our opinion, to the ending of the five-year period with which s. 30 (2) is concerned. Reference may also be made to Part 1 of the Act, which contains in s. 12 (1) (a) and s. 13 (3) provisions which correspond respectively to s. 30 (1) (f) and s. 31 (2) in Part 2. It is clear, we think, that the reference in s. 12 (1) (a) to the "termination of the tenancy" cannot have been intended to incorporate s. 64; for a landlord who wishes to obtain possession of premises on the ground that he proposes to demolish or reconstruct must, under s. 13 (2) (b), satisfy the court that he has made preparations to that end, and this would be reasonable and intelligible if the landlord had a definite date in mind when he could undertake the work but which would be quite impracticable if the provisions as to appeals in s. 64 applied.

A further relevant section in Part 1 of the Act is s. 4. Subsection (1) of that section is for relevant purposes similar to s. 25 (1), including the proviso regarding the interim continuation of tenancies. Subsection (3) of the section provides that a notice under sub-s. (1) shall not be effective unless it fulfils one of two alternative requirements, the first being that it contains proposals for a statutory tenancy (to take effect on termination of the tenancy) and the second being that if the tenant is not willing to give up possession of the property "at the date of termination of the tenancy" the landlord intends to apply for an order for possession on one or more of the grounds there referred to. If counsel for the landlords' argument is well founded, the date of the "termination of the tenancy" would appear to differ according to the alternative selected by the landlord. Moreover, by virtue of sub-s. (2) and sub-s. (3) of s. 7 the proposal for a statutory tenancy must include (inter alia) a proposal as to what rent is to be the standard rent of the premises. It is difficult to believe that Parliament was intending to impose on a landlord the obligation to specify the rent payable

A under a new tenancy which would not commence until a wholly uncertain date possibly two years later.

It is unnecessary to specify in any detail the scope of s. 64 in relation to the other provisions of the Act of 1954, and we will not attempt to do so. It is enough for present purposes to say that in our judgment, and for the reasons which we have indicated, it is not to be regarded as being incorporated in s. 30 (2) for the purpose of ascertaining the termination of a current tenancy. In other words, it seems to us that the terms of the proviso to s. 25 (1) do not have, for present purposes, the effect of postponing the termination of the tenancy (when a landlord has given a valid notice under the Act) to the wholly uncertain and unascertainable date involved by reference to s. 64; but only have the effect of saying that the termination of the tenancy, which remains determined by the landlord's notice, is to be without prejudice to its interim continuance, for relevant purposes, which do not include the ascertainment of the period specified in s. 30 (2) as provided by s. 64. It has frequently been pointed out, and was made plain by LORD REID in *Coutts & Co. v. Inland Revenue Comrs.* (7) that if two constructions of statutory language are reasonably possible that will be adopted by the court which would avoid an absurdity resulting from the other. That absurdities would arise from the construction of s. 30 (2) for which counsel for the landlords has contended, cannot be open to question. The construction which counsel for the tenants has submitted avoids these absurdities, and as, in our opinion, it is a reasonably possible construction it should be preferred.

In *Re 88, High Road, Kilburn. Meakers, Ltd. v. D. A. W. Consolidated Properties, Ltd.* (8) tenants of business premises applied under s. 24 of the Act for the grant of a new lease. The landlords did not object to a new lease being granted, but there was a dispute between the parties as to (among other things) the date on which it should commence. WYNN-PARRY, J., held that the grant of a new tenancy which would begin at the end of the current tenancy by virtue of s. 33 of the Act of 1954 was governed by s. 64 (1) of the Act and accordingly the new lease would not commence until the expiration of a period of three months after the termination of all proceedings relating to the application, notwithstanding any injustice which might result to the landlords by the continuation of the rent payable under the old lease. The learned judge in the course of his judgment considered s. 33 in conjunction with s. 25 and with the proviso thereto and said (9):

G "The effect of the proviso to s. 25 (1) appears to me to be the same as if s. 64 (1) had been written in at the end of the first paragraph of s. 25 (1) instead of the proviso. I am quite unable, in view of the force of the language, to come to any other conclusion than that, once the conditions stated in paras. (a), (b) and (c) of s. 64 (1) are fulfilled, then the notice given by the landlord under s. 25 (1) ceases to be of any effect so far as terminating the tenancy at the date specified in his notice, and that the tenancy will be continued and will only be terminated under the provisions of s. 64 (1)."

H The decision accordingly was that in the joint context of s. 33 and s. 25 (1) the words "end of the current tenancy" are controlled by s. 64 (1). We do not suggest that the decision of the learned judge was wrong. But the Act of 1954 is not a model either of lucidity or consistency, and the fact that the expression "on the coming to an end of the current tenancy" in s. 33 has the meaning which WYNN-PARRY, J., attributed to it does not necessarily show that the words "the termination of the current tenancy" are to have a similar meaning in the context in which they appear in s. 30 (2). As we have already pointed out, there are indications in s. 30 and s. 31 and elsewhere in the Act that the words were not intended to have that meaning in s. 30 (2) and those reasons are not applicable

(7) [1953] 1 All E.R. at p. 421; [1953] A.C. at p. 281.

(8) [1959] 1 All E.R. 527.

(9) [1959] 1 All E.R. at p. 529.

to s. 33. We do not, therefore, regard the decision in *Re 88, High Road, Kilburn* (10) as being inconsistent with the view which we have expressed as to s. 30 (2).

For the above reasons, the appeal must, in our judgment, be dismissed.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Titmuss, Sainer & Webb* (for the landlords); *Isadore Goldman & Son* (for the tenants).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

R. v. DANGERFIELD.

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Cassels and Winn, JJ.), May 26, 1959.]

Quarter Sessions—Committal of offender to quarter sessions with view to borstal sentence—Road traffic offences—Disqualification—Powers of quarter sessions—Criminal Justice Act, 1948 (11 & 12 Geo. 6 c. 58), s. 20 (5) (a)—Magistrates' Courts Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 55), s. 28.

Magistrates—Committal to quarter sessions for sentence—Indictable offence tried summarily—Offender seventeen years old—Advisability of committal under s. 29, rather than under s. 28, of Magistrates' Courts Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 55).

The appellant, who was seventeen years old, was convicted by a magistrates' court on three charges of taking and driving away a motor vehicle without lawful authority and on two charges of driving a motor vehicle while uninsured, and, under s. 28 of the Magistrates' Courts Act, 1952, the court committed him to quarter sessions for sentence to borstal training in accordance with s. 20 of the Criminal Justice Act, 1948. Quarter sessions sentenced the appellant to borstal training and disqualified him for five years for holding a driving licence, the sentence being, in effect, concurrent on each charge. On appeal against the sentence,

Held: under s. 20 (5) (a)* of the Criminal Justice Act, 1948, the court of quarter sessions had no power to impose a sentence of disqualification in addition to a sentence of borstal training, as its powers under s. 20 (5) (a) to sentence for an offence were alternative, being limited either to imposing a sentence of borstal training or to dealing with an offender in any manner in which the court of summary jurisdiction might have dealt with him; but, as the appellant had been convicted on five charges, quarter sessions could have imposed a sentence of borstal training on four charges, the terms to be concurrent, and, on the fifth charge, a sentence of five years' disqualification (being a sentence which the magistrates could have imposed), and the sentence would be varied accordingly.

Per CURIAM: in a case to which s. 29 of the Magistrates' Courts Act, 1952, applied (i.e., where the offender was not less than seventeen years old and, on a summary trial under s. 18 (3) or s. 19 of the Act for an offence triable by quarter sessions, had been convicted of the offence), it was preferable to commit the offender to quarter sessions for sentence under s. 29 rather than under s. 28, as the powers of quarter sessions on a committal under s. 29 were not so limited as they were on a committal under s. 28.

Appeal dismissed.

(10) [1959] 1 All E.R. 527.

* Section 20 (5) of the Criminal Justice Act, 1948, reads: "Where an offender is so committed for sentence as aforesaid, the following provisions shall have effect, that is to say:—(a) the appeal committee or court of quarter sessions shall inquire into the circumstances of the case and may—(i) if satisfied of the matters mentioned in sub-s. (1) of this section, sentence him to borstal training; or (ii) in any case, deal with him in any manner in which the court of summary jurisdiction might have dealt with him..."

A [As to committal of an offender to quarter sessions with a view to a sentence of borstal training, see 25 HALSBURY'S LAWS (3rd Edn.) 227, para. 442; and as to the desirability of a committal under s. 29 of the Magistrates' Courts Act, 1952, rather than under s. 28 of the Act, see *ibid.*, p. 228, note (g).

For the Criminal Justice Act, 1948, s. 20 (5) (a), see 28 HALSBURY'S STATUTES (2nd Edn.) 369, and for s. 29 (3) (a) of the Act, see 14 HALSBURY'S STATUTES (2nd Edn.) 1014.

B For the Magistrates' Courts Act, 1952, s. 28 and s. 29, see 32 HALSBURY'S STATUTES (2nd Edn.) 447, 449.]

Appeal.

The appellant, Terence Edwin Dangerfield, was convicted at Acton Magistrates' Court on Dec. 31, 1958, on two charges of taking and driving away a motor vehicle without the consent of the owner or other lawful authority, contrary to s. 28 of the Road Traffic Act, 1930, and on three charges of using a motor vehicle on a road without there being in force in relation to the user thereof a policy of insurance or such other security as complied with Part 2 of the Act of 1930, contrary to s. 35 of the Act. The magistrates' court committed him to Middlesex Quarter Sessions, under s. 28 of the Magistrates' Courts Act, 1952, for sentence in accordance with s. 20 of the Criminal Justice Act, 1948, and the chairman of quarter sessions sentenced him to borstal training and disqualified him for holding or obtaining a driving licence for five years. The appellant appealed against the sentence, the main ground of appeal being that, under s. 20 (5) (a) of the Act of 1948, quarter sessions had no jurisdiction to impose a sentence of disqualification in addition to a sentence of borstal training.

E *M. D. L. Worsley* for the appellant.

LORD PARKER, C.J., delivered the following judgment of the court: The appellant was convicted at Acton Magistrates' Court of taking and driving away a motor cycle without authority or insurance. He was committed to Middlesex Quarter Sessions under s. 28 of the Magistrates' Courts Act, 1952, and was then sentenced by the chairman under s. 20 of the Criminal Justice Act, 1948, to borstal training and disqualified for five years for holding or obtaining a driving licence. Two points are taken by counsel for the appellant on an appeal against that sentence, first, a point of law, which I will discuss subsequently, that the sentence was in a form which is not permissible and, secondly, that in any case borstal training and disqualification for five years is too severe a sentence. The court sees no reason to interfere with the sentence of borstal training as a matter of principle. The appellant is a young man seventeen years of age. He has been on probation for larceny. He has been to an approved school for two larcenies in dwelling-houses, fined for obstructing the police, fined for common assault and fined in August, 1958, for obstructing the police. It appears that he is a man of very hot temper, and he must learn to control it. The chairman thought, and, indeed, the magistrates must have thought because they committed him under s. 28 of the Act of 1952, that borstal training was the appropriate sentence for him. The court, having considered the matter, sees no reason to interfere.

The point of law that arises is this. It is, so the court thinks, clear that, when the magistrates have committed an offender to quarter sessions under s. 28 of the Magistrates' Courts Act, 1952, the powers of quarter sessions under s. 20 (5) (a) of the Act of 1948 are limited to sentencing the offender to borstal training or—and it is an alternative—to dealing with him in any manner in which the court of summary jurisdiction might have dealt with him. Accordingly, it is said that quarter sessions cannot at one and the same time sentence an offender to borstal training and disqualify him. That is perfectly clear; but in the present case there were no less than five charges, and although, in form, the sentence of the learned chairman is wrong because he, in effect, gave the sentence of borstal training and disqualification in respect of each charge concurrently, yet it was within his

power, and, therefore, within the power of this court, to provide that on four of the charges there should be, in each case, a sentence of borstal training, the terms to be concurrent, and that on the fifth charge the sentence should be one which the magistrates could have imposed, namely, disqualification. Accordingly, this court will vary the sentence to one of borstal training on four of the charges, the terms to run concurrently, and five years' disqualification on the other charge.

I should like to mention one further matter which is often overlooked. In the case of an offender who is seventeen years old, as the appellant was, it is possible for the magistrates to commit the offender to quarter sessions for sentence under s. 29* of the Act of 1952. That is a general committal, and not merely a committal for a sentence of borstal training; and then, under s. 29 (3) (a) of the Criminal Justice Act, 1948, quarter sessions will have complete power to deal with the matter and are not limited in the way in which they are limited when their powers are derived from s. 20 of the Act of 1948. Accordingly, as this court has said before†, magistrates should remember that, in the case of an offender of seventeen years of age, or over that age, it is simpler to commit him in a proper case under s. 29*, rather than s. 28 of the Magistrates' Courts Act, 1952.

Appeal dismissed.

Solicitor: *Registrar, Court of Criminal Appeal* (for the appellant).

[Reported by KEVIN WINSTAIN, Esq., *Barrister-at-Law.*]

BOLTON'S (HOUSE FURNISHERS) LTD. v. OPPENHEIM.

[COURT OF APPEAL (Hodson and Harman, L.JJ.), July 17, 20, 1959.]

Landlord and Tenant—New tenancy—Business premises—Opposition by landlord—Intention to demolish and carry out substantial work of construction—Notice stating ground of opposition—Notice did not state that landlord could not reasonably do the work without obtaining possession of the holding—Whether notice valid—Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2 c. 56), s. 25 (1), s. 30 (1) (f).

A landlord served on his tenants a notice in the prescribed form‡ to terminate a business tenancy under s. 25 of the Landlord and Tenant Act, 1954. The landlord's notice stated, in para. 3 on the front of the notice, that he would oppose an application to the court for the grant of a new tenancy "on the ground (Note 4) that on the termination of the current tenancy I intend to demolish the premises comprised in the holding and thereafter to carry out substantial work of construction on the holding". Section 30 (1) (f) of the Act of 1954 provided that the grant of a new tenancy might be opposed on the ground "that on the termination of the current tenancy the landlord intends to demolish . . . the premises comprised in the holding . . . or to carry out substantial work of construction on the holding . . . and that he could not reasonably do so without obtaining possession of the holding". Thus the landlord's notice did not contain in the ground of

* Section 29 of the Act of 1952 replaces the Criminal Justice Act, 1948, s. 29 (1), which was repealed by s. 132 of and Sch. 6 to the Act of 1952. Committal under s. 29 of the Act of 1952 is applicable only where there is a summary trial under s. 18 (3) or s. 19 of the Act of 1952 for an indictable offence triable by quarter sessions.

† In *R. v. Pegg* ((1952), 36 Cr. App. Rep. 113).

‡ Viz., Form 7 in the Appendix to the Landlord and Tenant (Notices) Regulations, 1957 (S.I. 1957 No. 1157); 12 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 159, 168. Paragraph 3 of this form, which contains the reference to Note 4, requires the landlord, if he opposes the grant of a new tenancy, to state the ground of opposition. The form includes on the front the words "your attention is called to Note 4 below".

- A opposition an express statement of the final words of s. 30 (1) (f) concerning the need for obtaining possession. The notice, however, referred, by its mention of Note 4, to the back of the form where the grounds on which a landlord might oppose the grant of a new tenancy were set out as part of the prescribed form, and among them the whole of para. (f) of s. 30 (1) was included. The tenants contended that, although by s. 30 (1) the landlord's notice was required to "state" on which of the grounds mentioned in s. 30 he would oppose the grant of a new tenancy, this notice did not do so because the concluding words of s. 30 (1) (f) were not set out on the front of the notice as part of the ground of opposition.
- B

Held: the notice was a valid notice because—

- C (i) (per HODSON, L.J.) by setting out the intention required to satisfy s. 30 (1) (f) of the Landlord and Tenant Act, 1954, the notice sufficiently stated the ground of the application, although the concluding words of s. 30 (1) (f) were not included in the statement of the ground of opposition, and (ii) (per HARMAN, L.J.) (a) the concluding words of s. 30 (1) (f) were not part of the ground of opposition but were a proviso, and therefore did not need to be stated in the notice, and (b) in fact the concluding words of s. 30 (1) (f) were stated in this notice since there was reference on the front of the notice to Note 4 on the back which stated them or since the words were necessarily implied in the statement of ground of opposition in the notice.
- D

Biles v. Caesar ([1957] 1 All E.R. 151) applied and *McMullen v. Great Southern Cemetery & Crematorium Co., Ltd.* (unreported, C.A., Nov. 19, 1958) applied.

- E Dictum of LORD ELLENBOROUGH, C.J., in *Doe d. Rodd v. Archer* ((1811), 14 East at p. 248) applied.

Per CURIAM: where a question arises on the form of a notice to terminate a tenancy under s. 25 of the Landlord and Tenant Act, 1954, it would be a convenient practice that the originating summons applying for a new tenancy should ask for the determination of the question, so that it may be determined before the summons is heard on the merits (see p. 92, letter D, and p. 96, letter B, post).

- F Decision of DANCKWERTS, J. ([1959] 2 All E.R. 473) affirmed.

[As to a landlord's notice to terminate a business tenancy, see 23 HALSBURY'S LAWS (3rd Edn.) 889, para. 1711.

- G For the Landlord and Tenant Act, 1954, s. 25, s. 30 (1), see 34 HALSBURY'S STATUTES (2nd Edn.) 410, 414.]

Cases referred to:

- Biles v. Caesar*, [1957] 1 All E.R. 151; [1957] 1 W.L.R. 156; 3rd Digest Supp.
- Budge v. Hicks*, [1951] 2 All E.R. 245; [1951] 2 K.B. 335; 2nd Digest Supp.
- H *Cadby v. Martinez*, (1840), 11 Ad. & El. 720; 9 L.J.Q.B. 281; 4 J.P. 105; 113 E.R. 587; 31 Digest (Repl.) 499, 6247.
- Doe d. Rodd v. Archer*, (1811), 14 East, 245; 104 E.R. 595; 31 Digest (Repl.) 498, 6233.
- Hankey v. Clavering*, [1942] 2 All E.R. 311; [1942] 2 K.B. 326; 111 L.J.K.B. 711; 167 L.T. 193; 31 Digest (Repl.) 599, 7170.
- I *McMullen v. Great Southern Cemetery & Crematorium Co., Ltd.* (C.A. Nov. 19, 1958), unreported.
- Sidney Bolsom Investment Trust, Ltd. v. E. Karmios & Co. (London), Ltd.*, [1956] 1 All E.R. 536; [1956] 1 Q.B. 529; [1956] 2 W.L.R. 625; 3rd Digest Supp.

Appeal.

The tenants appealed from the decision of DANCKWERTS, J., dated May 8, 1959, and reported [1959] 2 All E.R. 473, that a landlord's notice terminating a tenancy was sufficient to entitle the landlord to oppose the grant of a new

tenancy under Part 2 of the Landlord and Tenant Act, 1954. The facts, which are summarised in the headnote, are stated in full in the judgment of HODSON, L.J. A

R. E. Megarry, Q.C., S. N. Bernstein and Christopher Priday for the tenants.

L. A. Blundell, Q.C., for the landlord.

Cur. adv. vult. B

July 20. **HODSON, L.J.:** This is an appeal from an order of DANCKWERTS, J., on a summons issued in proceedings started by the appellant tenants under the Landlord and Tenant Act, 1954. The landlord has served on the tenants a notice of termination under s. 25 of that Act giving the tenants notice to quit on Mar. 25, 1959. He has opposed the grant of a new tenancy and, as required by s. 30 (1) of the Act, has purported to state the grounds of his opposition. The question is whether he has effectively done so, for if he has not the notice is invalid. The originating summons asked for the following relief, namely, an order pursuant to the Act for the grant of a new tenancy of the premises in question and for such further and other relief as might be just. This matter comes before the court on a pro forma summons issued by direction of the judge for consideration of the preliminary question whether the notice is bad. I see no reason why, if the tenant wishes to take a point of that kind, he should not include it in the originating summons, that is to say, include a prayer for a declaration to that effect. That seems to me to be a procedure which would save costs. C D

Section 30 (1) of the Act reads:

"The grounds on which a landlord may oppose an application under s. 24 (1) of this Act are such of the following grounds as may be stated in the landlord's notice under s. 25 of this Act or, as the case may be, under s. 26 (6) thereof, that is to say [and then a series of grounds are set out of which (f) is:] that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding." E F

There is, I should say, a prescribed form of notice prescribed by regulations made by the Lord Chancellor by statutory instrument (1). No assistance is to be gained by looking at the prescribed form because the question to be determined on these proceedings is not assisted by reference to the form itself. The notice given is to the tenant at 395, Brixton Road, London, by the landlord giving notice terminating the tenancy on Mar. 25, 1959, and stating that the landlord would G

"oppose an application to the court (Note 3) under Part 2 of the Act for the grant of a new tenancy on the ground (Note 4) that on the termination of the current tenancy I intend to demolish the premises comprised in the holding and thereafter to carry out substantial work of construction on the holding." H

Note 4 on the front of the notice refers to the back of the form which sets out in full, although not exactly in the words of the statute, the grounds on which the landlord can rely, so that the tenant had, if he looked, full opportunity of seeing the whole effect of the relevant section without looking at the Act of Parliament itself. I

Thus the landlord has set out his intention. There are in fact seven alternative grounds which the landlord can have and he has set out with sufficiency the intention mentioned in s. 30 (1) (f) but he has not added the concluding words

(1) Form 7, prescribed by the Landlord and Tenant (Notices) Regulations, 1957 (S.I. 1957 No. 1157); 12 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 159, 163.

A of para. (f) "that he could not reasonably do so without obtaining possession of the holding". It is on that that the tenant submits that the notice is defective.

As the learned judge pointed out (2) the concluding words contain an essential condition of the grounds. If the landlord failed to prove at the hearing—and that is the material time—that he could not reasonably carry out his intention without obtaining possession of the holding, he would fail or, to put it in another way, as *HARMAN, L.J.*, did in the course of the argument, the last part of the paragraph is in effect a proviso, which would prevent the landlord from relying on the intention described in the section if he could reasonably carry out his intention without obtaining possession of the holding. Does the omission of the concluding words invalidate the notice? The learned judge, bearing in mind that a notice, like an ordinary notice to quit, is a unilateral notice which must be strictly construed against the landlord under the general law, would, I think, have decided the case against the landlord had he not had before him the decision of this court in *Biles v. Caesar* (3) to which I will refer. In that case the question was different. There the landlords had given notice "to demolish and reconstruct the whole of the premises comprised in your holding". The landlord only intended to demolish a substantial part and not the whole of the premises comprised in the holding and this court held that the notice was good. Counsel for the tenants has sought to distinguish that case since there the greater included the less, and he accepts the decision on that basis. He argues, however, that the decision in that case is not conclusive against him since the language used by the court went further than was necessary to cover that situation; he said that that language ought not to control the position where there is, as he says, a vital omission in the notice. I accept the contention that there is a distinction. Nevertheless I think that the court did in *Biles v. Caesar* (3) and also in *McMullen v. Great Southern Cemetery & Crematorium Co., Ltd.* (4), a copy of which has been obtained from the Bar Library, use language which strongly supports the landlord's contention that the court should take a similar view in this case.

F In *Biles v. Caesar* (5) *DENNING, L.J.*, said:

"In my judgment, the tenant's argument on this point is not correct. It is sufficient for the landlords in their notice of opposition to specify the particular paragraph—(a), (b), (c), (d), (e), (f) or (g) of s. 30 (1) on which they rely. It is not necessary for them to specify any of the subsidiary portions of a paragraph, so long as they make clear which is the paragraph on which they rely. It seems to me quite plain that the landlords in their notice and in their answer were relying on para. (f)."

Then he went on to point out that the landlord did not prove the full extent of the notice. I made observations (6) which, I think, are to the same effect.

H *McMullen v. Great Southern Cemetery & Crematorium Co., Ltd.* (4) (unreported) was heard by the Court of Appeal on Nov. 19, 1958, the court being presided over by the Master of the Rolls. The notice there was under para. (g) and it was said to be defective because the word "building" was used instead of the word "holding". It is to be noted that "building" is a word of lesser content than "holding" and the question of the greater including the less would not excuse the error if it required excuse. I need only read two sentences of the Master of the Rolls' judgment. He said:

"If it were necessary that the terms of this notice should precisely and exactly cover the parliamentary language, there might be some substance in this objection."

(2) [1959] 2 All E.R. at p. 475.

(3) [1957] 1 All E.R. 151.

(4) C.A. Nov. 19, 1958. Unreported.

(5) [1957] 1 All E.R. at p. 153.

(6) [1957] 1 All E.R. at p. 154.

He also added:

"The obligation, therefore, is (as I conceive) to indicate, with sufficient clarity to be understood, on what grounds he will seek, when the time comes, to oppose the tenant's application."

Counsel for the tenants has argued that to treat the landlord's notice as valid does not give effect to the word "stated" in sub-s. (1) of s. 30 of the statute. He says that if the last words are omitted, it follows that the ground cannot be said to be "stated". The word "stated" is not, however, a term of art, and in view of the decision of this court counsel for the tenants cannot maintain that the landlord must slavishly copy out every word of the relevant paragraph in his notice.

Some cases have been referred to which are useful, at any rate, for comparison. In *Budge v. Hicks* (7) the question under consideration was a notice to quit given by the landlord to his tenant under the Agricultural Holdings Act, 1948. It was held that the notice, not having to be in any particular form, must state the reason why he required possession. The word "stated" is used in s. 24 (2) of the Agricultural Holdings Act, 1948, in several places (8), and the effect of that decision is that it does not follow, from the use of that word "state" that the exact words of a statute or statutory provision are to be followed. I also refer for comparison to *Sidney Bolsom Investment Trust, Ltd. v. E. Karmios & Co. (London), Ltd.* (9). There the statutory provision under consideration was the Landlord and Tenant Act, 1954, s. 26 (3):

"A tenant's request for a new tenancy shall not have effect unless it is made by notice in the prescribed form given to the landlord and sets out the tenant's proposals as to the property to be comprised in the new tenancy (being either the whole or part of the property comprised in the current tenancy), as to the rent to be payable under the new tenancy and as to the other terms of the new tenancy."

The tenant in that case had not set out the terms in full but had left one to be inferred. This the court was able to do by reference to the current tenancy.

In my judgment the concluding words of s. 30 (1) (f) of the Landlord and Tenant Act, 1954, need not be set out in the notice. The ground of the application is set out sufficiently by setting out the intention as required by the statute. It is true that the landlord will not succeed in his application unless he qualifies under the concluding words which state a condition precedent which must be satisfied by him, but the essential requirement, that the tenant must be informed of the intention with sufficient precision, has been complied with. There is nothing misleading to the tenant in the notice and nothing in the notice to quit cases which point to a contrary conclusion. There is nothing positively wrong in the statement, such as a wrong date in the notice to quit which cannot be cured, whether the tenant is misled or not. Compare the decision of this court in *Hankey v. Clavering* (10) following *Cadby v. Martinez* (11). In *Hankey v. Clavering* (10) there was a mistake in the date, obviously due to a slip on the part of the landlord, which could not be cured by acceptance of service by solicitors for the

(7) [1951] 2 All E.R. 245; [1951] 2 K.B. 335.

(8) The word "stated" is used in each of the seven paragraphs of s. 24 (2); the decision in *Budge v. Hicks* ([1951] 2 All E.R. 245) related directly to paras. (d) (e).

(9) [1956] 1 All E.R. 536; [1956] 1 Q.B. 529.

(10) [1942] 2 All E.R. 311; [1942] 2 K.B. 326.

(11) (1840), 11 Ad. & El. 720.

A tenant; LORD GREENE, M.R., treated the matter as very clear. In other respects notices to quit have been liberally construed following the maxim *ut res magis valeat quam pereat*.

One case to which we were referred is an illustration of that. It is *Doe d. Rodd v. Archer* (12). The headnote reads:

B "Where a farm was leased for twenty-one years, at a rent of £180 per annum consisting, as described in the lease, of the Town Barton, and its several parcels described by name, at the rent of £83, other closes named at other rents of £5, £5, and £1: the Shippen Barton, and its several parcels described by name, at £86: with a power reserved to either party to determine the lease at the end of fourteen years, on giving two years' previous notice: Held that a notice by the landlord to his tenant to quit 'Town Barton, &c. agreeably to the terms of the covenant between us on the expiration of the fourteenth year of your term', given in due time, was sufficient."

LORD ELLENBOROUGH, C.J., said (13):

D "The landlord must have intended to give such a notice to quit as the lease reserved to him the liberty of giving, and not a void notice to quit a part only: and so the notice in question must have been understood by the tenant."

The other members of the court agreed and BAYLEY, J., said (14):

E "We are to construe the notice to quit in such a way *ut res magis valeat quam pereat*."

In my judgment the landlord's statement gives the right information to the tenant in order that he may be able to deal with the ground stated in opposition to his application for a new tenancy, and I would, therefore, dismiss the appeal.

F HARMAN, L.J.: The Landlord and Tenant Act, 1954, is one more instance of a process, which began in the year 1915 with the Increase of Rent and Mortgage Interest (War Restrictions) Act of that year, of helping tenants to retain their holdings notwithstanding that their contracts with their landlords have run out. There has come into being, not unnaturally over this long period of time, a kind of theory that the landlord is an ogre and the tenant his victim in need of and entitled to every safeguard and protection which the law and the courts can devise in his favour. Whether that represents the reality of the situation in the middle of this century may perhaps be doubted, but that is how the matter stands. The Act of 1954 does something for tenants of business premises going far beyond anything done before, though something was attempted by the Landlord and Tenant Act, 1927.

H The tenancy here was one where the estate, created by the bargain constituted by a lease, expired one day before Lady Day, 1959; on that day the landlord would have been entitled to possession but for s. 24 of the statute, which enacted I that the term should be continued. Section 25 nevertheless gave the landlord a right, under certain conditions, to terminate the tenancy, and he gave a notice so to do on Lady Day, 1959, which was the earliest day that the statute allowed. The tenants would not accept the notice of termination and demanded a new lease. The landlord opposed that application and s. 30 tells us on what grounds that opposition may be raised. An originating summons was issued to try the

(12) (1811), 14 East, 245.

(13) 14 East at p. 248.

(14) (1811), 14 East at p. 248.

question whether any, and if so what, new lease should be granted and on that a preliminary point was raised, namely, whether the landlord had ever served a proper notice on the tenants so as to allow them to debate the question whether a new lease should be granted. This matter came on before DANCKWERTS, J., as a preliminary point and the learned judge felt himself constrained to direct a summons to be issued in the originating summons proceedings to raise the point, which does not appear on the face of the originating summons at all. I agree entirely with my Lord, HODSON, L.J., that it would obviously be a convenient practice where, as not infrequently, points arise on the form of a notice on one side or the other, that the court should be asked in the originating summons to exercise its jurisdiction to construe documents, and to construe the notice before hearing the originating summons on the merits. It may often save a great deal of evidence being filed uselessly. I add to that the fact that these sections have been made use of by tenants here and there to prolong their tenancies, being tenancies at a great under-value. So long as the tenant can think of an expedient for agitating the courts on these matters he is allowed by the transitional provisions of the Act to remain in possession paying the old, and almost inevitably lower, rent. Any procedure which speeds up these kind of proceedings and takes away from the obstructor his chances of obstruction is to be encouraged.

The landlord served the proper notice on the tenants giving the reasons why he should be entitled to oppose the tenants' application. I say "the proper notice" because there is a statutory form prescribed by the Lord Chancellor and he used the statutory form, but when he came to indicate on which of the seven reasons he was going to rely, he did not, as my Lord said, copy out the whole of s. 30 (1) (f) but left out the words at the end that he could not reasonably carry out the work without obtaining possession of the holding. It is said, therefore, that he has not "stated the ground" of his opposition and that his notice is bad. I incline to the view that on the true construction of that subsection the words "that he could not reasonably do so without obtaining possession of the holding" are not a "ground" at all. They are a proviso which prevents the landlord from succeeding on para. (f) unless he can show that it is impracticable for him to carry out his proposal without having possession. That does not seem to me to be a ground; if so, it need not be stated: but whether that is so or not, I think that the last words are in fact "stated" in the notice, and for two reasons. First of all the notice refers you to the back of the form, and if you look on the back of the form you will find these words or their equivalent plainly set out. The reason why notices of this sort are so elaborate is again tenderness for the tenant. He is supposed to be a person who is either almost illiterate or so poor that he cannot get advice and, therefore, he is to be shown very carefully everything which may help him to resist the landlord's demands to get his own property back. He has only to look at Note 4 on the back, and there he will find this bit about not being able reasonably to do so. That again gives him the chance, if he wishes to take it, to set about to prove that the landlord could do the proposed work without obtaining possession. If the tenant can prove that, the landlord is bound to fail. There is no discretion in the court.

The second reason why I think those words are to be read in by necessary implication is this:—any notice under para. (f) must necessarily mean that the landlord alleges that he cannot do the work without obtaining possession. If he alleged the contrary, he must necessarily allege himself out of court because para. (f) could not possibly avail him. Therefore, anybody reading that he intends to demolish and rebuild and so forth must necessarily know that he is also saying that he requires possession for that purpose, because otherwise the notice would be perfectly futile. Therefore, there arises a necessary implication, rather like

A that in *Doe d. Rodd v. Archer* (15) which my Lord cited, where LORD ELLENBOROUGH, C.J., said that it must be supposed that the notice to quit was a notice which the landlord could give; so here you must suppose the notice to be a notice which in itself involves the essential condition.

B It was urged on us by counsel for the tenants that although the utmost strictness was to be observed against the landlord under s. 30, the same was not true of a tenant's notice under s. 26 (3), under which a tenant requesting a new tenancy has to set out the tenant's proposals as to the property to be comprised in the new tenancy. That is exactly the Roland for the Oliver of s. 30, and it seems to me that the two ought to be construed in exactly the same way. They are both in *pari materia*, not quite the same words are used, but it seems to me that what is good law for the landlord is good law for the tenant, and that each must give such a notice to the other as will indicate with sufficient clarity what it is that is proposed. That test is amply passed here, as my Lord has already said.

I agree with my Lord, therefore, in dismissing this appeal.

Appeal dismissed. Leave to appeal to the House of Lords refused.

D Solicitors: *Harold Benjamin & Collins* (for the tenants); *Harris, Chetham & Co.* (for the landlord).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

E

PRACTICE DIRECTION.

F *Practice—Chambers—Queen's Bench Division—Lists—Applications to judge in chambers to be published in daily cause list—Duration of hearing to be estimated and indorsed on filed copy—Special appointment for applications estimated to last more than forty-five minutes.*

As from Oct. 1, 1959, the list of applications to be dealt with by the Queen's Bench judge in chambers will, except in vacations, be published in the daily cause list as well as in the chamber list.

G Applications in the ordinary lists on Tuesdays and Fridays will still be issued returnable at 10.30 a.m. (if attended by counsel) and 12 noon (non-counsel), but, depending on the number of applications to be dealt with, the list may be divided into two parts, one to be heard at 10.30 a.m. and the other not before 2 p.m. For this purpose it will be necessary to have an estimate of the duration of the hearing of each application, and, on the issue of the notice of appeal or summons (other than a summons for bail), a copy will be required to be filed H indorsed with such estimate. Any alteration in the estimated time or any settlement should be notified to the Chief Clerk, Summons and Order Department, not later than 12 noon on the day preceding the hearing.

Applications estimated to last more than forty-five minutes should, by consent of the parties, be taken out of the ordinary list for a special appointment on Wednesdays or Thursdays.

PARKER OF WADDINGTON, C.J.

July 31, 1959.

Re SCOTTISH ASSOCIATION OF MASTER BAKERS' AGREEMENT.

Re WHOLESALE AND RETAIL BAKERS OF SCOTLAND ASSOCIATION'S AGREEMENT.

[RESTRICTIVE PRACTICES COURT (Lord Cameron, Mr. W. Wallace and Mr. W. G. Campbell), June 1, 2, 3, 4, 5, July 23, 1959.]

Restrictive Trade Practices—Reference—Bread price restriction—Scottish Bakers' Associations—Agreements not to sell except at prices recommended by Associations—Whether removal of restriction would deny public substantial benefit—Restrictive Trade Practices Act, 1956 (4 & 5 Eliz. 2 c. 68), s. 21 (1) (b).

The baking industry in Scotland comprised four classes of bakers (i) the family baker, (ii) the large retail baker, (iii) the wholesale baker and (iv) co-operative societies. At the end of September, 1956, there were about six hundred bakery businesses making bread in Scotland. The number of bakery businesses, particularly the small businesses, had shown a tendency progressively to decrease for some twenty years past, and this tendency was continuing. The produce of Scottish bakers could be divided into four classes, and of these standard bread represented, in money turnover, about thirty per centum. Of the six hundred businesses about one hundred and twenty converted into bread weekly more than twenty-five sacks of flour, each of which contained 280 lb. of flour. The Scottish Association of Master Bakers was formed in 1891, and the Wholesale and Retail Bakers of Scotland Association was formed in 1951. The former Association included members of all classes of the baking industry; the members of the latter Association were twenty-three large producers, all of who were also members of the former Association. The industry was largely dominated by five groups of large producers. Among the many activities of the Master Bakers' Association was the making of recommendations to its baker members as to the minimum price of bread and other bakery products. There was no power to enforce recommendations, but they were in fact followed by members, and the implied* agreement not to offer standard bread except at prices so recommended constituted the restrictions in issue in the present case. Historically provision had been made for the control of price and weight of bread, as being an essential commodity, from early times. During the war of 1939-45 price was controlled by emergency legislation, and the weight of loaves was still so controlled. For the purposes of the emergency control a Costings Committee had been set up to advise as to the price of bread, and at the end of the bread subsidy on Sept. 29, 1956, the Associations had retained a Costings Committee which continued to carry out half-yearly costings in order to provide information for recommendations as to the price of bread. Thereafter the price of bread was determined by the recommendation of the Associations. The price was measured against the unit of a sack of flour, which would yield about 216 large 28 oz.

* Section 6 (7) of the Restrictive Trade Practices Act, 1956, provides:—"Where specific recommendations (whether express or implied) are made by or on behalf of a trade association to its members or to any class of its members, as to the action to be taken or not taken by them in relation to any particular class of goods or process of manufacture in respect of any matter described in the said sub-s. (1), this Part of this Act shall apply in relation to the agreement for the constitution of the association notwithstanding any provision to the contrary therein, as if it contained a term by which each such member, and any person represented on the association by any such member, agreed to comply with those recommendations and any subsequent recommendations made to them by or on behalf of the association as to the action to be taken by them in relation to the same class of goods or process of manufacture and in respect of the same matter."

A loaves, and the costings showed the average profit margin per sack. The costings for six months ending in November, 1958, showed, on the evidence of the accountant, a more than adequate average profit margin. The demand for standard bread was a comparatively stable demand, so that future production costs could be forecast with substantial accuracy. In recent years a large measure of goodwill and co-operation had prevailed throughout the industry. On a reference by the Registrar of Restrictive Trading Agreements under s. 20 (1) and s. 20 (2) (a) of the Restrictive Trade Practices Act, 1956*, whether the restrictions not to offer or supply standard bread except at prices recommended by the Association were contrary to the public interest and, therefore, void under s. 20 (3) of the Act of 1956,

B **Held:** the restrictions were deemed by s. 21 (1)† of the Restrictive Trade Practices Act, 1956, to be, and were declared to be, contrary to the public interest, because—

C (i) it was not established that greater stability of the price of standard bread would be achieved if the restrictions remained than if they did not exist; moreover, as a general rule (following *Re Yarn Spinners' Agreement*, [1959] 1 All E.R. at p. 317) price stabilisation as an alternative to a free market was not a benefit to the consuming public (see p. 109, letters D and G, post), and

D (ii) it was not proved that the prices of standard bread would be likely to be higher under free competition than if the restrictions were retained (see p. 112, letter I, and p. 111, letter D, post), and there was no basis for a general assumption that the lifting of price restrictions from an industry, where there was a large measure of group domination, would not induce greater flexibility of price (see p. 112, letter C, post), and

E (iii) a system of price restriction in which the preponderance of power was in the hands of a few large producers did not necessarily or naturally operate to reduce the risk of undue concentration of production or to prevent monopoly; and it was not shown that the removal of the restrictions would increase either danger in the baking industry (see p. 113, letter C, and p. 114, letter B, post), and

F (iv) freedom from price restriction should not, in general, lead to reduction in quality of the product (see p. 114, letter C, post; *Re Yarn Spinners' Agreement*, [1959] 1 All E.R. at p. 316, followed), and it was not established that any reduction in quality would be likely to follow removal of the restrictions on the price of standard bread (see p. 114, letter H, post), and

G (v) removal of the restrictions should not lead to a lessening of co-opera-

* Section 20, so far as relevant, provides:

H “(1) The court shall have jurisdiction, on application made in accordance with this section in respect of any agreement of which particulars are for the time being registered under this Part of this Act, to declare whether or not any restrictions by virtue of which this Part of this Act applies to the agreement (other than restrictions in respect of matters described in paras. (b) to (d) of s. 8 (8) of this Act) are contrary to the public interest.

“(2) An application to the court under the foregoing subsection may be made— (a) in any case, by the registrar . . .

I “(3) Where any such restrictions are found by the court to be contrary to the public interest, the agreement shall be void in respect of those restrictions; and . . . the court may . . . make such order as appears to the court to be proper for restraining all or any of the persons party to the agreement . . . (a) from giving effect to . . . the agreement in respect of those restrictions; . . .”

† Section 21 (1), so far as relevant provides: “For the purposes of any proceedings before the court under the last foregoing section, a restriction accepted in pursuance of any agreement shall be deemed to be contrary to the public interest unless the court is satisfied of any one or more of the following circumstances, that is to say— . . . (b) that the removal of the restriction would deny to the public as purchasers, consumers or users of any goods other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such, whether by virtue of the restriction itself or of any arrangements or operations resulting therefrom: . . .”

tion and good relations within the industry, even assuming that these were due to the price restrictions in issue in this case (see p. 115, letter C, post).

Per CURIAM: though there had been a long history of control over the price of bread, yet the control had been exercised by authorities outside the industry; and an appeal to history, without analysis of comparative conditions, was not a real help in determining an issue under the Restrictive Trade Practices Act, 1956 (see p. 110, letters A and B, post).

[For the Restrictive Trade Practices Act, 1956, s. 21, see 36 HALSBURY'S STATUTES (2nd Edn.) 954.]

Case referred to:

Yarn Spinners' Agreement, Re [1959] 1 All E.R. 299; [1959] 1 W.L.R. 154.

Reference.

Pursuant to the Restrictive Trade Practices Act, 1956, s. 20 (2) (a), the Registrar of Restrictive Trading Agreements referred to the Restrictive Practices Court by notice of reference dated Feb. 17, 1958, two agreements made respectively between the members of the Scottish Association of Master Bakers and the members of the Wholesale and Retail Bakers of Scotland Association. The main objects of the Scottish Association of Master Bakers were, as stated in r. 2 of the Association's Constitution and Rules:—

" . . . to promote and protect the interest of the trade, to further technical education, to watch over legislative enactments affecting the trade, to further social intercourse among the members, to support a benevolent fund, and generally to maintain the status of the trade."

The object of the Wholesale and Retail Bakers of Scotland Association as set out in para. 2 of the Association's Constitution and Rules was:—

" . . . to represent, promote and protect the trading interests of its members engaged in the baking of bread and/or cake and flour confectionery in Scotland and to undertake any act which may be considered incidental or necessary to the carrying out of this object."

The Constitution and Rules of the latter Association further provided:—

" 16. . . . No decisions shall be binding on a member provided notice of dissent is given at the meeting at which the decision was reached or within seven days of receipt of intimation of the decision from the secretary. No member shall act contrary to any decision or recommendation with which he has already complied until seven days after giving notice in writing to the secretary of such intention."

The following were the restrictions that were the subject of the reference:—

(i) In respect of the Scottish Association of Master Bakers—

" (a) Not to offer or supply standard bread to consumers except at the retail price recommended by the Association as appropriate to the standard bread offered or supplied and to the area in which such bread is offered or supplied."

" (b) Not to offer or supply standard bread to retailers except at the wholesale price recommended by the Association as appropriate to the standard bread offered or supplied and to the area in which such bread is offered or supplied."

(ii) In respect of the Wholesale and Retail Bakers of Scotland Association—

" (a) Not to offer or supply standard bread as defined for the purpose of this reference to consumers except at the retail price recommended by the Association as appropriate to the standard bread offered or supplied and to the area in which such bread is offered or supplied."

" (b) Not to offer or supply standard bread to retailers except at the wholesale price recommended by the Association as appropriate to the standard bread offered or supplied and to the area in which such bread is offered or supplied."

" (c) Not, having complied with a recommendation made by the Association

A in respect of the prices to be charged for standard bread, to offer or supply such bread at prices other than those recommended until seven days after giving notice to the secretary."

By order dated May 8, 1958, the Scottish Association of Master Bakers was appointed to represent all members of the Association. New members having joined after the date of the representation order, a further representation order

B in respect of them was made at the conclusion of the judgment.

The facts are stated in the judgment of the court.

I. M. Robertson, Q.C., and D. W. R. Brand (both of the Scottish Bar) for the Scottish Association of Master Bakers and the Wholesale and Retail Bakers of Scotland Association.

C J. O. M. Hunter, Q.C., and J. R. Fiddes (both of the Scottish Bar) for the registrar.

Cur. adv. vult.

July 23. LORD CAMERON read the following judgment of the court: The respondents in this case are the Scottish Association of Master Bakers and the Wholesale and Retail Bakers of Scotland Association. Both these are trade

D associations within the meaning of s. 6 (8) of the Restrictive Trade Practices Act, 1956. The earlier Association (the Master Bakers) was founded in 1891 with objects *inter alia*

"to promote and protect the interest of the trade, to further technical education, to watch over legislative enactments affecting the trade, to further social intercourse among the members, to support a benevolent

E fund, and generally to maintain the status of the trade."

The Wholesale and Retail Bakers of Scotland Association was formed in April, 1951, with the declared object

"to represent, promote and protect the trading interests of its members engaged in the baking of bread and/or cake and flour confectionery in

F Scotland and to undertake any act which may be considered incidental or necessary to the carrying out of this object."

As regards the earlier Association, the Scottish Association of Master Bakers, under art. 16 of its constitution and rules, it is provided that

"all decisions come to or recommendations made shall be duly recorded by the secretary. No decision shall be binding on a member provided

G notice of dissent is given at the meeting at which the decision was reached or within seven days of receipt of intimation of the decision from the secretary. No member shall act contrary to any decision or recommendation with which he has already complied until seven days after giving notice in writing to the secretary of such intention."

H There are three classes of members in the Master Bakers' Association: (i) Ordinary members comprising (a) persons or firms who are master bakers, (b) directors of limited companies engaged in the baking trade, (c) managers of bakeries, (d) sons of master bakers engaged in the trade and (e) retired master bakers; (ii) Associate members being persons having a business connexion with the trade; and (iii) Honorary members being persons who have

I rendered special services to the Association or trade. Ordinary members pay a larger subscription than associate members and, in addition, an oven levy based on the number and capacity of their ovens. As at February, 1958, the Association had 1,221 ordinary members and some six hundred associate and honorary members. Only ordinary members are entitled to vote at meetings and to receive recommendations on prices. The office-bearers and the elected members of the executive committee of the Association, which is responsible for the direction of its affairs, are elected at the annual general meeting. The Association is also divided into twenty-two local divisions covering the whole of Scotland.

Local divisions appoint divisional office-bearers and executive committees and are generally responsible for local affairs. Divisional chairmen are members ex officio of the Association's executive committee. The Master Bakers' Association is substantially representative of all large and small private traders in the industry, but since registration under the Act, a number of co-operative societies who were members of the Master Bakers' Association have withdrawn from membership. The Wholesale and Retail Bakers of Scotland Association was formed to promote and protect the interest of the large producers or "plant bakers". This body has a total of twenty-three members all of whom are also members of the Master Bakers' Association.

The baking industry is made up of four distinct classes of bakers, viz. (i) the family baker; (ii) the large retail baker; (iii) the wholesale baker; and (iv) the co-operative societies. The family baker generally has his bakehouse at the rear of his premises and a retail shop in front, and the variety of his products is as a rule limited to those which can be hand produced economically. On occasions, he may have a few other retail shops near to his bakehouse; he may also have a limited delivery by van. The large retail baker has a chain of retail shops scattered over a wide area and served from a central bakehouse. In his case he usually operates automatic bread-making plants similar to the wholesaler. He also sells by van over a wide area. The wholesale baker has a central bakery usually in a large city or town and sells by vans to retailers such as grocers and dairymen. Sectors of his area of supply are allocated to van-salesmen each of whom may have from fifty to a hundred retail customers in his sector. In addition, bakery goods are despatched by rail to remote places throughout Scotland. The co-operative societies (who obtain a large part of their bakery goods from the United Co-operative Baking Society) sell to their members either over the shop counter or from vans. A few societies sell to the private retailer on a wholesale basis.

On the removal of bread subsidy in September, 1956, there were approximately six hundred bakery businesses in Scotland making bread, and of these 120 were converting more than twenty-five sacks of flour into bread per week. A sack of flour weighs 280 lb. and when converted into bread gives an approximate yield of 216 one-and-three-quarter pound loaves or 192 two-pound loaves.

The bakers' produce may be generally classified in the following groups:— (i) "Standard Bread"; (ii) "Bread Products" including milk loaves, malt loaves, proprietary and other special loaves, Vienna bread and rolls and morning rolls; (iii) "Flour Confectionery" including teabread, iced teabread, smalls, biscuits, butter biscuits, cakes, fancy cakes, fruit loaves and bun loaves; and (iv) "Bakery Meat Products" including pies, bridies and sausage rolls. The rough proportion of the total production in Scotland in relation to money turnover of these four groups is approximately, standard bread thirty per cent., bread products seven per cent., flour confectionery sixty per cent., bakery meat products three per cent., so that the provision of standard bread roughly represents rather less than one-third of the total bakery production in Scotland. "Standard Bread" means all batch or pan loaves of fourteen ounce weight or multiples thereof, baked by members of the Associations, from brown or white flour or blends thereof, whether or not subsequently wrapped or sliced, other than Vienna bread or fancy or proprietary or specially enriched bread.

In Scotland there are two types of standard bread, the square or batch loaf and the pan loaf. The square or batch loaf, which is the traditional loaf of Scotland, has soft crumb all round it and the pieces of dough are all baked in one batch. The pan loaf on the other hand is baked in a tin and is comparable with the English tin loaf. The batch loaf is cheaper to produce than the pan loaf (which is a slightly enriched loaf and, accordingly, has a rather more costly ingredient content). According to figures supplied by the Ministry of Agriculture, Fisheries and Food in 1956, approximately 62.56 per cent. of standard bread sold in Scotland was batch bread, 37.44 per cent. was pan bread.

- A The statutory weight of bread is governed by s. 6 of the Sale of Food (Weights and Measures) Act, 1926. This section has been suspended by emergency legislation, the current statutory order being the Bread Order, 1953 (S.I. 1953 No. 1283), as amended by the Bread (Amendment No. 2) Order, 1956 (S.I. 1956 No. 1181). Under art. 3 of this order, loaves in excess of ten ounces in weight must have a nett weight of fourteen ounces or multiples of fourteen ounces.
- B Standard bread is usually sold in weights of twenty-eight ounces or fourteen ounces of which the twenty-eight ounce loaf is the more popular.

The Master Bakers' Association, following practices well established at the date of its formation, made recommendations to its members as to the price of bread, and in later years, particularly since the price of flour confectionery was controlled by the government during the war, has also made recommendations as to prices of other confectionery goods. Although the Associations' constitutions contain no powers for enforcing observation of their recommendations, no question arises whether these fall within the scope of the statute, as it was conceded that they are covered by the terms of s. 6 (7) of the Restrictive Trade Practices Act, 1956.

- D Prior to Feb. 10, 1958*, the local divisions of the Master Bakers' Association were in use to issue recommendations, differing in each district, as to prices of a variety of articles other than standard bread, including, inter alia, morning rolls and various items of flour confectionery and bakery meat products. These additional recommendations contained no specific requirements as to weight, size or contents, and were not based on any costing system or analysis of costing figures. They were withdrawn by the Association as at Feb. 10, 1958, and,
- E therefore, the only restrictions which are in issue in the present proceedings are those which arise out of the current recommendations in respect of the prices of standard bread and the wholesale discounts relating thereto.

The activities of the Master Bakers' Association are not limited to making recommendation of minimum prices of bread or other bakery products. These have represented only a small part of the Association's activities. It takes part in the negotiation of wages and conditions of employment in the industry with the Bakers' Union, and has helped to foster the extremely good relations which are said to exist in the industry. In addition, it assists members through its negotiation with various government departments charged with duties under such statutes as the Factories Acts, the Shops Act, Wages Councils Acts, Food Acts and other statutes which directly affect the interests of the trade. Over and above these services, the Master Bakers' Association provides advisory services through which any member can obtain expert advice on any practical or technical problems. It organises practical and technical demonstrations, and discussions by which means trade information and techniques are disclosed and exchanged among members. It makes itself responsible for the secretarial and administrative work of the National Bakery Education Committee which deals with the training of apprentices, and itself arranges the provision of scholarships, the organisation of competition and the general promotion of technical training. Both the Association and many of its individual members give active support to the British Baking Industries' Research Association, a body which circulates a wide variety of technical and scientific information from this country and abroad. These activities no doubt contribute, as is claimed, to the efficiency of the baking industry, and could, in appropriate conditions, contribute a consequential benefit to the consumer.

- I At the same time, the number of bakers in Scotland has been progressively falling during the past eight years, and the membership of the Association has shown a similar decline since 1950. The small baker has had to compete with the large, highly mechanised producers; this has tended to show itself in smaller concerns going out of business, or ceasing to produce bread or being absorbed

* The date of the issue of the notice of reference in these proceedings.

by the larger enterprises. This has affected particularly the family bakers, and today only about half this Association's membership is making bread, while the great majority of these breadmakers are producing bread in a very small way. So far as is known, no new businesses baking bread in any appreciable quantity have started up since the war. A

It was established in evidence that, from very early days, provision has been made for control of the price and weight of bread as being an essential commodity. Much of this control was exercised by local authorities at what were called bread assizes which ceased to operate early in the nineteenth century. Later in that century, various local trade associations made, from time to time, recommendations as to uniform prices of bread. On the outbreak of war in 1939, food rationing and control of food prices was introduced, and the prices of standard wartime flours and "national" bread were controlled, with penalties against prices in excess of the controlled price. In 1941 a system of bread subsidy was introduced which remained in operation until Sept. 29, 1956, and, during that time, maximum prices were prescribed for "national" bread, which prices were subsidised in order to give a permitted margin of profit. The subsidy was paid by the Ministry of Food, and, in order to determine the rate of subsidy, it was necessary for the government to obtain from a representative cross-section of the industry in Scotland particulars of the costs of production, distribution and sale of bread, and a uniform system of costings was instituted, representative samples of revenue and costs being provided by a sample of members of the industry. The particulars of costs and revenue so obtained were furnished at regular intervals to the Ministry. In 1940 the Association, along with representatives of the co-operative societies and of what is now the association known as the Wholesale and Retail Bakers of Scotland Association, had set up a committee of the industry known as the Scottish Bread Costings Committee which was to ascertain the costs of bread production and distribution, to consult with an independent accountant as to the results of costing inquiries, to agree the subsidy rates with the Ministry, to assist in obtaining the requisite cost returns from the individual bakers and to advise the constituent associations on matters relating to costings and subsidy. Mr. James Dowling, C.A., of Messrs. Thomson McLintock & Co., was appointed by the committee as the independent accountant to receive the cost returns from the bakers, collate them and bring out an average cost for the whole Scottish bread industry. The Ministry of Food had a costings division and a firm of accountants acting on behalf of that division. These investigated the figures prepared by Mr. Dowling and, after agreement between the sides had been achieved, the rate of subsidy was determined. B C D E F G

When the bread subsidy was abolished on Sept. 29, 1956, the trade representatives, i.e., representatives of the Co-operative Union (who later withdrew) and of the Associations, requested the Scottish Bread Costings Committee and its independent accountant to continue with the work of costs investigation and ascertainment and to advise them as to the price of bread from that date. Flour had been decontrolled on Aug. 29, 1953. The figures costed were those in respect of "national" bread, that being a loaf, batch or pan, of a quality and content which was regulated within prescribed limits. The so-called white loaf, milk bread and proprietary breads were excluded from the costings. Further, no figures were included (a) for the cost and proceeds of wrapping and slicing, (b) for flour rebates receivable under the Millers' Rebate Scheme operative from Dec. 4, 1955, as regards Scotland, or (c) for cash discounts. Costings for subsidy purposes were carried out quarterly until the last four years when they were on a half yearly basis, a practice which has been followed since decontrol. Until 1953, the final costings results were arrived at by calculation of an average of the results of each business in the sample. From that date till the discontinuance of subsidy, the sample of cases costed was considerably increased by the addition of a number of businesses mainly drawn H I

A from the more outlying districts and generally of small or medium size, and the method of averaging was altered by making a more detailed compartmenting of the results of bakers of differing weekly sackages, and these results were "weighted" to render the ultimate figure produced a more accurate reflection of typical baking costs. These figures (calculated separately for batch and for pan bread) were then combined, weighted in an ascertained proportion according to the proportion of the type of bread produced (batch sixty per cent., pan forty per cent.) and the resultant weighted average was the figure on which, with the inclusion of the permitted profit margin, the subsidy was calculated.

When the subsidy was discontinued and the selling prices of bread freed from control, the Bread Costings Committee, in response to the request of the Associations already referred to, continued carrying out half yearly costings with the object of having information available for the purpose of recommendation of minimum prices. As "national" bread had then ceased to exist as such, the new costings were related to all bread except milk bread and proprietary brands.

The form of costings after decontrol remained the same, except that the number of cases costed was reduced and the costings included figures for advertising, these having been disallowed in costings for subsidy. The results of batch and pan bread costings were not amalgamated as had formerly been the case, the new costings being required for separate consideration of the prices of batch and pan bread, and, owing to lack of information and to the fact that the sample on which costings were calculated was considerably reduced in number, the results were not weighted over sackage groups in the industry as had been the case for the latter years of subsidy. The number of samples costed during the period of subsidy had dwindled down to twenty in 1953, but it was claimed that inquiries showed that this number was sufficient at that time to enable a representative picture of the levels of costs and proceeds in the Scottish industry to be obtained. When bread was decontrolled and costings were continued, the number participating in the samples taken for costings purposes did not increase, and most of them came from large plant bakers, mainly in the central area of Scotland whose operations accounted for approximately half the total sackage of flour baked into bread in Scotland. The number of cases costed in the five half yearly inquiries carried out since Sept. 29, 1956 (including that of March, 1959), have been respectively, seventeen, seventeen, fourteen, fourteen, and fifteen.

It is not necessary to analyse in detail the method of costing, but the general pattern may be described. The unit against which cost is measured is the sack of flour. The generally accepted yield from a sack of flour is 216 large 28 oz. loaves and, for approximate calculation in terms of cost or process, one half-penny per large loaf represents roughly 9s. per sack. The figures on which costs are ascertained are divided into the following headings:—

- I. *Proceeds of sale*
- II. (i) Ingredients.
- (ii) Baking wages.
- (iii) Baking expenses.
- (iv) Shop expenses.
- (v) Delivery expenses.
- (vi) Wholesale discount and contract allowances.
- (vii) Losses on stale and damaged bread.
- (viii) Loss on setters (loaves, frequently distorted, bordering the outside of a batch).
- (ix) General expenses.
- (x) Flour.

The completion of the costing return is carried out by the baker himself, and

he is responsible for the allocation of wages figures and ingredient costs as between bread and other goods and services. A

In the proceeds of sale, the baker sets out the actual proceeds of sale of his standard bread, separating batch and pan and sub-dividing these as between the large and small loaves. When the price of bread was controlled and subsidised, the margin of profit permitted was the subject of discussion with, and determination by, the government. The figure which, it was maintained by the industry during the latter part of the period of control, should be allowed as baking margin or profit margin in terms of the costings system was 11s. 2d. per sack. This figure was not accepted by the Ministry, which at that time was only prepared to concede for costing purposes a profit margin of 5s. per sack as compared with the estimated pre-war figure of 4s. per sack. In 1954 the permitted profit margin was increased to 7s. per sack with an additional subsidy of 4s. on the first twenty-five sacks of a baker's weekly national bread production, which had been granted in 1953. Although this additional subsidy was of little consequence to the large baker, it was of considerable benefit to the small producer. On decontrol, the industry decided to aim at a baking margin averaged over batch and pan bread of 11s. 2d. per sack, and this has remained the target average of "baking margin" since decontrol. The baking margin figures, however, did not, and do not, include certain increasingly important additional items of profit from wrapping and slicing, flour rebates and cash discounts. Taking these into account, the independent accountant of the Costings Committee, Mr. Dowling, stated that, on the averages for the six months ended in November, 1958, the average profit margin at that date contained the following items:— B C D E

				s.	d.
Baking margin	...	...	...	13	2
Wrapping and slicing	...	...	...	2	4
Flour rebate	...	...	...	3	6
Cash discount	...	...	...	1	8
Total	...	...	...	20	8

He agreed that individual producers might have been, and were, making profit margins at that time much greater per sack than the above margin; in one particular selected example of one firm the corresponding figures were:— F

				s.	d.
Baking margin	...	...	...	19	6
Wrapping and slicing	...	...	...	5	8
Flour rebate	...	...	...	4	4
Cash discount	...	...	...	1	8
Total	...	...	...	31	2

He stated that, in his view, at that time 15s. per sack was a reasonable average overall profit and agreed, broadly, that a more than adequate return had been obtained since May, 1958. G H

When the figures of average baking costs have been ascertained they are submitted to the Costings Committee. The committee also has before it a statement showing the average cost per loaf of wrapping and slicing on the same four week period and is, therefore, apprised of the wrapping and slicing profit per sack earned by the concerns in the sample. With this information before them, along with their own broad knowledge of flour rebates and cash discounts, the committee advise the Associations what recommendations as to minimum retail prices of standard bread and wholesale discounts should be issued to the industry and the public. I

This is not an end of the matter, because the retail price is not uniform throughout the country, certain differences being made in respect of different areas.

- A These differences are always by way of supplement to the recommendations as to minimum price issued by the Associations after receiving the advice of the Costings Committee. For the purpose of determining the price of standard bread Scotland is divided into three parts, namely, Area 1—mainland south of the Caledonian Canal, Area 2—mainland north and west of the Caledonian Canal, Area 3—Inner and Outer Hebrides, Orkney and Shetland. It appears
- B that those areas were originally determined by the Ministry of Food and have been accepted by the Associations for the purposes of their recommendations as to the minimum retail price for standard bread. In Area 1, the recommended minimum retail price is (with certain geographical exceptions) the basic price; in the other areas it is subject to certain recommended increases, known as differentials. The price differentials (which operate and vary both as between
- C areas and types of standard bread) are determined by the Associations' twenty-two Divisional Committees. These differentials vary from $\frac{1}{2}$ d. to 2d. per large standard loaf, equivalent to from 9s. to 36s. per sack of flour respectively. The bases on which these differentials are decided are not found in analysed costs or calculated figures, but are determined, in the light of their own personal knowledge of local circumstances, by the appropriate committees which take
- D into account such matters as flour carriage charges in excess of the Glasgow-Edinburgh transport charge, delivery charges in remote areas, fuel costs and special wage costs. This is, in outline, the machinery which is available to, and used by, the industry for the determination of the recommended minimum retail prices of standard bread.

- E The industry has certain characteristics arising out of its nature and structure which we think are of importance in considering the issues raised in this case. Bread is not only an essential commodity but it is also one for which the demand, in particular for standard bread, is comparatively stable, and, both in totality and in particular areas, can be forecast with reasonable accuracy for a reasonably foreseeable future. The same factor of stability tends to be true of labour costs as well as of the cost of the principal ingredient—flour. This means that
- F future over-all production needs can be forecast with substantial accuracy and so can the principal production costs. It is a peculiarity of the industry not only that it is largely dominated by five groups of large producers, but that the sample figures, on which its existing calculations are based, are drawn in large measure from the operations of these groups, whose position, certainly as regards standard bread, is, therefore, one of virtual domination. Further,
- G experience over the past twenty years has shown an increasing tendency for the small producer to disappear from the industry, either from leaving it altogether or from amalgamation with, or absorption by, one of the large groups, and there has been an absence of recruitment.

- H Since decontrol in 1956, the activities and recommendations of the Costings Committee have no longer been subject to the scrutiny or supervision of any outside body. Secondly, apart from any question of adequacy of sample, the arrangements in force do not provide for a complete costing of all the operations connected with the production and sale of the commodity. Thirdly, although there is an independent accountant appointed, his remit is limited to the provision of partial and incomplete figures and to offering advice. In the result,
- I therefore, the ultimate recommendations as to the appropriate retail price is left to the unfettered discretion of the industry's own representatives who are free to disregard, and have, in fact, as the evidence in this case shows, on occasion disregarded, the independent accountant's advice as to the recommendation to be made.

Finally, it has to be kept in mind in considering the restrictions under review that the baking of standard bread is only one activity of the baking industry, and that the profits arising therefrom represent only a part, and not necessarily the major part, of the profits earned in that industry.

We turn now to consider the contentions and arguments of the Associations, but before doing so we should like to express our appreciation of the extremely frank and full statements made on behalf of the Associations by their officials and the independent accountant, whose testimony was of the greatest value, and our acceptance of the sincerity of the opinions expressed by the trade witnesses called on the Associations' behalf as to the future trends in the industry if the present restrictions are removed. The Associations maintain that the restrictions in question in the present case, being recommendations as to the minimum retail prices of standard bread and the wholesale discounts to be allowed thereon, are lawful in that they come within the protection afforded by s. 21 of the Act. They claim, for various reasons set out in their pleadings, that s. 21 (1) (b) applies to the recommendations as to minimum prices, and s. 21 (1) (g) to the recommendations as to wholesale discounts. As the issue on wholesale discounts only becomes live if the Associations succeed in their claims under s. 21 (1) (b), it will be both logical and convenient to consider these first and in the order in which they are set out in the Associations' pleadings, always keeping in view that the burden of proof here lies on the Associations.

The first question that arises is whether, in fact, prices of standard bread are stabilised at known and publicised levels. There is no doubt, of course, that variations in the price of bread are publicly intimated under the present system of recommendations, and we think the evidence shows that there is reasonable stability in the price of bread. But we are not satisfied that this stabilisation is achieved by virtue of the restriction which is the essential point for the Associations to prove. On the contrary, it appears to us, from the evidence of the Associations' own trade witnesses that, in the absence of restriction, the price of standard bread would be in very large measure stabilised because of the existence of the important stabilising factors in the structure and nature of the industry itself to which we have already drawn attention. Not the least important of these is the fact that, given the statutory requirement as to weight of the standard loaf, it has been shown that a variation of $\frac{1}{2}$ d. in the price of a large standard loaf is equivalent to a variation in the return to the baker of 9s. per sack of flour baked. Therefore, it is only considerable fluctuations in cost which can lead to effective alteration in the price of the standard loaf. Here we would point out that this circumstance would not prevent reduction of less than $\frac{1}{2}$ d. per loaf when the customer took more than one loaf at a time, e.g., $\frac{1}{4}$ d. (in the case of two loaves) or $\frac{1}{2}$ d. (for four loaves) per large loaf. In these circumstances and where, as here, demand for a commodity is unlikely to be subject to rapid or marked fluctuation and the range of wage and raw material costs is not likely to alter substantially within a reasonably foreseeable tract of future time, powerful factors making for stability of price are always present. Further, we think that it is plain from the evidence of the Associations' trade witnesses that knowledge of the price of bread and of any material change in it is likely to be and remain widespread without the aid of such publicity as is got by the publication of the Associations' recommended prices. Again, the witnesses for the Associations were practically unanimous that, if the recommendations were withdrawn, the price of standard bread would remain constant in the short run and that thereafter it would tend to follow the impact of the important economic factors to which we have already referred, and which themselves admittedly tend to stability of price and serve to prevent any but really substantial movements in cost being reflected in fluctuation of price. In addition, we were pressed with evidence to the effect that, among the five dominating groups of producers, price cutting warfare was unlikely to break out even under conditions of free competition in price. We will have occasion later to refer to this evidence and the argument based on it in considering the second of the grounds on which the Associations claim to be within s. 21 (1) (b). These are additional circumstances that, in our opinion, would operate to promote stabilisation and inhibit minor or frequent fluctuations in the price of

- A bread. It was, however, suggested in evidence that increases in the price of bread would more rapidly follow under conditions of freedom than under the present system. This hypothesis, however, has to be considered in the light of the factors which we have already mentioned as making for a natural stability of price as well as in the light of the provision which already exists for calling emergency meetings of the Costings Committee. On this latter point, it can be recorded that, on the occasion of the last increase in price on Dec. 10, 1956, the whole issue was determined in a few days, the price then under review having been fixed and published only as recently as Sept. 30 of that year. Moreover, as the practice of the Costings Committee is to have flour and other costs under continuous review so as to be able to report to the Associations whenever a change in bread prices is required, it cannot be doubted that, where the desire exists within the industry for a change in price, machinery has been provided for its rapid translation into action. We are not satisfied that, if this restriction were removed, there would be any substantial lessening of the time lag between the occurrence of any increase in costs, sufficiently significant to warrant an increase in price of standard bread, and concerted action to bring about an increase in price. We are not satisfied that the Associations have established on a fair balance of probabilities that greater stability of price of standard bread at known and publicised levels is achieved by virtue of the recommendations than would be achieved if the recommendations did not exist. In any event, we are not satisfied that the Associations have shown that the difference, if any, would be other than negligible.

- But, even if stabilisation were achieved by virtue of the recommendation, the critical issue still remains whether, in that circumstance, there is an advantage or benefit to the consuming public which is at once specific and substantial. No doubt it can be accepted as a general rule that price control tends to make for price stability, but the Restrictive Trade Practices Act, 1956, presumes that recommendations such as those in the present case are contrary to the public interest (1) until the presumption is overcome in one or other of the limited exempting categories prescribed by the statute. Further, in considering whether to promote stabilisation as claimed by the Associations is to confer a specific and substantial benefit or advantage on the consuming public it is, in our view, impossible to divorce the questions of quality in relation to price from its stability. It is not stabilisation of price by itself alone which is a benefit or advantage; it can only be stabilisation at the right level; it is difficult to envisage circumstances in which stabilisation at an excessive price level could be held to confer benefit on the consumer. We re-affirm the view already expressed by this court in *Re Yarn Spinners' Agreement* (2) that, as a general rule, price stabilisation as an alternative to a free market is not a benefit to the consuming public. Stabilisation does not appear to us to be necessarily a virtue. Indeed, it may prevent or retard the introduction of progressive methods in industry and thus operate positively against the interest of the consumer. Even if it were found (and we do not think that the evidence led would warrant such a finding) that an appreciable measure of increased stabilisation of prices at known and publicised levels was achieved by virtue of these recommendations, we can find no basis, either in general principle or on the particular evidence in this case, for holding that this circumstance by itself confers a specific and substantial benefit or advantage on the consumer. But, quite apart from these considerations, we find in fact that it is not proved that the price of standard bread has been stabilised by virtue of the recommendations under review. Thus the essential basis on which the Associations' argument is founded has not been established, and for all these reasons we reject the first of the Associations' contentions in support of their claim under s. 21 (1) (b). In so doing, we have not ignored the historical

(1) See the opening words of s. 21 (1) of the Act of 1956.

(2) [1959] 1 All E.R. at p. 317.

circumstances to which the Associations referred, or on which they appeared to some extent to rely in this part of their case. We do not doubt that bread is an essential commodity, nor could it be denied that there is a long history of control over its price, but for the most part it would appear that that control was exercised by outside authorities and was not directed from within the industry itself as under the present system. In any case, we do not think that an appeal to history, without analysis and comparison of the conditions in which the historical system operated, is of any real help in deciding the issue before us today, which has to be determined in terms of an Act of Parliament of 1956.

The next ground on which the Associations rely appears to raise the most substantial issue in the case and the most critical. As pleaded, this claim was very wide indeed. It was said that

“Consumers of bread are enabled to buy standard bread of high quality at the lowest prices which are economically practicable from time to time because of the nature of the costings system and the fact that the margin of profit is small. The operation of the system communicates the benefit of savings in costs to the consumer at least as effectively as would be the case in market situations which might emerge if bakers fixed their own prices. Under the costings system falls in cost are automatically passed on to the public.”

Counsel for the Associations conceded that this contention went too far and that on the evidence he could not support it. This concession, which, on the evidence, counsel could scarcely have withheld, cuts deep into the Associations' case. Counsel's submission was much more limited and more modest, as he took his stand on the proposition that, if the restrictions were to be removed, the public in general throughout the whole country would be deprived in the long run of prices as low as they would be if the system of restriction were retained.

Counsel further argued that this issue should be considered as at February, 1958, the date of the reference in these cases, at which date the lowest profit margin for the whole period since decontrol was brought out according to Mr. Dowling's figures. We do not agree with this. The facts of the case must be looked at as a whole, and not merely the situation existing at a particular point of time. In view of Mr. Dowling's evidence that he had advised the Costings Committee at any rate in light of the November, 1958, figures that the profit margin achieved on the existing price according to his calculation was more than adequate and there was no contrary evidence, we think it would have been impossible to support the contention as set out in the Associations' pleadings. But we do not think that the evidence as to the method of price ascertainment, or its operation in practice, warrants the Associations' contention in the more moderate form submitted by counsel. The system of costing adopted in the industry is based on average figures of baking costs taken from what is claimed to be a reasonably representative sample. But, as we have already pointed out, the figures on which the average “baking margin” is calculated do not contain the whole income of the bread producer. Additional allowances have to be made for profits on wrapping and slicing, flour rebates and cash discounts, none of which are included in the baking margin figures. It is true that the Costings Committee are furnished with certain figures by their independent accountant to represent average profits on wrapping and slicing, but they have no firm or calculated figures on the other two matters, which are regarded as being within the personal knowledge of the individual member of the Costings Committee and, as we have already shown earlier, these figures can be very substantial. Again, as the system is controlled by the industry itself, its operation cannot be immediate or automatic. Further, when the recommended minimum price comes to be considered by those areas and divisions in which

- A differentials in the price are permitted, the appropriate committees apply these differentials at their discretion and not on the advice of the independent accountant or on any costings figures, actual or calculated, supplied by him. The position, therefore, may be summarised thus: the system of price fixing is not automatic in operation; it is operated solely by members of the industry without outside supervision or control; it is not tied to any level of low cost production; it
- B does not accurately cover all costs or sources of income or profit; it provides no accurate or factual basis for the ascertainment of appropriate geographic differentials, and there is no evidence to show that the areas for the operation of the differentials are drawn so as to operate fairly in the interests of consumers in the particular areas. Further, the ascertainment of a price based on averaged costs has been shown in the evidence in this case to be consistent with high profits
- C being available to the low cost producers, with no means existing whereby they can pass any part of the benefit of these profits, or their own probable higher efficiency, to the consumer in the shape of lower prices for standard loaves. Not unnaturally, it is among the low cost producers that the businesses controlled by the five dominating groups are to be found. Thus the system is not designed to reflect the lowest economically practicable cost, or to result in the lowest
- D economically practicable price being paid by the consumer, and, if it does not do so in the short run, we do not see why it should do so in the long. But, even on the assumption (which we do not accept) that, in use, this system could reflect the lowest economically practicable price, we think it is plain from the evidence that it has not in fact resulted in customers paying that price for their standard loaves. As we have already pointed out, at any rate in light of the
- E November, 1958, figures, Mr. Dowling advised the Costings Committee that the situation then disclosed was such as to warrant a price reduction of $\frac{1}{2}$ d. This advice was not taken and, while the reason given for not taking action in light of the figures of May, 1958, might be in some measure supportable, i.e., that earlier fluctuation in cost had caused some bakers losses which they were reasonably entitled to make up, no such reason was advanced to explain inaction in
- F November. The explanation offered, that it was not desired to make a change in view of these proceedings, did not strike us as sufficient or even relevant. The inevitable consequence would seem to be that the consumer in Scotland has had for many months to pay sums, substantial in the aggregate, in excess of what would be sufficient to provide the baker working on average costs with more than an adequate margin of profit. That the manner of operation of the
- G system in this respect has caused uneasiness in the industry was demonstrated by the evidence of Mr. Webb, representing one of the dominant groups, and by that of Professor Campbell of St. Andrews University, an economic expert called for the Associations. Professor Campbell pleaded that the system had not been in operation for very long since removal of subsidy and control, and that a reduction of price may confidently be expected; but there has been, in
- H our opinion, sufficient experience to enable a fair inference to be drawn as to its operation in the hands of the industry. Professor Campbell also stated very frankly and fairly that the system could be improved by the introduction of an element of external control or supervision, a view which was supported by Mr. Webb. Against this background of fact, can it be said that the Associations succeed in proving that, in general and throughout the country, the price
- I levels will be lower under restriction than they would be under freedom? Counsel could not suggest that a fall in costs would be more rapidly reflected in a fall in price under the restrictions than under conditions of freedom; his main and, indeed, only contention could be that an increase of price consequential on increased costs would be likely to follow more swiftly under free competition than under the present system of restriction. The argument in general is a difficult one for the Associations, because of the body of evidence which was led to the effect that price competition was unlikely to arise following the removal of restrictions, and that no marked change was likely to take place in

the price structure in the industry. The specific ground on which counsel A took his stand was that, because of the group domination of the industry, price competition was "just not a possibility". This statement was supported by the evidence of Mr. Webb, Professor Browning and Mr. Morrison, all representing certain of the dominating groups, and is evidence which requires careful consideration. All founded on the disrepute which the "price cutter" would achieve, and all assumed the continued existence of the present balance of B power and "peaceful co-existence" in the industry. If this evidence is accepted, then obviously it is only on the narrow ground to which we have already referred that the Associations' contention could be based. But the opinion of these witnesses, experienced and honest as they were, is, in a measure, a matter of C speculation, and there is no basis for a general assumption that the lifting of price restrictions from an industry in which there is a large measure of group domination will not induce greater flexibility of price, especially where it is conceded that there is a keen spirit of competition in matters of quality and service throughout the whole industry, and that the process of absorption of small businesses into the large groups is steadily progressing.

In this connexion, it is proper to notice an argument based on what was called the "surplus capacity" of the industry. It was said that this was not D sufficient to act as a spur to price competition. But we were not impressed by the evidence on this matter; surplus production capacity is a matter which, in the first place, cannot be adequately assessed by a mere calculation of the available oven capacity over and above that required to meet current peak load demands. In assessing the true surplus production capacity of the industry, E a much more detailed factual investigation would be necessary than was possible in this case; and it would be even more important, in our opinion, to have regard to the potential production capacity of those already engaged in the industry, particularly of the dominant groups among whom serious competition might be assumed to be more likely, if competition was to arise at all. Under F competition, one of the rewards for a lower price is increased turnover. There are in this industry those with ample financial resources to provide production capacity for this. We, therefore, do not think that, in this case, the type and character of evidence presented as to alleged "surplus capacity" in the industry is of any real value in determining the question before us at this stage.

The more natural inference from the facts of the case appears to us to be that, if freedom from restriction on price were removed, extended opportunity for G competition in price would sooner or later be embraced, and, indeed, there is already some evidence in the case that removal of price restrictions on bakery products other than standard bread has led to variation in price both above and below the former recommended level. On the point that increase in price may more rapidly follow increase in cost if the restrictions are removed, although H this argument receives support from the opinions of certain of the Associations' trade witnesses drawn from the dominant groups, we are not satisfied that these opinions are sound. It is only substantial fluctuations in cost which can be reflected in alterations in the price of standard loaves and, for the reasons we have already given in considering the question of price stabilisation, it appears to us that, if the circumstances were otherwise equal, equally rapid action I could, and would, be taken under the present system to adjust price to meet such an increase in costs. There is no evidence at all that the existence of the present restrictions has either prevented or postponed an increase of price which would have been warranted by a sufficient increase in costs. It must always be kept firmly in view that it is to be presumed that freedom from the restrictions struck at by the statute is in the public interest, and freedom from such restrictions necessarily implies freedom to compete in price as well as in any other matters. We, therefore, find that the Associations fail to establish that, in general and in the whole country, prices to the consumer are likely to be higher under free competition than they are under restriction and, on this view of the

A matter, we reject the second main ground on which they now seek to overcome the presumption against them and to bring themselves within the shelter afforded by s. 21 (1) (b).

The next ground argued by counsel for the Associations was that the restrictions conferred a benefit in the avoidance of the dangers of undue concentration of production and the disadvantages of monopolistic control in particular districts, while permitting the proper development of the industry and concentration of production in large plants where that is economically desirable. We think that it is plain on the evidence that the process of concentration is going steadily on, and would go on unabated were the restrictions removed, or, in any event, that the rate of progress would not appreciably alter. That being so, there is no necessity to consider in this case the point at which concentration of production becomes "undue", and, not surprisingly, no evidence was available on this matter. A system of price fixing and control operated by members of an industry in which the preponderance of power and production is concentrated in the hands of a few large group producers, does not necessarily or naturally operate to reduce risk of undue concentration of production or to prevent monopoly. By itself, it does nothing to prevent the small producer being swallowed up or one group from absorbing another. There was nothing in the evidence led which seemed to us to contradict this view of the matter. As the evidence is that the process of absorption is going steadily on, and it is not suggested that this process would be appreciably hastened in free competition, then it is demonstrable that the restrictions are no bar to measures of concentration. The point on "monopolistic control in particular districts" seems to be met by what we have already said on the evidence. If the process of concentration which is admittedly at work under conditions of restrictions continues under conditions of freedom, and it is not suggested that there will be any appreciable alteration in the speed at which such concentration proceeds if the restrictions are removed, then progress towards "monopolistic control" is not checked by the existence of the restrictions, and the same disadvantages would arise whatever system—freedom or restriction—prevailed. It is not to be denied that "monopolistic control" has its dangers for consumer interests, but this is not the question; the question is whether the movement towards this end is arrested by virtue of these restrictions. The precise question that we have to consider is whether the Associations can show that, by virtue of the restrictions propounded by them, the disadvantages of monopolistic control in particular districts (some of which were illustrated in the evidence of Mr. Burnett) are checked so as to confer a specific and substantial advantage on the consumer. It was suggested that the smaller and higher cost producer must be expected gradually to cease the production of standard bread, as being unprofitable and that that process was at least arrested by the maintenance of the present price restrictions. But, quite apart from the fact that this tends necessarily to offer higher profits to the large groups, being low cost producers (and it is difficult to see what benefit this confers on the consumer) this would not in any way prevent those responsible for the swallowing up of the small producer from continuing that process and, indeed, using for that purpose the larger measure of profit thus made available to them. In this connexion the evidence of Professor Browning was significant. He stated that one reason why the large group producers were not in favour of price cutting at their own hands was that this would operate to the disadvantage of the small high cost producer by reducing his profits, and make him apprehensive that such a lowering of price was designed to squeeze him out of business and so more ready to sell his business at a lower price to one or other of the groups. In our view, a system which made for lower prices of standard bread would be better both in the immediate and ultimate interest of the consumer (provided quality and service did not suffer, a matter dealt with later), and that the small high cost producer would tend to find his remedy and way of survival (as was pointed

out in evidence) by developing the flour confectionery and other sides of his business and, possibly, also by the production of "hand made" breads, so bringing into play the advantage which his craft skill might offer. It has always to be kept in view that the baking industry's activities and products extend over a wide range of commodities, of which standard bread is only one and by no means the most profitable either actually or potentially. On the whole evidence and arguments, we are not satisfied that the Associations have demonstrated that the continuance of the restriction leads in any appreciable degree to a lessening of the dangers (whatever they may be) of undue concentration of production or the disadvantage of monopolistic control in particular districts.

The Associations further contended that the restriction confers benefit as tending to the maintenance and improvement of the quality of bread and the standard of service to consumers. In this connexion, we refer to what was said, by the court in *Re Yarn Spinners' Agreement* (3), about quality and service. We see no reason why freedom from restriction in price should, in general, lead to reduction in the quality of the product. In this particular case it was, however, maintained that the evidence showed that diminution in quality was to be expected if freedom of price competition was added to freedom of competition in quality and service. Counsel for the Associations strongly argued that, if price competition were open, competition in quality and service would lessen, and then there would be a falling off in both these matters, to the injury of the public. This argument, however, ignores the evidence of his own witnesses that competition in price is an unlikely sequel to removal of the restrictions. If his witnesses are correct in their view—though, for reasons already given, we question this—then the factual assumption of this argument disappears. On the other hand, if price competition is permitted, we do not see why this should lead to diminution of quality of the product. It is said that since de-control there has been improvement in the quality of standard bread, but we heard no evidence which satisfied us that this, if true in fact, was due to de-control and was not rather due to other extraneous circumstances such as improvement in the quality of flour and increased efficiency in the industry itself. Nor were the Associations' witnesses unanimous in their forecasts, their views were divided and the more positively expressed view was that no change was to be expected in the quality of bread baked or of services rendered if restrictions were removed. In any case, no attempt was made, and we doubt if it could be made, to assess the probable extent of any such apprehended diminution. It was not suggested, nor do we think that experience would support the view, that the example of other industries where price competition is free shows that this freedom leads to diminution of quality in the article produced or in the measure of the services proffered to the consumer. In this industry itself, the recent removal of price restriction on flour confectionery and baking products other than bread was not said to have produced any falling off in the quality of the product, nor was it said that this was likely in the foreseeable future. In these circumstances, we are of opinion that the Associations fail in this instance also to discharge the burden of proof on them, and that it is not established that any fall in quality or service is likely to follow removal of the restrictions on the prices of standard bread.

The last matter on which the Associations founded related to the volume of research and the rate of technical progress in the production of bread. Counsel for the Associations very wisely conceded that he could not substantiate his claim in respect of research, but contended that the existence of the restriction fostered a degree of co-operation in the industry which was of specific and substantial benefit to consumers. While we do not doubt that frank and friendly discussion among members of the industry may indirectly (and ultimately) benefit the consumer, we find it difficult to define the specific benefit to be gained or to measure its extent. As it is not suggested that either Association will

A dissolve if the price restrictions are removed, it is plain that the means and facilities for co-operation will continue to exist and will be maintained, and it is not easy to see why, if the keenest competition in quality exists side by side with a substantial measure of co-operation, removal of price restriction in the matter of only one of the numerous products of the baking industry should operate to reduce the existing degree of co-operation and lessen the good relations

B among members of the industry. In any case, the subject is both nebulous and speculative: In what particulars that affect the interests of the consumer of a standard loaf will "co-operation" fall away and to what extent? At present, it does not appear that recipes or the secret details of manufacturing processes are exchanged to any substantial degree, while it is open to anyone to purchase and analyse the commercial products of other bakers for their own information

C and, indeed, there was evidence before us that this is, in fact, done by at least one large concern. In the result, we can find no firm basis in evidence for the views that the measure of co-operation which, in fact, exists in the industry, as illustrated by the objects and activities of the Associations, is achieved by virtue of the particular restrictions and far less that the measure of such co-operation will be to any appreciable degree lessened by removal of the restric-

D tions. Nor is it possible to estimate to what extent, if any, an assumed but indeterminate and indeterminable lessening of the existing measure or spirit of co-operation within the industry itself would remove a specific and substantial advantage at present enjoyed by the consumer of standard bread by virtue of the restrictions. We, therefore, reject the Associations' contention on this final head. In the result, therefore, we hold on the facts that the Associations have

E failed to establish their case on s. 21 (1) (b) on any of the grounds advanced by them.

Being of this opinion, we find it unnecessary to consider whether the recommendations as to wholesale discounts are restrictions of such a character as to come within the scope of s. 21 (1) (g), because, if the Associations fail, as we hold they have in fact failed, on s. 21 (1) (b), the application of s. 21 (1) (g) to the

F recommendations on wholesale discount does not arise. In these circumstances, we express no opinion whether these recommendations could, in any circumstances, be brought within the protection of s. 21 (1) (g).

If the Associations fail to discharge the initial onus of proof which lies on them, and if, as we find, they are unable to substantiate in fact any of the grounds on which, in their pleadings, they allege that they are brought within

G s. 21 (1) (b), it becomes equally unnecessary to consider and balance the specific and substantial benefits claimed against the detriments arising out of the retention of the restriction, except in so far as any facts which would have been material to that issue have necessarily been taken into consideration in assessing the Associations' claim to confer on consumers of standard bread the specific and substantial benefits or advantages which they set out in their pleadings.

H On the whole matter, we declare that the recommendations as to prices of standard bread are contrary to the public interest, and that, that being so, the recommendations as to wholesale discounts are also contrary to the public interest.

Declaration accordingly. Undertaking not to put restrictions into force given by Associations and accepted in lieu of proceeding with motion for interdict.

Solicitors: *Beveridge & Co., W.S., for Bishop, Milne Boyd & Co., Glasgow (for the Scottish Association of Master Bakers and the Wholesale and Retail Bakers of Scotland Association); John M. Dick, Solicitor in Scotland for the Registrar of Restrictive Trading Agreements.*

[Reported by N. E. D. THOMSON, ESQ., Advocate.]

NORTH OF ENGLAND ZOOLOGICAL SOCIETY v. CHESTER RURAL DISTRICT COUNCIL.

[COURT OF APPEAL (Lord Evershed, M.R., Romer and Pearce, L.J.J.), June 17., 18, 1959.]

Rates—Limitation of rates chargeable—Zoo—Zoological society incorporated as company limited by guarantee—Main objects charitable—Organisation concerned with advancement of education—Whether organisation, though not established for profit, was conducted for profit—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 & 5 Eliz. 2 c. 9), s. 8 (1) (a).

Company—Memorandum of association—Object clauses—Distinction between objects and powers—Numerous objects set out—Determination of main objects by reference to evidence of company's activities.

A zoological society was incorporated in 1934 as a company limited by guarantee. Its objects were set out in some twenty-six paragraphs in cl. 3 of its memorandum of association, the first three being: "(a) To . . . take over as a going concern and conduct as a scientific and educational undertaking the business heretofore carried on as the [C.] zoological gardens [by another company] . . . (b) To promote, facilitate, and encourage the study of biology, zoology and animal physiology . . . and all kindred sciences and to foster and develop among the people an interest in and knowledge of animal life . . . (c) To establish, equip, and carry on, and develop zoological parks or gardens and living zoological collections at such places as the society shall determine". By cl. 4 of the memorandum, payment of dividends to members of the society was prohibited, and, by cl. 9, on the dissolution of the society its assets were not to be distributed among the members. In 1950 the society, not being a trading corporation for profit purposes, was allowed to omit the word "Limited" from its name. The society took particular care to keep the animals in its zoological gardens in surroundings as similar as possible to their natural surroundings and had successfully bred a number of creatures. A school of tropical medicine made frequent use of the society's livestock for experimental purposes and other institutions had been provided by the society with material for research. During the last few years the society's income, which was mainly derived from admission fees to the gardens, had appreciably exceeded its expenditure. The surplus income was used in improving the equipment and raising the standards of the zoological gardens. The society claimed, in respect of its zoological gardens and premises, the benefit of the limitation of rates afforded by s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955.

Held: the society was entitled to the benefit of s. 8 of the Act of 1955 in respect of its zoological gardens and premises, for the following reasons—

(i) looking at the history and operations of the society it was an organisation "not conducted for profit" within s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, that is to say, not conducted for the purpose of making profit, because the purpose for which it was conducted was, as stated at (ii) below, the advancement of educational objects and its profits were used in furtherance of that purpose (see p. 124, letter B, post).

Dicta of JENKINS, L.J., in *Guinness Trust (London Fund) v. West Ham Corpn.* ([1959] 1 All E.R. at p. 488) applied.

(ii) the society's main objects were to be found in para. (a), para. (b) and para. (c) of cl. 3 of its memorandum (the remaining objects being ancillary or in the nature of powers), and those main objects were charitable or, if they were not charitable, were at least "otherwise concerned

with the advancement of . . . education" within the meaning of s. 8 (1) (a)* of the Act (see p. 120, letter C, and p. 123, letter A, post).

Dicta of FARWELL, J., in *Re Lopes* ([1930] All E.R. Rep. at p. 47) adopted.

Per LORD EVERSLED, M.R.: in order to determine which of the numerous objects set out in the memorandum of association comprised the society's main objects, the court must first look at the memorandum, and then get some assistance from the evidence on the further question which of them have been in fact the main objects. In so far as the language might be equivocal it could be seen by reference to what had been done whether assistance could be obtained in solving the equivocation (cf. p. 119, letter G, post).

Dicta of ROMER, L.J., in *Berry v. St. Marylebone Corpn.* ([1957] 3 All E.R. at p. 682) applied.

Decision of VAISEY, J. ([1958] 3 All E.R. 535) affirmed.

[For the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8, see 35 HALSBURY'S STATUTES (2nd Edn.) 394.]

D Cases referred to:

Berry v. St. Marylebone Corpn., [1957] 3 All E.R. 677; [1958] Ch. 406; [1957] 3 W.L.R. 1029; 3rd Digest Supp.

Brighton College v. Marriott, [1926] A.C. 192; 134 L.T. 417; 28 Digest 24, 127.

Chartered Insurance Institute v. Corpn. of London, [1957] 2 All E.R. 638; 121 J.P. 482; [1957] 1 W.L.R. 867; 3rd Digest Supp.

Guinness Trust (London Fund) v. West Ham Corpn., [1959] 1 All E.R. 482; 123 J.P. 231; [1959] 1 W.L.R. 233.

Lopes, Re, Bence-Jones v. Zoological Society of London, [1930] All E.R. Rep. 45; [1931] 2 Ch. 130; 100 L.J.Ch. 295; 146 L.T. 8; 8 Digest (Repl.) 329, 115.

National Deposit Friendly Society Trustees v. Skegness U.D.C., [1957] 3 All E.R. 199; [1957] 2 Q.B. 573; 121 J.P. 567; [1957] 3 W.L.R. 550; *affd.*, H.L., [1958] 2 All E.R. 601; 122 J.P. 399; [1958] 3 W.L.R. 172; 3rd Digest Supp.

Appeal.

The defendant rating authority, Chester Rural District Council, appealed from a judgment of VAISEY, J., dated Oct. 24, 1958, and reported [1958] 3 All E.R. 535, whereby he held that, on the true construction of s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, the plaintiff, the North of England Zoological Society, was an organisation which was not established or conducted for profit and whose main objects were charitable or were otherwise concerned with the advancement of education.

The facts appear in the judgment of LORD EVERSLED, M.R.

G. D. Squibb, Q.C., and *D. G. Widdicombe* for the defendants, Chester Rural District Council, the rating authority.

H. I. Willis, Q.C., and *J. F. Coplestone-Boughey* for the plaintiff, the North of England Zoological Society.

LORD EVERSLED, M.R.: This is another case (one of a considerable number now) which has come before the courts on the effect of s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. Section 8 (1) is in these terms:

"This section applies to the following hereditaments, that is to say—
(a) any hereditament occupied for the purposes of an organisation (whether corporate or unincorporate) which is not established or conducted for

* Section 8 (1) (a) is printed at letter I, supra.

profit and whose main objects are charitable or are otherwise concerned with the advancement of . . . education . . . ”

If the plaintiff, the North of England Zoological Society, which is the respondent to this appeal, can bring itself, as regards the hereditament which it occupies, within the formula which I have read, then it is exempt at the moment from rates. Such was the conclusion of VAISEY, J. From that decision the rating authority, Chester Rural District Council, have appealed to this court. Their anxiety to test the matter further is certainly understandable, since, according to the figures before the court, the society has over a period of years carried on its affairs so that its income has appreciably exceeded its expenditure. In the year ended Dec. 31, 1956, that surplus was about £16,000, and from the balance sheets it would seem that, since the society's incorporation the total accumulated net surplus amounts to about £84,000. It is, however, fair to say that the surplus has clearly been used in extending and improving the equipment and general characteristics of the zoological gardens which are the hereditament here in question. From my reading of s. 8 (1) of the Act of 1955, it will be apprehended that there are here two points, for there is no doubt that the society is an organisation within the meaning of the section. The two points, expressed interrogatively, are: (i) Is this an organisation which is not established or conducted for profit? (ii) Is it one whose main objects are charitable or otherwise concerned with the advancement of education? In order to qualify for exemption, the society must satisfy both those tests: in other words, it must be shown that an affirmative answer should be given to both the questions I have posed.

I will start with some reference to the history of the society and of its ancestry. A zoological garden (which, according to common usage, I shall abbreviate to “zoo”) was started as long ago as in 1931 by a Mr. Mottershead, who began it as an undertaking entirely of his own. Counsel for the rating authority, who saw Mr. Mottershead and cross-examined him, told us fairly and frankly, by way of confirmation of what I would have expected from reading Mr. Mottershead's affidavit, that he is a man who is passionately enthusiastic, as many people are, about animal life. It cannot be doubted that, when Mr. Mottershead started this zoo in 1931, he was not starting something for the purpose of making money, nor was he starting something for the purposes of providing entertainment or amusement or shows to the inhabitants of the north-west part of England. He is an enthusiast regarding animal life, and he was anxious to do something in that part of England which would present species of the animal world in proper and carefully designed conditions, so that those who lived in the neighbourhood would have the advantage of being able to see them and, as he hoped, share his enthusiasm for his favourite subject. After a little time (1), however, a company, Chester Zoological Gardens, Ltd. was incorporated. It was incorporated as a public company apparently in the ordinary way, but, as has happened to other public companies, its life was somewhat short and financially highly unsatisfactory. After two years it was put into liquidation. The plaintiff society was then formed (2) (originally with the word “Limited” added to its name) as a company limited by guarantee under the Companies Act, 1929, and all the assets of the zoo itself, with its inmates, its equipment and so forth, were transferred to the society. We have not been told what happened about the debts of the old company, but it is quite plain that Mr. Mottershead made no profit out of any of these transactions. He is, as he told counsel for the rating authority in the course of cross-examination, the most substantial shareholder or proprietor of the society. Being a company limited by guarantee and not being a trading corporation for profit purposes, the society was allowed, in 1950, to omit the use of the word “Limited” as part of its

(1) In 1932.

(2) The society was incorporated on May 9, 1934.

A name. But it is clear, as counsel for the rating authority frankly admitted, that this is Mr. Mottershead still in another garb. It is true that he is now given a salary, but it is certainly not princely in amount and certainly not indicative that he is doing this work and concerning himself with the society with any idea at all of its being a money-making enterprise. There is no doubt at all about that, and I think it important for reasons to which I shall later revert.

B I come now to the society's memorandum of association. Of the two points which I have formulated (namely, (i) is the society conducted for profit, and (ii) are its main objects charitable, etc.), I shall find it convenient to deal with the latter first. In order to answer the question, "What are the society's main objects?", the first duty of the court is to look at the document of incorporation, which is designed to set out the objects for which the society is formed.

C In certain of the cases which have arisen under this legislation the question has been debated to what extent one must confine oneself to the charter or the memorandum of association of the organisation concerned and to what extent one is entitled to look at the facts, as proved in evidence, of the exact operations in which the organisation has engaged. I think that I can state briefly the answer to that question by citing a passage from the judgment of D this court delivered by ROMER, L.J., in *Berry v. St. Marylebone Corpn.* (3), a case concerning the Theosophical Society in England. ROMER, L.J., in reading the court's judgment, said (4):

"In our opinion, DEVLIN, J. [*in Chartered Insurance Institute v. Corpn. of London* (5)] was saying no more than that, when an organisation has several objects specified in its written constitution, as was the case with the Chartered Insurance Institute, its activities are relevant to an inquiry as to what should, for the purposes of s. 8, be regarded as its main objects. We do not think that the learned judge was intending to go further than that, and, if such was his view, we cannot see that it is open to any criticism. That, however, is a very different thing from saying that, where there is no doubt what the main objects of a body are (and there is no doubt in the present case), evidence of what its activities have been may be received either in order to construe the language by which the objects are described or to limit the proper construction of the language by reference to the activities."

G With the guidance of that passage, I take it that the court's duty is, first, to look at the society's memorandum of association and then, having looked at it, to see which of the numerous matters which are stated to be the objects comprise the main objects of the society, and to get some assistance from the evidence on the further question, which of them have been so far in fact the main objects. In so far as the language may be equivocal, it can be seen by H reference to what has been done whether assistance can be obtained in solving the equivocation.

I As practitioners well know, those who draw up draft memoranda of association these days do not commonly err on the side of brevity. Here the objects of the society are contained in cl. 3, in paragraphs which, after exhausting the alphabet from (a) to (z), then include (aa). It is clear when one looks at them that some of the objects are plainly not main objects on any view; they are more in the nature of powers or are ancillary. Indeed, para. (aa), although the longest in point of language, is clearly of that nature. The first three objects of the society read as follows:

"(a) To acquire and take over as a going concern and conduct as a scientific and educational undertaking the business heretofore carried on

(3) [1957] 3 All E.R. 677; [1958] Ch. 406.

(4) [1957] 3 All E.R. at p. 682; [1958] Ch. at p. 416.

(5) [1957] 2 All E.R. 638.

as the Chester Zoological Gardens, Upton-by-Chester, by Chester Zoological Gardens, Ltd., together with or any part of the real and personal property and assets of the company used in connexion with that business or belonging thereto.

"(b) To promote, facilitate, and encourage the study of biology, zoology and animal physiology, aviculture, aquaria, ichthyology, entomology, botany and horticulture and all kindred sciences and to foster and develop among the people an interest in and knowledge of animal life.

"(c) To establish, equip, and carry on, and develop zoological parks or gardens and living zoological collections at such places as the society shall determine."

Paragraph (d) refers to the establishment of bird sanctuaries and the like, but, as the argument has developed, I think that I may properly and fairly say that it is by looking at the first three paragraphs, (a), (b) and (c), that one will find the answer to the question: What are the main objects of the society?

In opening the case counsel for the rating authority put his finger on the word "business" twice used in para. (a) as indicating that, under whatever guise it be, this really was a trading operation. I hope counsel will forgive me if I do not take much time about that. There is no doubt that all that the word meant in this reference to taking over "the business heretofore carried on as the Chester Zoological Gardens" was the "undertaking". The work there referred to had been undertaken by a trading body, namely, the company which had been there and presumably had carried on business, but I do not think that that throws any light on the matter for the purposes with which we are concerned. But what is interesting (and it is a point emphasised by counsel for the society) is that the primary object in para. (a) of cl. 3 of the memorandum of association was expressed thus:

"To acquire and take over as a going concern and conduct as a scientific and educational undertaking [this subject-matter] . . ."

I think that that is a very important sentence. No doubt, if it was shown that the society was doing nothing in the gardens, certain consequences must follow, but at least those words show that this enterprise (which, let me recall, Mr. Mottershead, this great enthusiast for animal life, had started many years before) was to be conducted as a scientific and educational undertaking. I repeat once more that that, and that only, was the sort of thing in which Mr. Mottershead was interested. I am not, however, to be taken as saying that those few words provide the answer to the question: What are the main objects? I think that it is impossible to overlook paras. (b) and para. (c). But, as FARWELL, J., said in *Re Lopes, Bence-Jones v. Zoological Society of London* (6), one cannot read these paragraphs in isolation; they must be read all together.

Paragraph (b) is certainly strictly in line with the words used in para. (a), "scientific and educational undertaking", for it is to promote and encourage the study of various sciences, biology, zoology and so on. When one comes to para. (c), "To establish, equip, and carry on, and develop zoological parks or gardens", I agree that, if it stood alone, it might be said to cover equally the establishment of a zoological park or garden as a mere show piece or amusement place, although it might equally be said to cover the establishment of a zoological garden to achieve the continuance of what had gone on before. I think that it is relevant here to look at Mr. Mottershead's affidavit to see what in fact the society had done. I will not take time by reading at length from it; but I observe, first, that Mr. Mottershead, with his genius and his enterprise, has made it quite plain that he has taken very special care that the surroundings for the animal inmates of the zoo shall be as similar as possible to the natural surroundings in which they would be found in their native haunts. He says (and it is not disputed) that he has carried that aim much further at Chester

A than it has been carried elsewhere. He gives a number of instances showing how the animals are given these natural surroundings, some of them illustrated by photographs. He says that many wild animals will not breed in captivity unless they are in such natural surroundings, and he states in this part of his affidavit (para. 9) that the society has successfully bred certain creatures and that the zoological gardens are the only place in this country where one particular
B animal has been successfully bred.

Having mentioned Mr. Mottershead's affidavit, I will at this stage make further reference to what he says in the last two paragraphs. In para. 21 he says that the School of Tropical Medicine in the University of Liverpool has been a member of the society for nineteen years and has made frequent use of the livestock for experimental purposes. In para. 22 he says that the society has
C from time to time provided material for research and instruction to other institutions of learning, for example, the University of Reading and the Liverpool and Manchester Museums, and he gives as other examples some institutions in Manchester and other parts of England. While I am referring to the affidavit, I should perhaps say, in reference to para. (u) of cl. 3 of the memorandum which authorises the establishment and conduct of refreshment rooms, cigarette stalls,
D and so on, on the society's property, that Mr. Mottershead deals also with that. But, as the argument has developed, it has become quite plain that this case is not going to turn, and counsel for the rating authority has not suggested that it should turn, on the circumstance that these activities give some profit to the society from catering, the sale of cigarettes, sweets and the like.

I conclude, therefore, as did the learned judge, that the answer to the question,
E "What are the main objects of the society?", is to be found from reading para. (a), para. (b) and para. (c) of cl. 3 of the memorandum, with the assistance of the evidence, and that that material makes good the proposition which counsel for the society put in the forefront of his case, namely, that the society has conducted and conducts this zoo, not as a place of amusement or as a show place, but, by and large, as an educational or as a scientific and educational
F undertaking.

In his judgment VAISEY, J., referred to the decision of FARWELL, J., in *Re Lopes* (7), which raised the question, under a gift in a will, whether the Zoological Society of London was a charitable body so that a gift in its favour would be a charitable gift. The London zoo is an institution far older than
G this institution at Chester. It is over 120 years old. Its charter is expressed with much greater brevity than the modern memorandum of association. So far as is relevant, it is confined to

"... the advancement of zoology and animal physiology, and the introduction of new and curious subjects of the animal kingdom ..."

Moreover, it is true to say that the London institution originally was that of a
H small number of fellows and that today its fellows number many thousands. By contrast, the society in the present case has a very small number of fellows, and its fellows are perhaps really little more than season-ticket holders. Its main support is derived from ordinary casual entrance fees of so much per day.

In the report of *Re Lopes* (8) certain facts are set out, including these:

I " [The Zoological Society of London] maintained for the purpose of its scientific work a laboratory, where research work in anatomy and pathology was carried on under the direction of a full-time pathologist, and an anatomical fellow, and research into aquatic life was carried on in the laboratory of the aquarium by an aquarium research fellow. The society had also collected and maintained a library of scientific books and periodicals relating to zoology, which was reputed to be the most complete in the

(7) [1930] All E.R. Rep. 45; [1931] 2 Ch. 130.

(8) [1930] All E.R. Rep. at p. 46; [1931] 2 Ch. at p. 133.

world, and they had published continuously annual volumes of their scientific proceedings." A

It is pointed out, with perfect justice, that the Chester zoo cannot boast of any activities at all comparable in scope and reputation with what I have just read. There is no laboratory. It has no full-time trained pathologist or anatomical fellow. It does not contain a library of scientific books and periodicals and its publications are of a much more slight kind than are the proceedings of the London Zoological Society. But Chester zoo is very young. In its thirty years of life it is perhaps not surprising that it has not yet achieved anything like the equipment or the reputation of the London zoo; yet it is fair to the Chester zoo to say that its history, since 1950 at any rate, seems clearly to be that the excess of income over expenditure has been used to improve in every possible way the equipment and the materials, and to raise the standards of the zoo. Again I refer, because I think it is important, to the great interest of Mr. Mottershead in this enterprise. Posing, therefore, the question, whether, considered broadly, the Chester zoo is conducted on lines comparable with the London zoo, or whether it is, on the other hand, no more than a place of amusement, I unhesitatingly agree with the learned judge in thinking that it is the former. B C D

In his judgment in *Re Lopes*, FARWELL, J., after stating the facts in regard to the London zoo, said (9):

"Its first object is 'the advancement of zoology and animal physiology'. That is clearly educational—for the advancement of scientific knowledge—and, therefore, charitable. The second object is 'the introduction of new and curious subjects of the animal kingdom'. That object again, having regard to the form of the charter, is charitable. In the first place, although the copulative 'and' is used, and, no doubt, imports two objects, nevertheless I think that the second object must be read in connexion with the first, which may to some extent necessitate it." E

I adopt a similar line of reasoning when I refer to para. (c) of cl. 3 of the memorandum in the present case. Now comes the important sentence in the judgment of FARWELL, J. (10): F

"In the second place, I think that the introduction of non-indigenous animals, exhibited under proper conditions, is distinctly an educational object. It must widen the mind and outlook of everyone to see in the flesh animals, now becoming scarce in many parts of the world, which otherwise people might not see at all. Taking a broad view of the society's objects, I am satisfied that they are charitable, on the ground that they are for the advancement of education." G

That judgment, of course, is not binding on this court, although it has stood for twenty-nine years and, so far as I know, has never been challenged. I respectfully agree with it and adopt the passage which I have read. It may be that its language might be applied more widely than is required for the decision of this case; but, at any rate, I think it is true to say that a zoo with objects such as those in para. (a), para. (b) and para. (c) of cl. 3 of the memorandum in the present case, and provided with the means for the exhibition, under proper conditions, of non-indigenous animals, is an "educational object" when conducted in the manner in which Mr. Mottershead has conducted the affairs of the society. As regards "scientific", which is also in para. (a), I have said that there is at the moment nothing which the Chester zoo could boast comparable to the laboratories and other equipment of the London zoo. But, having regard to the existence of some scientific operations which are conducted at the Chester zoo, as stated at the end of Mr. Mottershead's affidavit, there H I

(9) [1930] All E.R. Rep. at p. 47; [1931] 2 Ch. at p. 135.

(10) [1930] All E.R. Rep. at p. 47; [1931] 2 Ch. at p. 136.

A is at any rate a scientific element present here in accordance with the statement of para. (a) of cl. 3 of the memorandum.

Taking, as FARWELL, J., did in *Re Lopes* (11) in the case of the London zoo, the broad view of the society's objects, I think that they satisfy the test that they are charitable. I am at any rate satisfied that, even if they were not (for some reason which has not been developed) strictly charitable, they are at least "otherwise concerned with the advancement of . . . education." There is support for that view in that, according to para. 3 of Mr. Mottershead's affidavit, they have been exempted from income tax under s. 448 of the Income Tax Act, 1952, and given other privileges under the Finance Acts which are only consistent with such a view; but that, of course, is not to say that the rating authority are thereby bound.

C Having reached that conclusion on what I have thought to be the main point in the case, I can come to the next question which presents itself on s. 8 (1) (a) of the Act of 1955: Is this organisation one "not established or conducted for profit?" Counsel for the rating authority did not press us to say that the society had been established for profit. The terms of the memorandum which prohibited the payment of dividends during the existence of the society (cl. 4) or the distribution of its assets on its dissolution (cl. 9) (12) indicate that on no ordinary use of language could one describe this society (which has been allowed to drop the word "Limited" from its name) as being established for profit. But counsel contended that the satisfactory financial history of the past five or six years, plus the use of the word "business" in para. (a) of cl. 3 of the memorandum, produces the result that this was an organisation "conducted for profit". That the society has made a profit, in the sense that for those years its income has appreciably exceeded its expenditure, is quite plain, but the words of the statute are "conducted for profit", and on those words we have again guidance of the highest kind.

In *Guinness Trust (London Fund) v. West Ham Corpn.* (13), JENKINS, L.J., delivering the leading judgment, referred to the judgment of this court delivered by PARKER, L.J., in *National Deposit Friendly Society Trustees v. Skegness U.D.C.* (14), and also to the speeches of LORD KEITH OF AVONHOLM, LORD MACDERMOTT and LORD DENNING in that case in the House of Lords. Having made those references, JENKINS, L.J., said (15):

G "I think that those are all the passages to which I can usefully refer, and notwithstanding the difference between the two cases, they fortify me in the view that 'established or conducted for profit' in s. 8 (1) of the Act means established for the purpose of making profit or conducted for the purpose of making profit, and does not extend to every organisation which in any circumstances or at any stage in its activities receives something which might be considered in itself to constitute a profit."

H I add a brief reference to what LORD DENNING had said (16), which was cited by JENKINS, L.J. (15):

I "But the fact that the society has made profits does not mean that it is 'conducted for profit', which I take to mean 'conducted for the purpose of making profit'. Many charitable bodies, such as colleges and religious foundations, have large funds which they invest at interest in stocks and shares, or purchase land which they let at a profit. Yet they are not

(11) [1930] All E.R. Rep. 45; [1931] 2 Ch. 130.

(12) By cl. 9 of the memorandum, on the winding-up or dissolution of the society, any assets were to be given to other institutions having objects similar to those of the society

(13) [1959] 1 All E.R. 482.

(14) [1957] 3 All E.R. 199; [1957] 2 Q.B. 573; H.L. [1958] 2 All E.R. 601.

(15) [1959] 1 All E.R. at p. 488.

(16) [1958] 2 All E.R. at p 612.

established or conducted for profit. The reason is because their objects are to advance education or religion, as the case may be. The investing of funds is not one of their objects properly so called, but only a means of achieving those objects."

The question is one which, I think, must be answered according to the common sense of the matter. If one poses the question: "Looking at the history of the society and the operations which it has conducted, is it a society which is being conducted for profit?", I would have no hesitation in answering that question negatively. In giving that answer I am now assuming the correctness of my answer on the main question that the society is an educational charity. If it were otherwise, if the true view was that the society's zoo was an amusement park, then the answer to the question, "Is the society conducted for profit?", might be very different; but, given that this is an educational charity or an educational organisation, then it seems to me that the answer which must be given to the further question which I have posed, namely, "Is the organisation one which is conducted for profit?", is that it is not; it is one conducted for the advancement of its educational objects and the profits have been entirely used in the furtherance of those objects and for no other purpose.

I do not think that *Brighton College v. Marriott* (17) can assist for present purposes on the question which we have to decide, because the question whether it was conducted for profit was not the question which was there debated. I therefore conclude that the society in this case has satisfied both branches of the test in s. 8 (1) of the Act, which is what VAISEY, J., also thought. I would accordingly dismiss the appeal.

ROMER, L.J.: I agree. I can summarise my views on this appeal very briefly. It has been quite clearly established by the authorities (there has been a number of decisions on s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955) that in order to claim the benefit of that section a society or other organisation has to show that all its main objects are charitable or otherwise concerned with the advancement of religion, education or social welfare. Accordingly, the respondent society in the present case can only obtain the benefit of the section by saying in effect that, having regard to the whole of its main objects, it is an educational charity. I agree with LORD EVERSHERD, M.R., in thinking that, beyond any reasonable doubt, the main objects of the society are to be found in para. (a), para. (b) and para. (c) of cl. 3 of the memorandum of association. It is to be observed that, under para. (a) and para. (b), a distinction is to some extent drawn on the language of the paragraphs between scientific activities and other activities. But taking these three paragraphs by themselves, I have no doubt at all—indeed, without the assistance of *Re Lopes, Bence-Jones v. Zoological Society of London* (18), I should have had no difficulty at all in coming to this conclusion—that they reveal a charitable object in the educational sense.

Counsel for the rating authority said that, so far as the scientific aspect of the activities was concerned, the evidence showed that they had been disregarded and that all that remained were the other objects which were referred to in these three paragraphs. I think that it is true that the scientific activities have occupied rather a subordinate place, although they have not by any means been wholly disregarded. But, even if the scientific aspects had been wholly omitted from the factual activities of the society, I do not, for my part, see why the society's objects should be any less charitable, provided that the other parts of them were charitable and had been carried out by the society. The only result of discarding one branch of its activities might be that the members might complain, but, for the purposes of s. 8, to my mind, it is quite unimportant whether the society did or did not give full, or, indeed, any, effect to the scientific approach to the enterprise for which the society was incorporated.

A But apart from the scientific matters which are mentioned in the objects, for example, in para. (b):

"To promote, facilitate, and encourage the study of biology, zoology . . . and all kindred sciences . . ."

B which objects are clearly charitable, the rest of the objects in para. (a), para. (b) and para. (c) appear to me to be charitable as tending to educate people and to broaden their minds.

As LORD EVERSLED, M.R., said, a similar matter was considered by FARWELL, J., in *Re Lopes* (19) and he expressed himself in language which my Lord has already read and one sentence only of which I will repeat:

C " . . . I think that the introduction of non-indigenous animals, exhibited under proper conditions, is distinctly an educational object."

With that sentence I fully agree. I would emphasise that in the present case the affidavit of Mr. Mottershead shows that the public here have an advantage which they do not have in a good many zoos in this country or elsewhere, deriving from the fact that Mr. Mottershead and his colleagues have given considerable thought and attention to providing, and have provided, a more

D or less natural setting in which these various kinds of animals can be seen, so that the public have the advantage, not merely of seeing wild animals behind bars, which is perhaps in itself somewhat unedifying, but the advantage, which to my mind is a distinct educational advantage, of seeing them behaving in surroundings which approximate to their natural surroundings and their native habitat, so that they can observe the habits and conduct of the animals in

E these surroundings; in other words, the conditions in which, in the present case, the public can see these animals are essentially the "proper conditions" referred to in the phrase which FARWELL, J., used. Accordingly, it is quite clear to me that, both on the relevant paragraphs of the object clause of the memorandum and on the evidence which has been filed as to the precise activities which the society has undertaken, the society has shown (and I entirely agree with the learned judge in so finding) that it is an educational charity.

F Accordingly, I agree with the judgment which VAISEY, J., gave on that point. There only remains the further question, which logically, I suppose, comes first, whether the society was established or conducted for profit. As to that there is nothing that I desire to add to what the Master of the Rolls has said. It appears to me to be clear that, so far as this court is concerned, the question must be answered in the negative because of the reasoning in the decision of this court in *Guinness Trust (London Fund) v. West Ham Corpn.* (20). I accordingly agree that this appeal should be dismissed.

G PEARCE, L.J.: I entirely agree with what my Lords have said. The main objects of this undertaking are to be found in para. (a), para. (b) and para. (c) of cl. 3 of the memorandum of association. The learned judge rightly held that this case came within the reasoning and the authority of *Re Lopes, Bence-Jones v. Zoological Society of London* (21). I too agree with the observations of FARWELL, J., in that case which LORD EVERSLED, M.R., has read.

H Further, in my view, the undertaking was not established or conducted for profit, for the reasons given by this court in *Guinness Trust (London Fund) v. West Ham Corpn.* (20), reasons which are equally applicable to the facts of this case. For the reasons which LORD EVERSLED, M.R., has given more fully, I agree that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Preston, Lane-Claypon & O'Kelly*, agents for *Gamon & Co.*, Chester (for the rating authority); *Field, Roscoe & Co.*, agents for *Ouseley-Smith & Co.*, Chester (for the society). [*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

(19) [1930] All E.R. Rep. at p. 47; [1931] 2 Ch. at p. 136.

(20) [1959] 1 All E.R. 482.

(21) [1930] All E.R. Rep. 45; [1931] 2 Ch. 130.

THE HEBRIDEAN COAST. OWNERS OF STEAMSHIP LORD CITRINE v. OWNERS OF MOTORSHIP OR VESSEL HEBRIDEAN COAST.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P.), June 3, 4, 19, 1959.]

Shipping—Collision—Damages—Detention—Measure of damages—No specific vessel chartered as replacement tonnage—Interest on capital value.

On Dec. 23, 1951, the Lord Citrine, a collier owned by the Central Electricity Generating Board, was damaged by the defendants' vessel, the Hebridean Coast. The defendants admitted liability. The Lord Citrine was detained for 11½ days undergoing permanent repairs. Much of the coal which the board required was transported to them by sea, and about half of their sea-borne coal was carried in their own ships, the rest being carried in chartered vessels. Ten such vessels were on long-term charter to the board at the time and other vessels were employed by them on short charter or spot charter. None of the board's vessels was idle and the Lord Citrine would not have been idle during the detention period if she had not been detained, but no vessel specifically replaced her by carrying coal which she would have carried. Damages for loss by detention of the Lord Citrine having been referred for assessment, the registrar allowed as damages by way of interest on the capital value of the Lord Citrine a sum which was substantially equivalent to that which would have been assessed on the basis of a charter of another vessel for the detention period, and which amounted to interest at more than thirty per cent. per annum. On appeal,

Held: the fair inference in the circumstances of this case was that there had been no necessity to make any special arrangement to replace the Lord Citrine during her detention, but it was not legitimate to infer that coal which otherwise might have been carried by the Lord Citrine had been carried by chartered tonnage; accordingly the proper measure of damages was interest on her capital value for the period of the detention, but not a sum equivalent to the cost of hiring another vessel, for the measure of damage by interest on capital value was essentially a different measure to that applicable if special damage by hiring another vessel was established, and in the circumstances of this case interest would be allowed at seven per cent. per annum.

Dictum of LORD HERSCHELL in *The Greta Holme* ([1897] A.C. at p. 605) applied.

Appeal allowed.

[As to measure of damages in shipping collisions, see 30 HALSBURY'S LAWS (2nd Edn.) 860-862, paras. 1138, 1139 and SUPPLEMENT; and for cases on the subject, see 41 DIGEST 800-803, 6613-6636; 806-808, 6666-6695; 812, 813, 6737-6745, and SUPPLEMENTS.]

Cases referred to:

Admiralty Comrs. v. Susquehanna (Owners), The Susquehanna, [1926] A.C. 655; 95 L.J.P. 128; 135 L.T. 456; 41 Digest 802, 6624.

Mediana (Owners) v. Comet (Owners, etc.), The Mediana, [1900] A.C. 113; 69 L.J.P. 35; 82 L.T. 95; 41 Digest 811, 6733.

Mersey Docks & Harbour Board v. Marpessa (Owners), The Marpessa, [1906] P. 14; *affd.* C.A., [1906] P. 95; *affd.* H.L., [1907] A.C. 241; 76 L.J.P. 128; 97 L.T. 1; 41 Digest 808, 6690.

No. 7 Steam Sand Pump Dredger (Owners) v. Greta Holme (Owners), The Greta Holme, [1897] A.C. 596; 66 L.J.P. 166; 77 L.T. 231; 41 Digest 808, 6689.

Strathfillan S.S. (Owners) v. Ikala S.S. (Owners), The Ikala, [1929] A.C. 196; 98 L.J.P. 49; 140 L.T. 177; Digest Supp.

A Motion.

The plaintiffs, the Central Electricity Generating Board, were the owners of the steamship Lord Citrine and claimed damages for loss of use of the ship against the defendants, the owners of the Hebridean Coast, in respect of a collision for which the defendants admitted liability. On Oct. 30, 1958, the reference came before the Admiralty registrar by which time the items in the plaintiffs' claim for damages had either been admitted by the defendants or agreed between the parties with the exception of item 14 (as regards which see letter I, *infra*) which was a claim for damages for loss by detention, quantified at £2,032. The registrar decided that the plaintiffs had not succeeded in showing that they had chartered tonnage to replace the Lord Citrine, though it was likely that they had done so; but he allowed substantially the same sum that he would have awarded if such chartering had been established, namely £2,032, by way of interest on the capital value of the Lord Citrine, i.e., £207,500. This amount of damages, viewed as interest over the detention period, represented a rate of interest exceeding thirty per centum per annum.

The defendants filed a notice of motion in objection to the registrar's decision on Dec. 19, 1958, on the grounds—(a) that the registrar was wrong in law in that after disallowing the plaintiffs' claim under item 14 (based on charter rates less savings) he awarded the plaintiffs such a rate of interest on capital as to produce the same result; (b) that he failed to distinguish between a profit earning vessel and a non-profit earning vessel; and (c) that in fixing the rate of interest he improperly had regard to evidence concerning profit earning vessels, and (d) that he misdirected himself in awarding to the plaintiffs a rate of interest of over thirty per cent. which rate was grossly excessive.

Waldo Porges, Q.C., and R. F. Stone for the plaintiffs.

Kenneth Carpmael, Q.C., and Peter Bucknill for the defendants.

Cur. adv. vult.

June 19. **LORD MERRIMAN, P.**, read the following judgment: This is an appeal from the decision of the Admiralty registrar dated Dec. 5, 1958, on a reference as to damages by collision in the following circumstances. The Central Electricity Generating Board, established under the Electricity Act, 1957, in place of the Central Electricity Authority created by the Electricity Act, 1947 (hereinafter referred to as the plaintiffs), are the owners of the Lord Citrine, a collier employed by them at the material time in carrying coal for the generation of electricity in the London area. On Dec. 23, 1951, she sustained damage while lying at anchor off Cromer in a collision with the defendants' vessel, the Hebridean Coast. On Mar. 31, 1952, the defendants admitted liability, and by an agreement dated July 19, 1955, the defendants' solicitors consented to a reference to assess that part of the plaintiffs' claim which had not been admitted or agreed. The reference before the registrar did not take place until Oct. 30, 1958. By that time all the items in the statement of damages sustained by the plaintiffs had been agreed, except item 14, in respect of loss by detention, quantified at £2,032.

Originally this head of claim was put forward on the basis that the Lord Citrine was a profit-earning vessel. But as early as June 14, 1954, in a letter (the material part of which I was invited to read, although the letter as a whole was marked "without prejudice"), the chartering of equivalent shipping space was, for the first time, put forward as the basis for the assessment of the damages. The letter, so far as is material, reads as follows:

"Item 14. As we have already said, we are unable to agree with your view that the British Electricity Authority is not a trading body, and that the Lord Citrine is not to be regarded as a profit earning ship. However, even if you are right as to this, it is quite clear in our view that interest on capital value is not the proper basis for the allowance for loss of use but that our clients must then be entitled to recover the cost of chartering other shipping space to carry the coal which the Lord Citrine would have carried if she had

not had to be stopped for repairs . . . Since it was, as stated above, essential that all the coal allocated should be carried, as this was in fact done, and as the authority's own ships could not have done it in any case, the lay-up of the Lord Citrine necessarily of course involved extra chartering for which they have had to pay. Although the exact replacement ships cannot be identified in the circumstances, it seems to us that the amount of our clients' loss on a chartering basis can doubtless be arrived at roughly by calculating what quantity of coal she would have carried during the detention period from the average cargoes on the six voyages (of which you have particulars) and from the times occupied by those voyages (of which you also have particulars) and ascertaining the cost of hiring other ships to carry that quantity . . ."

The following facts were found, and are justified by the evidence. For the year in question the National Coal Board provided only eighty-seven per cent. of the quota allocated to the plaintiffs. The quantity short-delivered was no less than $1\frac{1}{4}$ million tons. Of the eighty-seven per cent. delivered, twenty-five per cent. of the coal was sea-borne. Of that fraction forty-five per cent. to fifty per cent. was carried in the plaintiffs' own colliers, whereas fifty to fifty-five per cent. was carried in chartered tonnage. The plaintiffs' own ships could not have carried the whole of the sea-borne coal actually received. There were ten large chartered vessels on ten-year charter from June, 1949, all of which were regularly employed over the years, while certain other vessels were employed on short charter, and others on "spot" charter, as required. None of the plaintiffs' own vessels was idle during the detention period, and if the Lord Citrine had not been under repair she would not have been idle. At no time during the twenty-six winter weeks of 1951-52 were the plaintiffs not chartering vessels additional to the long-term chartered vessels; but no specific vessel can be pointed to as having taken the place of the Lord Citrine during the detention period in order to carry the coal which she would have carried had she not been laid up for repairs. It was, of course, cheaper for the plaintiffs to carry coal in their own vessels, because all chartered vessels, whether on long-term, short-term or spot charter, were entitled to be paid so much per ton of coal carried. There was no question of the plaintiffs chartering their own vessels or sub-chartering the chartered vessels to anyone else. While it was customary to build up stocks at each station during the twenty-six summer weeks, and to run down stocks in the period from November to April, the situation in the winter period 1951-52 was normal, and there was no under-stocking or over-stocking at all.

The period during which the Lord Citrine was detained was originally claimed as being thirteen days twenty-one hours between 10 a.m. on Dec. 31, 1951, and 7 a.m. on Jan. 14, 1952. This was reduced by agreement to $11\frac{1}{2}$ days, but without specifying the precise dates covered by this period. The registrar held, and I agree, that this was immaterial.

It is well settled that the fact that a ship is owned by a public authority, or is not "profit earning", does not disentitle the owner from claiming damages; and that such damages are not merely nominal: *No. 7 Steam Sand Pump Dredger (Owners) v. Greta Holme (Owners)*, *The Greta Holme* (1). If it is necessary to charter alternative tonnage to replace the damaged vessel, the amount chargeable for the period may be recovered. Alternatively, if the owners are able to provide a substitute out of their own resources, as in the case of the spare light-ship (see *Mediana (Owners) v. Comet (Owners, etc.)*, *The Mediana* (2)), an amount may be recovered for the notional hire of the substitute as special damage. Failing any other measure, damages may be computed at a reasonable rate of interest on the value of the vessel, after taking depreciation into account, for the period during which the owner is deprived of her services.

The registrar held that if the plaintiffs had to show that they chartered other

A tonnage to replace the Lord Citrine he did not think that they had succeeded in doing so; though it seemed to him quite likely that they did in fact do so. On the contrary, he held that he was driven to the conclusion that interest on capital was the only available measure of damages, however artificial and unsatisfactory it might be. But he was prepared to adopt the rate of interest on the agreed value of £207,500 which would produce the figure claimed on the basis of the charter of alternative tonnage, namely, £2,032. On this basis the rate of interest works out at over thirty per cent.

I agree with the finding that the plaintiffs did not succeed in showing that they had chartered tonnage to replace the Lord Citrine, but I disagree with the suggestion that it is quite likely that they did so; and I do not approve of the allowance of the identical sum of £2,032 by way of interest on her capital value.

C The plaintiffs' case is based mainly on one passage in the speech of LORD WARRINGTON OF CLYFFE in *Strathfillan S.S. (Owners) v. Ikala S.S. (Owners)*, *The Ikala* (3), in which it was the loss incurred by a profit earning ship that was in question. Having expressed the clear opinion that the evidence was not sufficient to establish that the appellants found it necessary to provide extra tonnage equivalent to thirteen days' use of their injured vessel, and that in consequence of such necessity they did in fact provide it, LORD WARRINGTON proceeded (4) as follows:

E "But this does not dispose of the question. Though there was no sufficient positive evidence of any chartering effected for the purpose of supplying the tonnage lost by the detention of the *Strathfillan* the circumstances proved might have been such that the tribunal would have been justified in drawing the inference that a proportion of the chartered tonnage did in fact supply the tonnage lost by the detention."

F He held, however, agreeing with the Court of Appeal (5), that the evidence was not sufficient to justify the inference in question. It is true, as the registrar points out, that the view of the facts which had prevailed up to the time when the case was heard in the House of Lords, and on which LORD WARRINGTON held that the inference could not be drawn, turned out to be erroneous. Accordingly, *The Ikala* (6) affords little or no guidance as to the kind of evidence which would support such an inference.

G In substance it was sought to apply this passage in LORD WARRINGTON's speech by the argument that having regard to the percentages of coal carried in the plaintiffs' own colliers and in chartered vessels respectively, it followed that whatever quantity of coal was actually received by the plaintiffs during the year, the necessary inference was that of the total amount the proportion carried by chartered vessels, as against the proportion carried by the plaintiffs' own colliers, was increased by the Lord Citrine being detained for the 11½ days.

H In my opinion, however, it is vital to recall the observations of VISCOUNT DUNEDIN and LORD SUMNER in *Admiralty Comrs. v. Susquehanna (Owners)*, *The Susquehanna* (7). In that case LORD DUNEDIN in his opinion (8), emphasises the difference between special damage which must be averred and proved and general damage, the quantification of which is a jury question. LORD SUMNER (9), having commented that the whole suggestion of chartering at the time of the detention was pure speculation, pointed out that as the Admiralty, the owners of the damaged vessel, had got through their work without her, they could not get damages based on the use of a stand-by when in fact they did very well without one; and he added—"In no case can this be matter of presumption". With this he contrasted (10) cases in which the principle of *The Greta*

(3) [1929] A.C. 196.

(5) [1928] P. 86.

(7) [1926] A.C. 655.

(9) [1926] A.C. at p. 663.

(4) [1929] A.C. at p. 211.

(6) [1929] A.C. 196.

(8) [1926] A.C. at pp. 661, 662.

(10) [1926] A.C. at p. 664.

Holme (11) might be applied with such rates of interest and depreciation as the evidence might justify. A

Moreover LORD HERSCHELL, in his opinion in *The Greta Holme* (12), drew a marked distinction between the cost of hiring an alternative dredger and the loss of the interest on the money spent on the purchase of the damaged vessel. This distinction clearly emerges in the following passage (13):

“ If the appellants had hired a dredger instead of purchasing one, and had during the months they were deprived of its use been bound to pay for its hire, it cannot be doubted that the sums so paid could have been recovered. How can they the less be entitled to damages because, instead of hiring a dredger, they invested their money in its purchase? The money so invested was out of their pockets, and they were deprived of the use of the dredger, to obtain which they had sacrificed the interest on the money spent on its purchase. A sum equivalent to this, at least, they must surely be entitled to.” B C

In this passage LORD HERSCHELL was clearly laying down that the loss of interest on the capital value was a measure of damages essentially different from that which would have been recoverable had the plaintiffs been able to prove special damage in hiring another dredger. D

In my opinion, having regard to the evidence it is not legitimate to infer that the coal which might otherwise have been carried by the *Lord Citrine* during the 11½ days was carried by chartered tonnage; or, if so, that it was necessary to do so. Certainly there is no evidence that there was any special chartering for the purpose; or that such “ spot ” charters as were made for special deliveries had any connexion with the detention of the *Lord Citrine*. To my mind the fair inference from the evidence as a whole is that such coal as was carried in chartered vessels during the 11½ days was carried in this way in the normal course, and that there was no necessity, as a matter of business, to make any special arrangements to replace the *Lord Citrine* for that period. It seems to me that, having rightly rejected that particular head of special damage, it was wrong in principle for the registrar to award the identical amount by way of interest on the capital value. The two measures of damage are quite distinct, and should not be confused. E F

Admittedly the question of the rate of interest to be allowed on capital is a matter for discretion, but the rate at which the present award works out seems to me to be inordinate. It was agreed that five per cent. is usually allowed, but there is at least one reported instance of the allowance of seven per cent. (*Mersey Docks & Harbour Board v. Marpessa (Owners), The Marpessa* (14)). I think that this is a case in which a generous rate is justified. Accordingly, I allow the appeal, and vary the registrar's award by substituting for the sum of £2,032 interest at the rate of seven per cent. on the agreed depreciated value of £207,500 for 11½ days. G

Appeal allowed. Order varied.

Solicitors: *Sinclair, Roche & Temperley*, agents for *Botterell, Roche & Temperley*, Newcastle-upon-Tyne (for the plaintiffs); *Middleton, Lewis & Co.*, agents for *Middleton & Co.*, Sunderland (for the defendants).

[Reported by N. P. METCALFE, ESQ., Barrister-at-Law.]

(11) [1897] A.C. 596.

(12) [1897] A.C. 596.

(13) [1897] A.C. at p. 605.

(14) [1906] P. 14; *affd.* C.A., [1906] P. 95; *affd.* H.L., [1907] A.C. 241.

A

FISHER v. FISHER.

[COURT OF APPEAL (Hodson, Sellers and Harman, L.J.J.), June 11, 15, 16, 1959.]

Divorce—Estoppel—Desertion—Constructive desertion—Previous suit charging cruelty against husband dismissed—Wife's evidence accepted but husband's conduct held not to amount to cruelty—Evidence of same matters tendered by wife in second suit—Evidence of other expulsive conduct also tendered by wife in second suit—Admissibility.

B

In 1954 the wife left the husband. The husband petitioned for nullity and the wife by her answer sought a divorce on the ground of cruelty. At the trial in 1955 the court accepted the wife's evidence but held that the husband's conduct proved thereby did not amount to cruelty because, apart from other considerations, her health had not been affected. Neither party was granted a decree. In 1957, three years after the wife had left him, the husband petitioned for divorce on the ground of desertion; the wife denied desertion and herself cross-prayed for a decree on the ground of the husband's constructive desertion. In support of her case the wife sought to give evidence of conduct leading up to their parting, including evidence of the same matters as she had put forward in support of her allegation of cruelty in the previous suit. She sought also to raise some additional matters, which she alleged amounted to expulsive conduct; these, so it was contended against her, could have been but were not raised in the previous suit. On the question whether the wife was estopped,

C

D

E

Held: there was no estoppel because the subjects of litigation in the two suits, viz., constructive desertion in the present suit and cruelty in the former suit, were not the same; moreover the wife's allegations in the previous suit had not been rejected, so that there was no question of her seeking to re-litigate matters of fact that had been determined against her.

Thompson v. Thompson ([1957] 1 All E.R. 161) explained and followed.

The second ground of the decision in *Bright v. Bright* ([1953] 2 All E.R. 939) disapproved.

F

Appeal allowed.

[As to estoppel in divorce proceedings by reason of previous judicial determinations, see 12 HALSBURY'S LAWS (3rd Edn.) 277, para. 533 and 294, para. 581, and 15 *ibid.*, 183, para. 356; and for cases on the subject, see 27 DIGEST (Repl.) 375, 376, 3089-3098.]

G

Cases referred to:

Bright v. Bright, [1953] 2 All E.R. 939; [1954] P. 270; 117 J.P. 529; [1953] 3 W.L.R. 659; 3rd Digest Supp.

Cooper v. Cooper, [1954] 3 All E.R. 358; [1955] P. 168; 118 J.P. 549; [1954] 3 W.L.R. 923; 3rd Digest Supp.

H

Foster v. Foster, [1953] 2 All E.R. 518; [1954] P. 67; 117 J.P. 377; [1953] 3 W.L.R. 623; 3rd Digest Supp.

Henderson v. Henderson, (1843), 3 Hare, 100; 1 L.T.O.S. 410; 67 E.R. 313; 21 Digest 174, 276.

Hill v. Hill, [1954] 1 All E.R. 491; [1954] P. 291; 118 J.P. 163; [1954] 2 W.L.R. 473; 3rd Digest Supp.

I

Hoystead v. Taxation Comr., [1926] A.C. 155; 94 L.J.P.C. 79; 134 L.T. 354; Digest Supp.

New Brunswick Ry. Co. v. British & French Trust Corp., Ltd., [1938] 4 All E.R. 747; [1939] A.C. 1; 108 L.J.K.B. 115; 160 L.T. 137; Digest Supp.

Society of Medical Officers of Health v. Hope, [1959] 1 All E.R. 509; [1959] 1 Q.B. 462; 123 J.P. 211; [1959] 2 W.L.R. 377.

Thompson v. Thompson, [1957] 1 All E.R. 161; [1957] P. 19; [1957] 2 W.L.R. 138; 3rd Digest Supp.

Winnan v. Winnan, [1948] 2 All E.R. 862; [1949] P. 174; [1948] L.J.R. 345; 27 Digest (Repl.) 375, 3098. A

Appeal.

The wife, respondent to this petition by her husband for a decree of divorce on the ground of her desertion, who had herself cross-prayed for divorce on the ground of her husband's desertion, appealed against the decision of Mr. Commissioner SIR REGINALD SHARPE, given at Lewes on Nov. 6, 1958, that she was not entitled to give evidence as to the conduct of her husband leading up to the parting. The facts, which are summarised in the headnote, are stated in the judgment of HODSON, L.J. B

F. B. Purchas for the wife.

N. H. Curtis-Raleigh for the husband. C

HODSON, L.J.: This is an appeal by a respondent wife from an order of Mr. Commissioner SIR REGINALD SHARPE given at Lewes on Nov. 6, 1958. The learned commissioner held that in divorce proceedings instituted by the husband against the wife on the ground of desertion, in which she had denied the desertion and herself asked for divorce on the ground of desertion in the constructive sense, the wife was estopped per rem judicatam from pressing the issue of desertion or putting forward her own case of desertion, since her defence to her husband's desertion charge and her own cross-charge involved the same questions as those which had been determined against her in previous proceedings, and since, further, she sought to raise some additional matters which might have been, but were not, raised in the earlier proceedings. D

The history of the matter is that the parties were married on Sept. 5, 1936. They adopted a child in September, 1945, and the wife left the husband in 1953, taking proceedings for the custody of that child, which was given to her. That was followed by a reconciliation; but on Oct. 27, 1954, she left the husband, leaving, it is said, a note to the effect that she had been told to get out. On Nov. 11, 1954, shortly after leaving, she took out a summons in the magistrates' court alleging persistent cruelty, desertion and wilful neglect to maintain against her husband. That summons or those summonses (if there were more than one) were not proceeded with, because on Sept. 18, 1954, the husband filed a petition for nullity, the basis of the petition being, as the husband said, that the marriage had not been consummated. The wife by her answer denied the allegations of the nullity petition, and she also counter-charged cruelty against her husband and sought a divorce on that ground. On Dec. 6, 1955, both prayers were rejected. E
F
G
The parties have lived apart since, and the present proceedings were instituted on Nov. 8, 1957.

That the wife left her husband, and never thereafter returned, was common ground between the parties; but she was not permitted by the learned commissioner to give any evidence as to the circumstances leading up to her leaving. The issue of desertion was not open to the wife in the earlier proceedings, which were for nullity, and it was no defence to that petition that the wife had been deserted. Moreover, she could not then make a substantive allegation of desertion as the foundation for a petition for divorce because the period which had elapsed since the separation was less than three years. In those circumstances it would indeed be strange if the wife were estopped from setting before the court and having decided the question whether or not she had been deserted by her husband. I
But the learned commissioner, in holding that she was estopped, followed the decision of WILLMER, J., in *Bright v. Bright* (1). The learned judge in that case based himself on the Privy Council decision, *Hoystead v. Taxation Comr.* (2), and it is desirable to refer to that case first. The dispute there was about an income tax assessment. The position was (2):

"Under a will the annual income from an estate in Australia was divisible

(1) [1953] 2 All E.R. 939; [1954] P. 270.

(2) [1926] A.C. 155.

A by the trustees between the testator's daughters. The trustees objected to an assessment for the financial year 1918-1919 under the Land Tax Assessment Act, 1910-1916, of Australia; they claimed . . . a deduction . . . in respect of the share of each daughter. A case was stated for the opinion of the Full Court of the High Court upon the questions: (1) Whether the shares of the joint owners, or of any and which of them, in the land were original shares . . . ; (2) How many deductions . . . the respondent should make. The Full Court answered these questions as follows: (1) The shares of the six children surviving at the date of the assessment; (2) Six. Judgment upon the objection was entered accordingly. Upon the assessment for 1919-1920 the commissioner allowed only one deduction of £5,000, contending that the beneficiaries were not joint owners within the meaning of the Act."

C That view was upheld by the Full Court; but it was held by the Privy Council: "That the commissioner was estopped, since although in the previous litigation no express decision had been given whether the beneficiaries were joint owners, it being assumed and admitted that they were, the matter so admitted was fundamental to the decision then given."

D LORD SHAW in giving the judgment of the Board used this language (3):

E "It is seen from this citation of authority that if in any court of competent jurisdiction a decision is reached, a party is estopped from questioning it in a new legal proceeding. But the principle also extends to any point, whether of assumption or admission, which was in substance the ratio of and fundamental to the decision. The rule on this subject was set forth in the leading case of *Henderson v. Henderson* (4) by WIGRAM, V.-C., as follows: 'I believe I state the rule of the court correctly when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time'."

Those are wide words, but they have been considered by the House of Lords in *New Brunswick Ry. Co. v. British & French Trust Corp., Ltd.* (5). LORD ROMER, referring to the passage which I have read from LORD SHAW's judgment, H said (6):

I "It was sought to treat this passage as an authority for the proposition that the plea of *res judicata* can successfully be raised whenever it can be shown that a question substantially similar to that being litigated has been decided in an earlier action between the same parties. My Lords, I cannot read the words that I have just cited as laying down any such proposition, a proposition for which, I venture to think, no authority can be found in the books. It is no doubt true to say that, whenever a question has in substance been decided, or has in substance formed the ratio of, or been fundamental to, the decision in an earlier action between the same parties, each party is estopped from litigating the same question thereafter. However, this is

(3) [1926] A.C. at p. 170.

(4) (1843), 3 Hare, at p. 114.

(5) [1938] 4 All E.R. 747; [1939] A.C. 1.

(6) [1938] 4 All E.R. at p. 770; [1939] A.C. at p. 43.

very different from saying that he may not thereafter litigate, not the same question, but a question that is merely substantially similar to the one that has already been decided. If, in an action, the question of the construction of a particular document has been in substance decided, each party to the action is estopped from subsequently litigating the same question of construction of that particular document. However, he is not estopped from subsequently litigating the question of construction of another document, even though the second one be in substantially identical words, for the documents are two distinct documents, and the questions of their construction are two distinct questions."

WILLMER, J., in *Bright v. Bright* (7) sought to apply those principles which he derived from the judgment in *Hoystead v. Taxation Comr.* (8) in a case where there had been previous proceedings by a wife alleging cruelty inter alia, and subsequent proceedings by a wife alleging desertion, and based on the same matters in part as she had raised in the earlier proceedings. He came to the conclusion that as to those matters which had been previously raised, they had specifically been decided against her in the earlier proceedings, and therefore she could not raise them again; but the learned judge went on to say that she was estopped from raising certain matters not specifically raised before on the ground that those allegations could well have been brought forward as part of the previous case of cruelty if they were allegations of substance.

It is only the second part of the learned judge's decision which is, I think, open to criticism, because it is, after all, a salutary and necessary principle that one party should not be permitted to vex and oppress his opponent by repeating allegations which have been previously made and decided adversely to that party. However, the rule has to be confined within proper limits, and sometimes it has been difficult to determine how the rule should be applied in particular cases. The most recent statement of the rule was that of MORRIS, L.J., sitting in this court as one of the majority in *Society of Medical Officers of Health v. Hope* (9). He said:

"The underlying principle supporting a plea of res judicata is that it is desirable that litigation should end and that it is undesirable that a person should be vexatiously pursued in litigation in regard to a matter that has already been decided. It has, however, always been clear that the plea will only avail if it appears that there is an attempt to re-open the very matter that has been decided . . ."

The question often arises, what is "the very matter that has been decided".

Before passing from *Bright v. Bright* (7) I should, I think, refer to a recent decision of this court in which that case was discussed. That is *Thompson v. Thompson* (10). The actual questions which arose for decision in *Bright v. Bright* (7), certainly the second question which has been criticised, did not there arise. I ought to refer to some observations of my own in *Thompson v. Thompson* (10) about *Bright v. Bright* (7) because I think that what I said then is certainly incomplete, and may well be misleading. I referred to *Bright v. Bright* (7) and *Hill v. Hill* (11), which was another decision arising in the divorce jurisdiction, as (12)

"... cases where there had been previous divorce proceedings in which judgment had been given against parties, who were held to be estopped from again raising in later divorce proceedings issues which had been decided in the earlier divorce proceedings. In such cases there is no difficulty in applying the ordinary principles of estoppel."

(7) [1953] 2 All E.R. 939; [1954] P. 270. (8) [1926] A.C. 155.

(9) [1959] 1 All E.R. at p. 515.

(10) [1957] 1 All E.R. 161; [1957] P. 19.

(11) [1954] 1 All E.R. 491; [1954] P. 291.

(12) [1957] 1 All E.R. at p. 171; [1957] P. at p. 38.

A I did not make it clear in that passage that I was considering only those issues which the wife in *Bright v. Bright* (13) had sought to raise again after those specific issues had been determined against her in earlier proceedings; but I did refer again to *Bright v. Bright* (13), showing that I had in mind the criticism which can be and, I think, must be said to be validly directed against the second part of WILLMER, J.'s decision. I said:

B "In dealing with the decision of WILLMER, J., in *Bright v. Bright* (13), I have not overlooked the observations of the Divisional Court in *Cooper v. Cooper* (14), which, however, do not touch the particular aspect of estoppel raised in this appeal."

I may say that the majority decision in *Thompson v. Thompson* (15) was to the effect that there was no estoppel, because the charges of cruelty which the wife sought to make in the case had not previously been in issue at all. There had been earlier proceedings for wilful neglect to maintain in which she had made accusations that her husband was cruel, but the allegation of cruelty was not specifically made. It is always difficult in these cases to distinguish between them: one has to bear in mind that the facts of the cases nearly always differ, and very often there is more than one ratio decidendi in the particular case.

D I must now make a reference to the decision of the Divisional Court which was referred to, viz., *Cooper v. Cooper* (14), which followed *Foster v. Foster* (16), which was another decision of the Divisional Court. In *Bright v. Bright* (13) WILLMER, J., had sought to distinguish *Foster v. Foster* (16), but LORD MERRIMAN, P., in *Cooper v. Cooper* (14) disapproved of that part of the judgment of WILLMER, J., in *Bright v. Bright* (13) which related to matters which might have been raised as particulars of cruelty, in so far as the learned judge held that the wife was estopped from raising them in desertion proceedings by directing her evidence to expulsive matter. The learned President said (17):

"It is said that *Foster v. Foster* (16) has been distinguished and criticised by WILLMER, J., in *Bright v. Bright* (13). I venture to observe that in so far as there is a difference between the two cases, and the principles on which they are decided, this court as, indeed, WILLMER, J., is bound by the decision in *Foster v. Foster* (16) if it is applicable. I do not propose to go in detail through the matters which were used in connexion with the charge of cruelty in *Bright v. Bright* (13) which had been dismissed by Mr. Commissioner BUSH JAMES, Q.C., and the particulars which were given in support of the charge of desertion, save one only. It appears that one of the new allegations which had not been included in the dismissed petition for cruelty was an allegation in para. 13: 'That between the years 1927 and 1930 at the White House, Freetown . . . the [husband] frequently told the [wife] that he no longer wanted her and wished that she would go'. If that allegation had been dealt with on the ground that it could not fairly be taken to be expulsive conduct, that would be one thing; ruling it out as inadmissible, in spite of the fact that it had not been, though it ought to have been, put before the court on the charge of cruelty, is another thing. WILLMER, J., said (18): 'In the result, I hold that so far as this petition raises the same allegations as those put forward in the previous petition for cruelty the wife is estopped from reiterating those allegations in support of her plea of constructive desertion. [I introduce there my own words that in the previous decision those allegations had been specifically rejected.] That decision covers para. 14, para. 15 and para. 17, which, as I pointed out, are paragraphs reiterating matters which formed the subject of specific allegations and specific findings in the previous case. With regard to . . . para. 13, which raise[s] matters not specifically raised in the previous proceedings, it is clear to me that these allegations are all allegations which could well

(13) [1953] 2 All E.R. 939; [1954] P. 270. (14) [1954] 3 All E.R. 358; [1955] P. 168.

(15) [1957] 1 All E.R. 161; [1957] P. 19. (16) [1953] 2 All E.R. 518; [1954] P. 67.

(17) [1954] 3 All E.R. at p. 361, 362; [1955] P. at pp. 174, 175.

(18) [1953] 2 All E.R. at p. 949; [1954] P. at p. 287.

have been made as part of the cruelty case which was then sought to be set up; indeed, one could go further, and say, from experience of this court, that each of them is of the type commonly raised in almost every cruelty case that comes before this court.' And then the learned judge says that that brings it within the passage in LORD SHAW's opinion in *Hoystead v. Taxation Comr.* (19) which had been cited in full in support of the proposition that estoppel relates not only to acts which actually were raised and decided, but to anything which ought to have been raised and was not raised, deliberately or otherwise, on the occasion before. In so far as that lays down that because, in the course of the hearing of a charge of cruelty, matters may emerge or even be particularised suggesting that the husband wishes or has plainly told the wife to clear out, the dismissal of the cruelty charge operates as an estoppel from using that class of evidence in support of a charge of constructive desertion, I respectfully disagree. If that is the purport of that paragraph, as I think it is, I think that it conflicts essentially, though the details of the cases are different, from the decision of this court in *Foster v. Foster* (20), and I am not prepared to accept it."

KARMINSKI, J., agreed with the opinion expressed by the President in that case, and in my view that expression of opinion by the Divisional Court has the effect, which I think is right, that part at any rate of WILLMER, J.'s decision in *Bright v. Bright* (21) cannot be supported.

It is to be observed that the allegations made in the present case are not the same as the allegations which were made in *Bright v. Bright* (21) in this respect, because the allegations (which have been repeated in this petition from the earlier pleading) are allegations of matters which had not been determined adversely to the wife in the previous proceedings. The learned commissioner who tried the earlier case—who was the same commissioner who tried the later case—preferred the wife's evidence to that of the husband; but in arriving at a conclusion that there was no cruelty he based himself in part on the fact that there was no evidence of injury to the wife's health. He concluded that even in the light of his finding as to the correctness of the wife's evidence about the matters on which she relied for cruelty, he did not think that it would be at all possible in this case to hold that the husband's behaviour amounted to cruelty. There is no question of the wife's allegations having been rejected, and therefore there is no question of her seeking to re-litigate in later proceedings matters of fact which have been specifically determined against her in earlier proceedings.

As to the second group of allegations, they are, I think, of the same character as those which were excluded by WILLMER, J., in *Bright v. Bright* (21), that is to say, allegations of what is called expulsive conduct. It is quite true, as WILLMER, J., indicated, that very often in cruelty cases everything conceivable is included which may possibly have a bearing on the issue of cruelty, the pleading usually being based on a course of conduct coupled with an allegation of injury to health; and that it is very often difficult to say that any matter which takes place between husband and wife which savours of unkindness is irrelevant. But that is not to say that details of expulsive conduct, if excluded from a previous suit based on cruelty, cannot be relied on in a subsequent case based on desertion.

In this case I think that it is clearly the duty of the court on the facts, as I have stated them, to give to the wife an opportunity of having her case on desertion heard, and of having her case heard in so far as it consists of a denial of her husband's allegations of desertion. She has so far been deprived of that opportunity by what I regard as a misapplication of the rule applicable to *res judicata*. To enable her to pursue her remedy is not, I think, in breach of that part of the rule which is relevant here, which is stated at p. 9 of SPENCER BOWER ON RES JUDICATA. Rule 5 is:

(19) [1926] A.C. at p. 170.

(20) [1953] 2 All E.R. 518; [1954] P. 67.

(21) [1953] 2 All E.R. 939; [1954] P. 270.

A “That a judicial decision was, or involved, a determination of the same question as that sought to be controverted in the litigation in which the estoppel was raised.”

I agree that the language of *Hoystead v. Taxation Comr.* (22) can be read as lending support to the argument accepted first by WILLMER, J., and afterwards by the learned commissioner, but I think that on consideration that language does not support the whole of the learned judge’s judgment, and that this appeal should be allowed. The case should, in my opinion, be sent back for re-trial; and I think that it would be right in the circumstances of this case that the matter should go for re-trial before the same learned commissioner, if he is available to take it.

C **SELLERS, L.J.:** I feel no doubt that this matter must be tried, and that the case must go back for the wife’s allegations to be heard and assessed. No decision has been reached at any time on the issue of constructive desertion by the husband of his wife. Some evidence of the wife in the previous proceedings, which was in fact accepted, was held not to be cruelty, and that decision seems to have been arrived at, as my Lord has said, because the learned commissioner—
D who was the same judge who tried this case from which appeal now lies—was not able to find that the acts which were proved were sufficient in themselves to amount to cruelty or had, in any event, affected the wife’s health. However, that evidence was, as evidence, accepted in her favour as to acts which had taken place between the parties. It seems to be available to the wife, and there is nothing to estop her from relying on it along with the additional matters which she
E wishes to raise to support her allegation that, on a proper consideration of the whole of the facts, there should be a finding of constructive desertion by the husband.

Observations in the course of the argument invited this court to review the whole of the cases. I do not feel free to examine either the several authorities which have been cited to us, or the principles which they establish. If it were
F otherwise, I should think that there was some conflict of judicial opinion which might well be considered. However, I feel that this court is precluded from any such investigation because, as I follow it, this matter, so far as this case is concerned, has been decided by the case to which my Lord referred (*Thompson v. Thompson* (23)), and the previous decision on which it was based (*Winnan v. Winnan* (24)). An accurate summary of the decision of the two majority lords
G justices, HODSON, L.J., and MORRIS, L.J., in *Thompson v. Thompson* (23), is:

“the allegation of cruelty put forward by the wife in the divorce proceedings should not be struck out on the ground that she had previously failed to establish the same charge in the maintenance proceedings, for the subject of litigation was not the same in the two sets of proceedings.”

H The decision of this court in *Thompson v. Thompson* (23) followed its decision in *Winnan v. Winnan* (24)—a decision of LORD MORTON OF HENRYTON, BUCKNILL, L.J., and ASQUITH, L.J., who agreed with the judgment delivered by BUCKNILL, L.J.—and the same principles are set out there. The second ground on which that case was decided was that “the subject of litigation in the two proceedings was not the same”. The litigation in the two proceedings here is not the same, and those two cases would appear to be binding authorities on this court.

I However, whatever the right view is on that matter, this is a case in which there can be no estoppel because, in my view, quite plainly the issue has never been tried in any way whatsoever. The facts should be given consideration, not to see whether they amount to cruelty, but looked at again to see whether they amount to something other than cruelty and establish constructive desertion, because it was conceded by counsel that there is a difference between the two. It is not

(22) [1926] A.C. 155.

(23) [1957] 1 All E.R. 161; [1957] P. 19.

(24) [1948] 2 All E.R. 862; [1949] P. 174.

necessary in order to establish constructive desertion that the facts relied on should of necessity amount to cruelty. A

I therefore feel that this appeal should be allowed, and the matter should be tried by the same commissioner. I think that that is most desirable.

HARMAN, L.J.: I agree. It seems to me that there has been a confusion of terms. That is a very potent source of deception and it arises here again. It can be truly said that this wife has made unfounded charges of cruelty against her husband; that may mean either that the court rejected the facts alleged or that though it accepted them, it decided they did not amount to cruelty as that word is understood in the Divorce Court. B

The second is the present case. It follows that these charges of cruelty may not be repeated as such. That is a very different matter from saying that those same facts did not amount to matters relevant to an issue of constructive desertion which, as my Lord has said, has never been tried at all. C

It would indeed be an astonishing result of the confusion in which words can result if the wife, on an issue which has never been before the court, were compelled to be silent about matters which the court has already declared that she has truly stated. That she should be kept silent even from true words on a new issue is an astonishing plea. With all respect to the very energetic argument which we have heard, I think that this court would be landed in an absurdity if we prevented the wife from telling the truth about her case. D

I agree, therefore, that the appeal should be allowed, and with the course proposed by my Lords.

Appeal allowed: new trial ordered. E

Solicitors: *Marsh & Ferriman*, Worthing (for the wife); *Cyril E. Wheeler*, Brighton (for the husband).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

NOTE.

R. v. CADDY.

[COURTS-MARTIAL APPEAL COURT (Byrne, Slade and Salmon, JJ.), July 20, 1959.]

Court-Martial—Appeal—Abandonment of appeal—Withdrawal of notice of abandonment—Application for such withdrawal not allowable unless notice of abandonment a nullity, as through mistake or fraud—Criminal Appeal Rules, 1908 (S.R. & O. 1908 No. 227), r. 23—Courts-Martial Appeal Rules, 1952 (S.I. 1952 No. 194), r. 5 (1). G

[For the Courts-Martial (Appeals) Act, 1951, s. 3 (2) (a), and s. 21, see 30 HALSBURY'S STATUTES (2nd Edn.) 466, 479.

For the Courts-Martial Appeal Rules, 1952, r. 4, r. 5, r. 8 (3), r. 9 (2), r. 11 (3) and r. 21, see 19 HALSBURY'S STATUTORY INSTRUMENTS 212-215, 218. H

For the Criminal Appeal Rules, 1908, r. 23, see 6 HALSBURY'S STATUTORY INSTRUMENTS 50.]

Cases referred to:

R. v. Moore, [1957] 2 All E.R. 703; 41 Cr. App. Rep. 179; [1957] 1 W.L.R.841; 3rd Digest Supp. I

R. v. Pitman, (1916), 12 Cr. App. Rep. 14; 14 Digest (Repl.) 613, 6089.

R. v. Van Dyn, (1932), 23 Cr. App. Rep. 150; 14 Digest (Repl.) 613, 6093.

Application.

On Nov. 16, 1958, the applicant was charged before a district court-martial in Cyprus with three offences of conduct to the prejudice of good order and discipline. He was convicted and was sentenced to six months' detention and reduction to the ranks. The findings of the court-martial were promulgated on Jan.

A 17, 1959, the detention being remitted and the reduction to the ranks being confirmed. On Mar. 14, 1959, he presented a petition pursuant to s. 3 (2) (a) of the Courts-Martial (Appeals) Act, 1951, praying for the conviction to be quashed, and on May 7, 1959, he was notified that the petition had been refused. On May 16, 1959, he applied for leave to appeal against the conviction. On June 19 the application came before a single judge, under s. 21 of the Act of 1951, and was refused, the applicant being notified of the refusal on June 22. Under s. 21 of the Act and r. 8 (3) of the Courts-Martial Appeal Rules, 1952, an application for leave to appeal to a full court could be made within ten days of the notification. On June 26 the applicant gave notice of abandonment of his application for leave to appeal, signing the appropriate Form (Form 3 of Sch. 1 to the Rules of 1952) in accordance with r. 5 (1)* of the rules. On June 29 (i.e., within the period of ten days) the applicant made a requisition, on the appropriate Form (Form 4 of Sch. 1 to the rules), appealing from the decision of the single judge. On the Form he stated that he wished his notice of abandonment (Form 3) to be cancelled and the appeal (Form 4) to be substituted therefor. The reason, given in a letter written on behalf of his commanding officer and accompanying Form 4, for the applicant's desiring to cancel the notice of abandonment was that he had been advised by a legal expert that it would be unwise to submit a notice of abandonment.

The applicant did not appeal and was not represented.

SLADE, J., delivering the judgment of the court, stated the facts and said that the court was treating the application as an application for leave to withdraw the notice of abandonment of appeal. After pointing out that, though the Criminal Appeal Act, 1907, and the Courts-Martial (Appeals) Act, 1951, and the rules made under the respective Acts dealt with the abandonment of an appeal, neither the Acts nor the rules contained any reference to withdrawals of notice of abandonment. After reading the references to appeals and abandonment in r. 4 (1) and (2), r. 5 (1), r. 9 (2), and r. 11 (3) of the Courts-Martial Appeal Rules, 1952†, and r. 21 (which provides that non-compliance with the rules by an appellant shall not prevent the further prosecution of his appeal, unless the court or a judge thereof otherwise directs), HIS LORDSHIP continued: The practice in the Court of Criminal Appeal in regard to applications for leave to withdraw a notice of abandonment was laid down in *R. v. Moore* (1). LORD GODDARD, C.J., referred to r. 23 of the Criminal Appeal Rules, 1908, which provides that on notice of abandonment being given the appeal shall be deemed to have been dismissed, and said:

"Accordingly, the court will not entertain applications for the withdrawal of notices of abandonment unless something amounting to mistake or fraud is alleged, which, if established, would enable the court to say that the notice of abandonment should be regarded as a nullity."

H Two cases where a similar practice had been laid down were referred to, *R. v. Van Dyn* (2) and *R. v. Pitman* (3).

The only difference between the practice of the Court of Criminal Appeal and that on an application to this court is that in the Courts-Martial Appeal Rules, 1952, there is no provision corresponding to r. 23 of the Criminal Appeal Rules, 1908; but that does not seem to warrant any alteration of the practice, because the

* Rule 5 (1) reads: "An appellant may, at any time after he has made application for leave to appeal, abandon his appeal by giving to the registrar notice of abandonment thereof in Form 3."

† The Courts-Martial Appeal Rules, 1952, have been amended by the Courts-Martial Appeal (Amendment) Rules, 1954 (S.I. 1954 No. 1557) and the Courts-Martial Appeal (Amendment) Rules, 1955 (S.I. 1955 No. 1883), but the amendments do not affect any of the rules mentioned above.

(1) [1957] 2 All E.R. at p. 703. (2) (1932), 23 Cr. App. Rep. 150.
(3) (1916), 12 Cr. App. Rep. 14.

grounds on which, in exceptional circumstances, the court will allow a notice to be withdrawn are based on circumstances which will enable the court to treat the notice of abandonment as itself a nullity, so that no question would then arise of the appeal being deemed to have been dismissed. The only other circumstance of difference in the present case is that the attempt to reinstate the application for leave to appeal was within the ten days prescribed (4) by r. 8 (3) of the Courts-Martial Appeal Rules, 1952. This court sees no ground whatever for differentiating the procedure in the Courts-Martial Appeal Court from the similar procedure in the Court of Criminal Appeal. No circumstance even approaching the exceptional circumstances in which an appeal would be considered on the grounds that the notice of abandonment should be treated as a nullity is shown in this case, and the application is, accordingly, refused.

Application dismissed. C

[Reported by KEVIN WINSTAIN, Esq., Barrister-at-Law.]

BARCLAYS BANK, LTD. v. INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Lord Evershed, M.R., Romer and Pearce, L.JJ.), July 1, 2, 3, 21, 1959.]

Estate Duty—Company—Shares—Valuation—Control of company—Shares held by deceased in fiduciary capacity—Whether permissible to look beyond company's articles and register—Finance Act, 1940 (3 & 4 Geo. 6 c. 29), s. 55 (1) (a), (3) (a). E

The issued share capital of a company consisted of 8,350 ordinary shares of £1 each. The estate of the deceased, who died on Dec. 15, 1955, included eleven hundred shares of the company, and 3,650 shares were the subject of a settlement made by the deceased in 1936. The deceased took no beneficial interest under the settlement, but he had been a trustee thereof since 1936 until his death. The shares were registered in the company's register of members in the names of the deceased and the other three trustees, and the deceased's name appeared first of the four registered holders. By the company's articles of association, on a poll every member had one vote for each share of which he was the holder, and, in the case of joint holders, the vote of the senior who tendered a vote was to be accepted to the exclusion of the votes of the other joint holders, seniority for this purpose being determined by the order in which the names stood in the register of members. On a summons by the executors to determine whether the principal value of the eleven hundred shares comprised in the deceased's estate should be estimated, for the purposes of estate duty, in the manner prescribed by the Finance Act, 1894, s. 7 (5), or in the manner prescribed by the Finance Act, 1940, s. 55*, which would apply if the deceased had control of the company at any time during the five years ending with his death.

Held: the method of valuation prescribed by s. 55 of the Act of 1940 was applicable because, by virtue of the voting rights vested in him, the deceased was in a position to secure the passing of any ordinary resolution at a general meeting and, therefore, had "control of the company" within s. 55 (1) (a); and it was irrelevant that in respect of the settled shares he was registered jointly with others as trustee (see p. 144, letter H, and p. 146, letters A to D, post).

(4) I.e., prescribed as the period within which an applicant who has been refused leave to appeal by the single judge may require that his application be referred to the full court.

* The relevant provisions of s. 55 are printed at p. 142, letters F to I, post.

A *Inland Revenue Comrs. v. Bibby & Sons, Ltd.* ([1945] 1 All E.R. 667) and *John Shields & Co. (Perth), Ltd. v. Inland Revenue Comrs.* (1950 S.C. 441) applied.

Decision of DANCKWERTS, J. ([1959] 1 All E.R. 65) reversed.

[As to the valuation of shares by reference to the value of the assets, see 15 HALSBURY'S LAWS (3rd Edn.) 75, para. 154.

B For the Finance Act, 1940, s. 55, see 9 HALSBURY'S STATUTES (2nd Edn.) 483.]
Cases referred to:

Berendsen (S.), Ltd. v. Inland Revenue Comrs., [1957] 2 All E.R. 612; [1958] Ch. 1; [1957] 3 W.L.R. 164; 3rd Digest Supp.

Himley Estates, Ltd. & Humble Investments, Ltd. v. Inland Revenue Comrs., [1933] 1 K.B. 472; 102 L.J.K.B. 383; 148 L.T. 319; 17 Tax Cas. 367; Digest Supp.

Inland Revenue Comrs. v. Bibby & Sons, Ltd., [1945] 1 All E.R. 667; 114 L.J.K.B. 353; 173 L.T. 17; 29 Tax Cas. 167; 2nd Digest Supp.

Inland Revenue Comrs. v. Silberts, Ltd., [1951] 1 All E.R. 703; [1951] Ch. 521; 2nd Digest Supp.

Noble (B. W.), Ltd. v. Inland Revenue Comrs., (1926), 12 Tax Cas. 911.

D *Parsons, Re, Parsons v. A.-G.*, [1942] 2 All E.R. 496; [1943] Ch. 12; 112 L.J.Ch. 65; 167 L.T. 384; 2nd Digest Supp.

St. Aubyn v. A.-G., [1951] 2 All E.R. 473; [1952] A.C. 15; 3rd Digest Supp.

Shields (John) & Co. (Perth), Ltd. v. Inland Revenue Comrs., 1950 S.C. 441; 29 Tax Cas. 475; 2nd Digest Supp.

Appeal.

E This was an appeal by the Crown from a decision of DANCKWERTS, J., dated Dec. 17, 1958 and reported [1959] 1 All E.R. 65.

By their originating summons dated Oct. 7, 1958, the plaintiffs, the executors of the will of Tom Shippide, deceased, asked for the determination under s. 3 of the Administration of Justice (Miscellaneous Provisions) Act, 1933, of the following question: whether on the true construction of the Finance Act, 1894, and the

F amending Acts, and, in particular, of s. 55 of the Finance Act, 1940, the principal value of eleven hundred fully paid ordinary shares of £1 each in T. Shippide, Ltd. comprised in the estate of the deceased should be estimated for the purpose of payment of estate duty on his estate in respect of his death (a) in accordance with the provisions of s. 55 of the Finance Act, 1940, or (b) in accordance with the provisions of s. 7 of the Finance Act, 1894, or (c) in some other, and, if so, what

G way. DANCKWERTS, J., held that the valuation had to be made in accordance with s. 7 of the Finance Act, 1894. The Crown appealed.

John Pennycuick, Q.C., and *E. Blanshard Stamp* for the Crown.

B. L. Bathurst, Q.C., and *Denys B. Buckley* for the plaintiffs.

Cur. adv. vult.

July 21. The following judgments were read.

H LORD EVERSLED, M.R.: The plaintiffs in this action are the personal representatives of Mr. Tom Shippide, who died on Dec. 15, 1955. The assets of Mr. Shippide's estate included eleven hundred fully paid shares of £1 each in the capital of a company, T. Shippide, Ltd., formed in the year 1917 to acquire the motor business formerly carried on by Mr. Shippide. The share capital of the company was and is £10,000, divided into ten thousand shares of £1 each, carrying the right, on a poll, of one vote per share at general meetings of the company. The issued share capital was at all material times, and is, £8,350. The company's regulations include cl. 61 of Table A in the Companies (Consolidation) Act, 1908, whereby, in the case of joint holders of shares

I " . . . the vote of the senior who tenders a vote, whether in person or by proxy, shall be accepted to the exclusion of the votes of the other joint holders; and for this purpose seniority shall be determined by the order in which the names stand in the register of members."

Mr. Shipside was, I understand, a director of the company from the date of its incorporation until the date of his death. In addition to the eleven hundred shares registered in Mr. Shipside's sole name, of which he was, admittedly, the beneficial owner, his name also appeared first on the register as joint holder with (since 1948) the names of three other persons of a further 3,650 of the company's shares. These 3,650 shares are the subject of a settlement made by Mr. Shipside on Dec. 1, 1936, in favour of his wife and three children (to the exclusion of any beneficial interest in himself). By the settlement Mr. Shipside had the power during his life of appointing new trustees—a power which he exercised in 1948. It will be noted that the 3,650 shares plus Mr. Shipside's own eleven hundred together amount to a majority of the issued shares of the company; so that if Mr. Shipside exercised his voting rights, under the company's regulations, as "senior" registered holder of the 3,650 shares and as sole proprietor of his own eleven hundred shares, he would command a majority of all the votes at general meetings of the company. In these circumstances the question has arisen whether it should now be held that at any time during the last five years of Mr. Shipside's life he was "in control" of the company within the meaning of s. 55 of the Finance Act, 1940; for if so, it must follow that Mr. Shipside's own eleven hundred shares in the company must be valued for estate duty purposes, not according to their value in the market pursuant to s. 7 of the Finance Act, 1894, but according to the value of the company's assets as provided by the Act of 1940. It is this question of the proper basis of valuation which is posed for the court by the originating summons, and which DANCKWERTS, J., answered in the sense favourable to the plaintiff executors. It is to be noted, as counsel for the plaintiffs observed, that an answer favourable to the Crown may have the added effect of so increasing the value of the estate as to raise also the general rate of estate duty payable in respect of it.

The problem turns entirely on the true interpretation of the relevant provisions of the Finance Act, 1940, and it will, therefore, be convenient if I read those provisions at once. They are as follows. Section 55 (1) provides:

"Where for the purposes of estate duty there pass, on the death of a person dying after the commencement of this Act, shares in or debentures of a company to which this section applies, then if—(a) the deceased had the control of the company at any time during the three years ending with his death . . . the principal value of the shares or debentures, in lieu of being estimated in accordance with the provisions of s. 7 (5) of the Finance Act, 1894, shall be estimated by reference to the net value of the assets of the company in accordance with the provisions of the next succeeding subsection."

The period of three years in para. (a) has now become five years (1). Section 55 (3) provides:

"For the purposes of this section a person shall be deemed to have had control of a company at any time if he then had—(a) the control of powers of voting on all questions, or on any particular question, affecting the company as a whole which if exercised would have yielded a majority of the votes capable of being exercised thereon; or (b) the capacity to exercise, or to control the exercise of any of the following powers, that is to say, the powers of a board of directors or of a governing director of the company, power to nominate a majority of directors or a governing director thereof, power to veto the appointment of a director thereof, or powers of a like nature; or if he could have obtained such control or capacity by an exercise at that time of a power exercisable by him or with his consent."

Section 55 (5) provides:

"Control of a company which a person had in a fiduciary capacity shall be disregarded for the purposes of this section."

(1) See Finance Act, 1946, s. 47 and Sch. 11, Part 1.

A Section 58 provides:

B “(4) References in this Part of this Act to a disposition’s being made by any person, to a power’s being exercised or exercisable by any person, or to any other act’s being done by any person, include references to its being made, or being exercised or exercisable, or being done, by him and another jointly or by another at his direction or by a company of which he had control within the meaning of sub-s. (3) of s. 55 of this Act, whether with or without the consent of any other person; references importing an omission on the part of any person in relation to any such matter as aforesaid shall be construed in like manner; and references in relation to any such matter as aforesaid to its being made, or being exercised or exercisable, or being done or omitted, with the consent of any person include references to its being made, or being exercised or exercisable, or being done or omitted, at his request or with or subject to his acquiescence.

C “(5) References in this Part of this Act to a person having any power or control or doing any act in a fiduciary capacity shall be construed as references to his having that power or control or doing that act in a fiduciary capacity imposed on him otherwise than by a disposition made by him and in such a capacity only.”

D It is easy, and perhaps not profitable, to criticise the draftsmanship of an Act of Parliament; but the inelegance and obscurity of some, at any rate, of the relevant provisions of the Act of 1940 is certainly remarkable, and in this respect s. 58 (4) undoubtedly takes pride of place. Nevertheless, it is, I think, a mistake to suppose that, to the draftsman of this Act, the phrases “control of the company” or “controlling interest in the company” had acquired the precise significance which later judicial pronouncements in *Inland Revenue Comrs. v. Bibby & Sons, Ltd.* (2) and other cases have given them. In 1940, only ROWLATT, J., in *B. W. Noble, Ltd. v. Inland Revenue Comrs.* (3) had anticipated the law as later laid down when he said that the phrase “controlling interest” in regard to a company was a reference to the situation of one “whose shareholding in the company is such that he is the shareholder who is more powerful than all the other shareholders put together in general meeting”; for on this point I do not think that the decision of this court in *Himley Estates, Ltd. & Humble Investments, Ltd. v. Inland Revenue Comrs.* (4) is relevant. In that case the question for the determination of the court was whether the company then in question was to be treated as being under the control of not more than five persons within the meaning of the Finance Act, 1922, s. 21 (6) (d). The voting shares were held by fourteen persons, all of whom were admittedly beneficial owners of their shares. But it was said on behalf of the Crown that they were none the less friends (though not relatives or nominees) and supporters of the tenant for life, Lord Ednam, and that the case fell, therefore, somehow within the language (the “ridiculous” language, according to one member of this court) of the definition at the end of the subsection,

H “A company shall be deemed to be under the control of any persons where the majority of the voting power or shares is in the hands of those persons or relatives or nominees of those persons, or where the control is by any other means whatever in the hands of those persons.”

I The debate before ROWLATT, J., and this court was substantially directed to the interpretation of that special formula, quite different from anything found in the Act of 1940.

It follows then, if I am right so far, that the draftsman, in using the phrase in s. 55 (1) (a) “control of the company”, would not, or at least may well not, have intended by it what a draftsman in 1959 would intend. In the absence of

(2) [1945] 1 All E.R. 667; 29 Tax Cas. 167.

(3) (1926), 12 Tax Cas. 911.

(4) [1933] 1 K.B. 472.

judicial interpretation "control of the company" is a somewhat wide phrase. A
 This consideration leads me, therefore, to the view that sub-s. (3) was intended
 as a definition or exposition; and this view seems to be supported by the return
 in sub-s. (5), to the phrase "control of a company"—for I feel it difficult to
 suppose that sub-s. (5) was only intended to apply to sub-s. (1) cases and not
 to sub-s. (3) cases. My view is also, I think, supported—as counsel for the
 Crown conceded—by the reference to s. 55 (3) in s. 58 (4). If "control of a B
 company" in sub-s. (1) was thought to have a precise but limited meaning,
 which sub-s. (3) was intended to expand, I should have expected sub-s. (3)
 to say "In this section the phrase 'control of a company' shall be deemed to
 include . . ." etc., or words to that effect. But in the end, it may not very
 much matter. Counsel for the plaintiffs conceded that the phrase in sub-s. (3) (a)
 "control of powers of voting" etc., would cover the ordinary case of a majority C
 shareholder entered in the register. As LORD RADCLIFFE indicated in *St.*
Aubyn v. A.-G. (5), the effect of a "deeming" clause may be to cover both
 the obvious and the not-so-obvious. In my view, the difficulty in sub-s. (3) (a)
 is caused by the words "powers of". What is really meant by the phrase
 "control of the powers of voting" is surely no more than "the control of
 voting": perhaps "rights" would have been a better word than "powers". D
 What, however, I think the words were intended and are apt to cover is the
 person who can, either by the direct exercise of the voting power or rights
 that he has, or indirectly by requiring such power or rights to be exercised as
 he wants by others, command, or produce the result, that the majority of the
 votes will be given as he wishes. It covers the absolute owner of fifty-one
 per cent. of the (voting) shares: it covers also, to my mind, the beneficial owner E
 of fifty-one per cent. registered in the name of a nominee.

One result of this view may be that in the contemplation of the section more
 than one person may have "control of a company" within the section at the
 same time. This indeed is made clear by sub-s. (3) itself, e.g., where A owns
 beneficially fifty-one per cent. of the shares, but B is the governing director F
 (see para. (a) and para. (b) of the subsection)—for the argument is not affected
 by the later repeal of para. (b). Similarly, a custodian trustee and managing
 trustee might both have "control". The latter point is, however, not likely
 to be of much practical significance having regard to sub-s. (5). The relevance
 for present purposes is that, in construing the section, the fact that "control"
 is, within the meaning of the section, found to be in one person, does not impliedly G
 negative "control" also in someone else. After all, the section is not con-
 cerned to regulate companies, but to tax the estates of people whose interests
 in a company have a certain proprietary quality.)

I, therefore, conclude that the section applies *prima facie*, and subject to
 exclusion under sub-s. (5), to a person who was, during the relevant period,
 in a position, by virtue of the voting rights vested in him, to secure the passing H
 of any ordinary resolution at a general meeting. The next question then
 arises, is the *prima facie* result altered if it is shown that a relevant number
 of the shares whose votes he was able and entitled to cast were registered in him
 jointly with others as a trustee or otherwise? I assume in posing the question
 that sub-s. (5) has no application, and since, for the purposes of this case, it is
 conceded that sub-s. (5) cannot help the plaintiffs, having regard to the fact I
 that Mr. Shipside himself made the trust disposition (see s. 58 (5)), I shall dis-
 regard the possible application of the former subsection to this case.

DANCKWERTS, J., thought that the question posed should be answered affirma-
 tively. His grounds, briefly, were (and they are those submitted by the plaintiffs):
 (i) it is clear, for example from s. 55 (5), that you must go beyond the company's
 constitution and inquire of the capacity in which the registered shareholder
 in fact held his shares; and (ii) when you find that the person entitled or primarily

A entitled to vote is one of four trustees, then it follows that he is speaking not with his own voice but with the united voices of all four trustees; it, therefore, follows that Mr. Shipside, though first on the register, was not voting the trust shares for himself and for his own purposes (as he was in respect of his own eleven hundred shares): he was voting those shares on behalf and in the interests, to the exclusion of his personal interest, of the four trustees as a body. It was, therefore, said (and held by DANCKWERTS, J.) that the present case was outside the scope of the relevant authorities, particularly *Inland Revenue Comrs. v. Bibby & Sons, Ltd.* (6), the two cases in this court, *Inland Revenue Comrs. v. Silverts, Ltd.* (7) and *S. Berendsen, Ltd. v. Inland Revenue Comrs.* (8), and the case before the First Division of the Court of Session in Scotland in 1950 (which was expressly approved by this court in the *Silverts* case (7)), viz., *John Shields & Co. (Perth), Ltd. v. Inland Revenue Comrs.* (9). I have, for my part, reached a different conclusion from DANCKWERTS, J., and I can state as follows the grounds for my conclusion:

(1) Although the *Bibby* case (6) and other cases (above referred to) were decisions on somewhat different contexts and related to the tax liability of companies and not of individuals, nevertheless, the speeches and judgments in those cases seem to me to have laid it down as a clear general proposition of law that control of a limited liability company depends on, and is to be judged by reference to, the company's own constitution. I do not repeat the citations which DANCKWERTS, J., made in his judgment, but in my view the general proposition has been affirmed with increasing emphasis as one case has succeeded another. What the company, being a "persona ficta", does or does not do is determined by the resolutions of its corporators so that those who command a majority of the corporators or their votes in general meeting control the company, the validity of the transactions of which cannot be questioned so long as the resolutions have been duly passed in accordance with the company's regulations—however much those who voted may have regarded or disregarded other (outside) obligations resting on them. "A clean cut" (said LORD SIMONDS in the *Bibby* case (10)) "there must be". It is nihil ad rem that the control of the company may be in the hands of persons who are themselves controlled from without. The company is in this respect like a motor car the speed and direction of which is controlled by the driver—notwithstanding any influence or encouragement to which the driver is subject from other passengers.

(2) In the absence, therefore, of some compelling context to the contrary, the court must respect the general rule binding on it; and it should avoid making fine distinctions. In my judgment there is no such compelling context in s. 55 of the Act of 1940. For reasons which I have earlier attempted to state, other persons than the majority shareholders may well also, under the section, be deemed at the same time to control the company: and in this connexion I refer to the last three lines of sub-s. (3) of the section. But these other "controllers" (if such there be) do not displace the control of the man who, according to the company's regulations, secures by his votes the passing of the resolutions—any more than the "control" of a motor car by the driver is displaced by the fact that he may be acting under the influence and orders of a passenger who might therefore also be sensibly alleged to be in "control".

(3) It is true that, as DANCKWERTS, J., pointed out, you are required by s. 55 (5) to look into the character of the shareholder to see whether he is a trustee. But I observe that that subsection in terms affirms rather than negatives the trustee's "control". The subsection does not say that a majority shareholder who is a trustee shall not be deemed to control the company; it says rather that the control which the trustee has is to be disregarded. Further,

(6) [1945] 1 All E.R. 667; 29 Tax Cas. 167. (7) [1951] 1 All E.R. 703; [1951] Ch. 521.

(8) [1957] 2 All E.R. 612; [1958] Ch. 1. (9) 1950 S.C. 441; 29 Tax Cas. 475.

(10) [1945] 1 All E.R. at p. 673; 29 Tax Cas. at p. 185.

if counsel for the plaintiffs' argument were accepted, the subsection can, as he A
concedes, only apply to a sole trustee—a result which seems to me, to say the
least, to be an unlikely intention.

(4) If I am right so far, then the only remaining question is whether the facts
that Mr. Shipside, as the "senior" of the four trustees, had by virtue of cl. 61
of Table A only a prior right of voting quoad the other trustees, and that, when
he voted, he must be taken to have spoken with the voices, in unison, of all B
four trustees, make any difference. It is true that these facts did not precisely
arise in any of the decided cases; but in my opinion we should not on that
ground distinguish this case from the Scottish case of *John Shields & Co. (Perth),*
Ltd. v. Inland Revenue Comrs. (11) which (as I have said) has been expressly
approved in this court. It is true that under the relevant article in the *Shields*
case (11), Mrs. Bell had more than mere priority—she was to be treated as the C
sole proprietor of the trust shares. But, like Mr. Shipside, she had still to attend
and vote; and like Mr. Shipside, if (as we must assume) she performed her trust
duties properly, she spoke with the voice of all the trustees.

In my judgment, therefore, we ought, in conformity with the principles of law
binding on us, to hold that the Crown has in this case discharged the onus
which rests on it of showing that Mr. Shipside, during the relevant period, was D
(by virtue of the 3,650 shares registered in the names of himself and his three
co-trustees—his own name being first on the register—and of the eleven hundred
shares of which he was the registered proprietor and beneficial owner) "in
control of the company" within the meaning of s. 55 (1) and (3) of the Act.

Counsel for the plaintiffs argued that on this view anomalies would arise,
of which he gave examples. It may be that some anomalies do arise, on my
view of the construction—and on sections worded as are these, it would be E
perhaps surprising if it were not so. But I do not think that my construction
involves anomalies so striking as to require that construction to be rejected.

Finally, I am also not satisfied that acceptance of the Crown's argument
involves a manifestly unjust result or one which is contrary to the apparent
intention of Parliament. Mr. Shipside was without doubt closely connected F
with the business of the company which bears his name. Immediately before
the making of the settlement he appears to have held in his own right 4,750
shares out of an issued total of 8,350, or approximately fifty-seven per cent.
At that time he undoubtedly "controlled the company". He appears also to
have been at all times a director. I have also referred to the fact that by the
terms of the settlement he gave himself the power (which he exercised eight G
years after the passing of the Act of 1940, retaining his own place as first on the
register) to appoint new trustees. It is no doubt a misfortune for his estate
that Mr. Shipside on making the settlement, or thereafter, forbore from putting
the name of one of the trustees other than himself first on the register. But
he did not do so. It appears to me at least highly likely that the conduct and
management of the company's affairs remained (and may even have been H
intended to remain) after the settlement exactly the same as it had been before.

I add that I am glad to be able to reach the conclusion that I do without
recourse to the almost offending language of s. 58 (4). As regards that sub-
section, I content myself by saying that as at present advised, I am inclined to
agree with counsel for the plaintiffs that its terms are not apt to apply to the
circumstances of the present case. I have also not found it necessary to do I
more than refer to s. 58 (5), since it was (as I have earlier stated) conceded
before us that so far as Mr. Shipside was concerned, the subsection effectively
disqualified the plaintiffs from invoking s. 55 (5).

For the reasons which I have stated, I would allow the appeal and answer
the question raised by the originating summons in the sense of para. 1 (a).

PEARCE, L.J., who is unable to be present today but who has seen the draft

A of the judgment which I have delivered, has authorised me to say that he agrees with it.

ROMER, L.J.: I agree with LORD EVERSHED, M.R., and PEARCE, L.J., in thinking that this appeal should be allowed, but as I have reached that conclusion by a somewhat different road, and as we are differing from the learned judge, I will add a few words of my own.

B For myself I incline to the view that if a case be found to come within s. 55 (1) of the Finance Act, 1940, it is unnecessary to look further and in particular it is irrelevant to inquire whether the case falls within the terms of sub-s. (3) of the same section. In other words, it seems to me that the "deeming" provisions of sub-s. (3) are supplementary to, or expansive of, sub-s. (1), and are not merely expository thereof. I think that sub-s. (1) is dealing with direct control of a company whilst sub-s. (3) is concerned with indirect control. If sub-s. (3) were merely expository of sub-s. (1) it must at least be assumed to cover the case of a registered beneficial owner, but such an owner does not easily fit into the words "the control of powers of voting on all questions". These words in their natural sense would seem to indicate control of powers vested in some third person as distinct from the exercise of powers which are vested in a registered owner himself—a distinction which is recognised in terms of sub-s. (3) (b). I feel that if sub-s. (3) had been intended to be an exhaustive definition of what constituted "control of a company" for the purposes of s. 55 the draftsman would have used wider language in sub-s. (3) (a) such as "the powers of voting or the control of powers of voting" etc. It is true that s. 58 (4) tends to the opposite view to that which I have expressed, but that subsection is drawn in such a bewildering manner as to be an unsure guide to the interrelation of sub-s. (1) and sub-s. (3) of s. 55. I find some support for the construction of these subsections which appeals to me from the approach of LORD GREENE, M.R., to a somewhat similar question in *Re Parsons, Parsons v. A.-G.* (12).

D On the footing, then, which I have indicated, the first question to consider is whether the Crown have succeeded in establishing that the late Mr. Tom Shipside had the control (within the meaning of s. 55 (1)) of T. Shipside, Ltd., at any time during the relevant period before his death.

E LORD EVERSHED, M.R., has stated the material facts of the case and I do not repeat them. The answer to the question which I have posed depends on whether the shares comprised in the settlement which this gentleman made in 1936, and in respect of which he and his co-trustees were at all material times on the company's register, are relevant to the issue. Mr. Shipside's name appeared first on the register in respect of the joint holding of these shares, and it is the Crown's contention that this fact, combined with his own beneficial holding, gave him control of the company at and prior to his death. The contrary view accepted by DANCKWERTS, J., and advanced before us by counsel for the plaintiffs, is based on the contention that no regard should be had to the settled shares in considering whether Mr. Shipside had control of the company.

H The precise words "the control of the company" which appear in s. 55 (1) have not been judicially interpreted in any decision binding on this court. The words "controlling interest", however, have been considered in more than one case, including *Inland Revenue Comrs. v. Bibby & Sons, Ltd.* (13), which was a decision of the House of Lords. The cases in question were concerned with other statutes and dealing with other issues than those which arise under the Finance Act, 1940, s. 55; but it appears to me that the result of the decisions is that where Parliament speaks in a taxing statute of a "controlling interest" in a company, that expression is referable to voting control and to nothing else. If so, I am unable to attribute a different meaning to the words "control of a company"; and accordingly the control of a company is in the hands of the person (if any) whose holding carries a majority of votes. "The control of a

(12) [1942] 2 All E.R. 496; [1943] Ch. 12.

(13) [1945] 1 All E.R. 667; 29 Tax Cas. 167.

company", said LORD MACMILLAN in *Bibby's* case (14), "resides in the voting power of its shareholders". Nor does it matter that the shares which confer the voting power are held by a trustee. "... the trustee like the beneficial owner controls...": (per LORD PORTER (15)). Nor, as was pointed out by LORD SIMONDS, is it material that the trustee has to pay regard to the wishes of others. He said (16):

"Those who by their votes can control the company do not the less control it because they may themselves be amenable to some external control."

Prima facie, then, if Mr. Shipside had been the sole trustee of the settlement and the shares comprised therein had been registered in his name alone it could, I think, hardly be contended that the voting power so vested in him should be disregarded in an inquiry whether or not he had control of the company. And, indeed, as LORD EVERSHED, M.R., has pointed out in his judgment, s. 55 (5) inferentially recognises that control of a company may be in the hands of a person who holds shares as trustee for third parties. But the plaintiffs' argument in the present case is based on the fact that Mr. Shipside was only one of four trustees; that any decision of two or more trustees must be unanimous; and that accordingly the vote and voice of Mr. Shipside at a meeting of the company were those of the trustees as a body and not the personal vote and voice of Mr. Shipside as an individual. True it is, said counsel for the plaintiffs, that by reason of art. 61 of Table A of the Companies (Consolidation) Act, 1908, the vote of Mr. Shipside, as the first of the joint holders on the register, was accepted to the exclusion of the votes of the other trustees; but the fact remains, and should be recognised by the court, that Mr. Shipside's vote was the vote of the trustees as a whole and that each trustee had an equal say as to the manner in which that vote should be cast. It seems to me that this argument seeks to apply by analogy the decision of this court in *S. Berendsen, Ltd. v. Inland Revenue Comrs.* (17), in which it was held that where a registered shareholder was a body corporate it was necessary to look beyond the share register to ascertain who by their votes controlled that body corporate. In the course of his judgment in that case, LORD EVERSHED, M.R., said (18):

"... where the registered shareholder is a body corporate one nevertheless may, and indeed must, for certain purposes look beyond the register; for, since the company cannot itself speak, one must find out with whose voice it must do so. One may therefore ask: Who does control the body corporate by the necessary shareholding interest in it?"

The plaintiffs say that it is not even necessary to look beyond the share register of *T. Shipside, Ltd.*, for the names of all the trustees appeared on it; but that it is clear that the voice of Mr. Shipside was that of the body of the trustees, which (by reason of art. 61 of Table A) could no more speak as such than could an incorporated body. In my opinion this contention must be rejected for three reasons. In the first place it necessarily involves the view that s. 55 (5)—as qualified by s. 58 (5)—was directed only to cases in which the majority voting power in a company is in the hands of a sole trustee of a settlement to the exclusion of the far more common case of settled shares being held by two or more trustees. I find it difficult in the extreme to suppose that this can have been the intention of the legislature. Secondly, there is no true analogy, in my judgment, between the position of Mr. Shipside and his co-trustees on the one hand and a corporation on the other. It was of the essence of the decision in *Berendsen's* case (17) that a corporation is unable itself to speak, which cannot

(14) [1945] 1 All E.R. at p. 670; 29 Tax Cas. at p. 181.

(15) [1945] 1 All E.R. at p. 672; 29 Tax Cas. at p. 184.

(16) [1945] 1 All E.R. at p. 673; 29 Tax Cas. at pp. 184, 185.

(17) [1957] 2 All E.R. 612; [1958] Ch. 1.

(18) [1957] 2 All E.R. at p. 622; [1958] Ch. at p. 38.

A be said of a body of individuals, and I do not think that the limiting provisions of art. 61 are sufficient to constitute an analogy. Thirdly (and possibly of most importance), the plaintiffs' contention is, in my judgment, inconsistent with the decision of the Court of Session in *John Shields & Co. (Perth), Ltd. v. Inland Revenue Comrs.* (19), which was approved by this court in *Inland Revenue Comrs. v. Silverts, Ltd.* (20). In that case the majority of shares in a company consisted

B of a trust shareholding of which there were four trustees. One of the articles of association of the company provided, so far as relevant, that

C "If two or more persons are registered as joint owners of any shares any one of them nominated in writing by them all from time to time, or in default of such nomination the person first named on the register in respect of such shares, shall, as regards voting . . . be deemed the sole owner."

No such nomination as that mentioned in the article was made. There were four trustees on the company's register in respect of the trust holding, and of these a Mrs. Bell was named first in the register. Other points arose in the case to which it is not, for present purposes, necessary to refer, but the court held that

D the controlling interest in the company resided in Mrs. Bell. The plaintiffs' submission in the present case, as applied to *Shields'* case (19) would have resulted in a decision that the controlling interest in the company was vested in all four trustees and not in Mrs. Bell alone. It is true that in *Shields'* case (19), having regard to the article which I have quoted, unless Mrs. Bell attended a meeting of the company and voted, the voting power conferred by the trust

E holding could not be exercised at all and that that would not be the position under art. 61 of Table A, but in my opinion that is a distinction without a difference. The essential fact is that the voting control was held to reside in Mrs. Bell notwithstanding that as a trustee she could only properly record a vote with the unanimous concurrence of her co-trustees and that in that sense

F her own voice was the voice of them all. Counsel for the plaintiffs suggested that if Mr. Shipside had stayed away from a meeting of the company, or had attended but refrained from voting, the trustee whose name next appeared on the register could exercise the voting power conferred by the settled shares and that such power was accordingly not vested in the deceased exclusively. I think that the answer to that is that control of a company may well exist

G in a person even though he may, on occasion, choose not to exercise it; and, so far as I am aware, there is in any case no suggestion made that Mr. Shipside did not at any time during the five years which preceded his death exercise the voting power himself.

Accordingly I am of opinion, for the reasons above stated, that on the facts of this case it falls within s. 55 (1) and regard need not be had to the provisions of s. 55 (3). If, however, I am wrong in thinking that s. 55 (3) is not merely

H expository of sub-s. (1), I would agree that in the end the same result follows, for the reasons which LORD EVERSHED, M.R., has stated in his judgment.

In conclusion I would only add that except to the extent that s. 55 does or may operate harshly (a question with which we are not concerned) I cannot

I regard the present case as one of any special hardship. For Mr. Shipside, in settling the shares in question, took good care to see that during the lifetime of his wife the voting powers attaching to such shares remained in his own control, so that he could continue to exercise the same influence over the conduct and management of the company's affairs as he had done previously. Moreover, by cl. 8 of the settlement of 1936 he expressly reserved to himself during his life the power to appoint new trustees, a power which he in fact exercised when

one of the original trustees retired in 1948. I agree that the appeal must be allowed. A

Appeal allowed: declaration accordingly. Leave to appeal to the House of Lords granted.

Solicitors: *Solicitor of Inland Revenue; Gibson & Weldon, agents for J. & A. Bright, Nottingham (for the plaintiffs).*

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*] B

HUDSON'S BAY CO. v. THOMPSON (VALUATION OFFICER). C

[HOUSE OF LORDS (Viscount Simonds, Lord Reid, Lord Tucker, Lord Keith of Avonholm and Lord Denning), June 30, July 1, 2, 29, 1959.]

Rates—De-rating—Industrial hereditament—Adapting for sale—Sorting, grading and matching of skins—Rating and Valuation (Apportionment) Act, 1928 (18 & 19 Geo. 5 c. 44), s. 3 (1), (2)—Factory and Workshop Act, 1901 (1 Edw. 7 c. 22), s. 149 (1). D

A hereditament was occupied and used by a company for the sorting, grading and matching of furs and for their arrangement in matched lots of skins of uniform grade for sale at the company's fur auctions. The skins were received from different trappers and breeders at the hereditament. They arrived in bales of unmatched, unsorted and ungraded skins, which in that state would command a very poor price if they were saleable at all. The contents were checked with the invoices and each skin was marked so as to be identified as the property of the owner of that parcel and it remained so identified until made into lots or sold. All the skins were mixed together regardless of ownership and were subjected to a highly skilled process of sorting, grading and matching. They were ultimately made up into lots of matched and graded skins of uniform quality, which included skins from several different trappers or breeders. The lots were sold at the company's periodical fur auctions at prices computed at so much per skin. Each lot was sold, however, for an aggregate lump sum and the owner of a skin or skins in each lot sold received a proportion of the aggregate price appropriate to the number of his skins in that lot, less commission, all skins in a lot being assumed to be of equal value. This method of selling skins in graded lots produced far better prices than sales of skins by owners individually. E F G

Held: the process carried on at the hereditament was a dealing with collections or agglomerations of single things (the unit formed by agglomeration being each bale of skins which arrived at the hereditament), and the single skin within a bale was not the unit to be regarded for the purposes of de-rating; thus there was an "adapting for sale" (of the bales of skins) within the meaning of the definition of "workshop" in the Factory and Workshop Act, 1901, s. 149 (1), and the hereditament was an industrial hereditament within s. 3 (1) (2) of the Rating and Valuation (Apportionment) Act, 1928, and ranked for de-rating accordingly. H

Valuation Comr. v. McAllister ([1954] N.I. 54) and dicta of SCRUTTON, L.J., in *Hines (Ipswich Revenue Officer) v. Eastern Counties Farmers' Co-operative Assocn., Ltd.* ([1931] 1 K.B. at p. 504), and in *Bailey (Stoke-on-Trent Revenue Officer) v. Potteries Electric Traction Co. Ltd.* ([1931] 1 K.B. at pp. 494, 495), and dictum of LORD SANDS in *Inland Revenue v. Easson Bros.* (1930 S.C. at p. 485) applied. I

Decision of the COURT OF APPEAL ([1958] 3 All E.R. 244) reversed.

[As to the definition of a factory for the purposes of rating relief extending to premises where articles are adapted for sale, see 27 HALSBURY'S LAWS (2nd Edn.) 441, para. 877.]

A As to the exclusion from rating relief of premises used for distribution, see 27 HALSBURY'S LAWS (2nd Edn.) 452, para. 883, text and note (1); and for cases on the subject, see 38 DIGEST 457, 226, and DIGEST SUPPS.

For the Rating and Valuation (Apportionment) Act, 1928, s. 3, see 20 HALSBURY'S STATUTES (2nd Edn.) 176; and for the Factory and Workshop Act, 1901, s. 149, see *ibid.*, 180.]

B Cases referred to:

Bailey (Stoke-on-Trent Revenue Officer) v. Potteries Electric Traction Co., Ltd., [1931] 1 K.B. 388; *affd.*, H.L. sub nom. *Potteries Electric Traction Co., Ltd. v. Bailey (Stoke-on-Trent Revenue Officer)*, [1931] A.C. 151; 100 L.J.K.B. 153; 144 L.T. 410; 95 J.P. 64; Digest Supp.

C *Davis Cohen & Sons, Ltd. v. Hall*, [1952] 1 All E.R. 157; 116 J.P. 49; 3rd Digest Supp.

Fullers, Ltd. v. Squire, [1901] 2 K.B. 209; 70 L.J.K.B. 689; 85 L.T. 249; 65 J.P. 660; 24 Digest (Repl.) 1025, 27.

Grove (Dudley Revenue Officer) v. Lloyd's British Testing Co., Ltd., [1931] All E.R. Rep. 242; [1931] A.C. 450; 100 L.J.K.B. 271; 145 L.T. 73; 95 J.P. 115; Digest Supp.

D *Hines (Ipswich Revenue Officer) v. Eastern Counties Farmers' Co-operative Assocn., Ltd.*, [1931] All E.R. Rep. 242; [1931] A.C. 456; 100 L.J.K.B. 271; 145 L.T. 73; 95 J.P. 115; *affmg.*, [1931] 1 K.B. 446; Digest Supp.

Inland Revenue v. Easson Bros., 1930 S.C. 480; Digest Supp.

E *Kaye (Dewsbury Revenue Officer) v. Burrows & Dewsbury Assessment Committee*, [1931] All E.R. Rep. 242; [1931] A.C. 454; 100 L.J.K.B. 271; 145 L.T. 73; 95 J.P. 115; Digest Supp.

Richardson & Son v. Middlesbrough Borough Assessment Committee, [1947] 1 All E.R. 884; [1947] K.B. 958; 177 L.T. 103; 111 J.P. 357; 2nd Digest Supp.

F *Sedgwick (Camberwell Revenue Officer) v. Camberwell Assessment Committee & Watney, Combe, Reid & Co.*, [1931] All E.R. Rep. 242; [1931] A.C. 447; 100 L.J.K.B. 271; 145 L.T. 73; 95 J.P. 115; Digest Supp.

Valuation Comr. v. McAllister, [1954] N.I. 54; 47 R. & I.T. 635; 3rd Digest Supp.

Appeal.

G Appeal by the ratepayers, the Governor and Company of Adventurers of England trading into Hudson's Bay (commonly known as Hudson's Bay Co.), from an order of the Court of Appeal (JENKINS, SELLERS and PEARCE, L.JJ.), dated July 25, 1958, and reported [1958] 3 All E.R. 243, affirming a decision of the Lands Tribunal dated Oct. 2, 1957, and reported 2 R.R.C. 211. The ratepayers had appealed against a decision of a local valuation court of Central London Local Valuation Panel, confirming the assessment of a hereditament described as a warehouse, offices and cold store, Great Trinity Lane, 26-30, Little Trinity Lane, 1-13, Garlick Hill and 1-6, Sugar Loaf Court, Beaver House, in Part I of the valuation list for the City of London at £15,818 gross value, £13,178 rateable value. The facts are set out in the opinion of VISCOUNT SIMONDS.

J. R. Willis, Q.C., and *W. L. Roots, Q.C.*, for the appellants.

I *J. P. Widgery, Q.C.*, and *J. R. Phillips* for the respondent.

Their Lordships took time for consideration.

July 29. The following opinions were read.

VISCOUNT SIMONDS: My Lords, this appeal from an order of the Court of Appeal affirming a decision of the Lands Tribunal on an appeal from the Central London Local Valuation Court raises the question whether a certain hereditament in the City of London occupied by the appellants, the Hudson's Bay Co., is "an industrial hereditament" as defined by s. 3 of the Rating and

Valuation (Apportionment) Act, 1928. It is common ground between the parties A that it is such a hereditament if, and only if, it is a workshop as defined by s. 149 (1) of the Factory and Workshop Act, 1901, the relevant part of which I set out:

"The expression 'workshop' means—... (b) any premises, room or place, not being a factory, in which premises, room or place... any manual labour is exercised by way of trade or for purposes of gain in or incidental to any of the following purposes, namely: ... (iii) the adapting for sale of any article, and to or over which premises, room or place the employer of the persons working therein has the right of access or control."

The question, therefore, involves two considerations, first, whether, on the hereditament in question, any manual labour is exercised in the manner indicated in the section and, secondly, whether it is exercised for the purpose of adapting any article for sale. Unfortunately, the first of these considerations has been lost sight of in the course of the case, and their Lordships have, therefore, found it impossible to dispose finally of the matter. They have, however, found it possible to deal conclusively with the second and, perhaps, more difficult question, viz., whether the activities of the appellants, whether or not they can properly be called manual labour, were exercised for the purpose of adapting an article for sale.

The case came before the Court of Appeal on Case Stated by the Lands Tribunal at the request of the appellants, the question on which the decision of the court was desired being, whether there was any evidence on which the tribunal could make the findings of fact set out in para. 5 of the Case, and whether, on those findings, it came to a correct decision in law. It will be remembered, that, under s. 3 of the Lands Tribunal Act, 1949, the decision of the tribunal is final except that any person being aggrieved by the decision as being erroneous in point of law may require the tribunal to sign and state a Case for the decision of the court. The contention of the appellants was that there was no evidence on which the tribunal could make the said findings of fact to support their decision that the hereditament in question was not an "industrial hereditament" and that, on the facts set out in the Case and the annexures thereto, it was in law an "industrial hereditament".

The materials before the court were not only the Case Stated, to which, as a separate document, was appended the lengthy decision of the tribunal, itself containing a further statement of facts, but also the oral and other evidence which had been before the tribunal. In view of the form of question and the contention of the appellants, no other course was open, but it involves a detailed consideration of facts which is not altogether appropriate to the procedure by way of Case Stated. I will be as brief as I can, but I see no alternative to setting out the facts first as set out in the formal Case, then as supplemented in the decision and finally as explained or amplified in the evidence.

The hereditament in question is described as Warehouse Offices, and Cold Store, Great Trinity Lane, 26-30 Little Trinity Lane, 1-13 Garlick Hill and 1-6 Sugar Loaf Court "Beaver House", and is entered in Part I of the valuation list for the rating area of the City of London at gross value £15,818 and rateable value £13,178. Your Lordships are not concerned with the question which was at one time raised, whether the hereditament which, in fact, consists of three parts known as Beaver Hall, the Carpenter's Workshop and Beaver House should be assessed as three separate hereditaments. The sole question is whether the activities carried on at Beaver House are such as to constitute it an industrial hereditament. If they are, the necessary adjustment and apportionment of the rate must be made. The question in the Case refers specifically to the findings in para. 5 thereof, and I cannot fairly abbreviate them. They are as follows:

"I am informed that the appellants desire to contend that there was in point of law no evidence to support my findings of fact set out hereunder:—

"(A) 'I put it this way—without the sorting and grading the buyer,

A unless he were himself an expert, would be taking a risk but the skins are still saleable . . . the conclusion I have come to is that the only effect of the sorting and grading was to certify that the skins were of such a quality as to merit being placed in the category in which they appear in the auction catalogue.'

B "(B) 'What is emptied out of the bales that come into the Hudson's Bay Co. is not a huge amorphous mass. It is a bundle of easily identifiable individual skins. They are sent in bundles merely for the convenience of despatch. It is not like the rag case (1) or the seed case (2) in that it is not what has come to be known as a "bulk" case at all. It is not the intention that the skins should be made into a bulk and sold as a bulk. Each skin is sent to the Hudson's Bay Co. to be sold as a skin, in fact the owner might send only one skin although admittedly this would be unusual. It is also bought as a single skin although the bidder bids for a lot that are matched. In a word selling in lots is only for the convenience of the buyer.'

"(C) 'All that has been done here was to arrange the skins.'

D "'In my view the process carried out in Beaver House, highly technical as I concede it is, is merely an identification of skins and their arrangement in price classes for sale. Nothing has been done to any skin which in any way makes it a little different to what it was before—I ignore the cleaning of the skins in the drum because it applied to a negligible number of the skins dealt with in Beaver House. There has therefore been no adapting for sale'."

E At an earlier stage, the tribunal had referred to certain additional facts which were admitted though not referred to in its decision. They were (so far as now material) (i) that very approximately twenty-five per cent. of the skins coming into Beaver House are owned by the appellants and seventy-five per cent. by other persons (but these are very variable figures); (ii) that each skin (except musquash) is labelled on arrival at Beaver House with the object of making that skin identifiable as the property of a particular customer at all stages, that large numbers of musquash are dealt with but their value is small, both individually and collectively, in relation to the appellants' turnover, usually one bale of musquash providing one or two satisfactory lots, the identity of which can be preserved without ticketing; (iii) that some furs are sold by private treaty at Beaver House; and (iv) that no one buys furs at the auctions except with a view to resale, and the Committee of London Public Fur Sales does not regard a private individual as an authorised trader. It appeared at the hearing before your Lordships that the facts admitted under (ii) as to identification were not strictly accurate, but I do not think that anything turns on this.

G I must next, at the risk of some repetition, state some of the further facts as found in the decision of the tribunal which forms part of the Case. It is necessary to refer only briefly to that part of the hereditament known as Beaver Hall. It is there that auction sales of fur are carried on under the conduct of a committee known as the Committee of London Public Fur Sales which operate under an agreement made between the appellants and certain other companies and partnerships. Nor need I mention further the carpenter's workshop. It is on the activities carried on in Beaver House that the issue turns. They are described by the tribunal as follows (3):

I "Bales of skins are addressed from almost all parts of the world except the Soviet Union. They arrive in lorries at the reception basement. There they are unloaded on to lifts and conveyed to the first floor where the bales are opened and are sorted according to types—the bales consist of mixed

(1) *Kaye (Dewsbury Revenue Officer) v. Burrows & Dewsbury Assessment Committee*, [1931] All E.R. Rep. 242; [1931] A.C. 454.

(2) *Hines (Ipswich Revenue Officer) v. Eastern Counties Farmers' Co-operative Assocn., Ltd.*, [1931] All E.R. Rep. 242; [1931] A.C. 456.

(3) 2 R.R.C. at p. 214.

skins of various animals. The sorted bundles are then passed up to the next floor, some of the skins which may be dusty or gritty are put in drums with clean sawdust and whirled round. This eliminates the dust and grit. This process is necessary only in the case of very few, indeed almost a negligible quantity of the skins that come in. Next comes the process on which the appellants mainly rely to establish their contention that there is an adaptation for sale. The skins are passed along in trollies to the sorters' counters. The counters extend along the room which is especially lighted with artificial light and large windows. The sorters are men who have been specially trained in the art of sorting. It is said that it takes about ten years to make a man an entirely efficient sorter. The sorter takes the skin and grades it either by its feel or visual appearance. Immediately behind the sorter is a trolley with various shelves. Each shelf represents the class which the sorter assigns to the skin. These grades of skin are then conveyed to another sorting room where there are sorters who can be described as final specialists. These sorters examine the skins and either confirm the grading or up or down grade the skins again. After this final grading the skins are catalogued and passed down to the display room. There they are displayed for some days and prospective buyers come along to examine them and bid for them at the auctions which are held about three times yearly.

"The skins are still in a raw state in the sense that they could not be used as furs. They have to undergo a highly technical process which converts them from skins into saleable furs. This process is not undertaken at Beaver House. It is carried out by the furriers who buy the skins at the auction."

On these findings, the tribunal came to the conclusion after a consideration of certain cases to which I must refer that (4)

"the only effect of the sorting and grading was to certify that the skins were of such a quality as to merit being placed in the category in which they appear in the auction catalogue."

The tribunal further held (distinguishing cases called "the seed case" (5) and "the rag case" (6) which I must examine) that the bales of skins that come to the appellants are bundles of easily identifiable individual skins, being sent in bundles merely for the convenience of despatch, that it is not the intention that the skins should be made into a "bulk" and sold as a bulk, that each skin is sent to the appellants to be sold as a skin—in fact, the owner might send only one skin although, admittedly, this would be unusual—that it is also bought as a single skin although the bidder bids for a lot of skins that are matched, in a word that selling in lots is only for the convenience of the buyer. I conclude my reference to the decision of the tribunal by citing its penultimate paragraph (7):

"In my view the process carried out in Beaver House, highly technical as I concede it, is merely an identification of skins and their arrangement in price classes for sale. Nothing has been done to any skin which in any way makes it a little different to what it was before—I ignore the cleaning of the skins in the drum because it applied to a negligible number of the skins dealt with in Beaver House. There has therefore been no adapting for sale."

Before I examine the conclusions of the tribunal, which were, in effect, adopted by the Court of Appeal, I must refer to some further facts which appeared plainly from the evidence and were relied on by the appellants. The furs which are sent to the appellants from a great many countries in the world are sent

"to be graded and presented to the fur trade in such a manner as to command for them, the producers, the best possible market price. They enjoy the careful . . . handling of the furs to suit the requirements of various

(4) 2 R.R.C. at p. 218.

(5) [1931] All E.R. Rep. 242; [1931] A.C. 456.

(6) [1931] All E.R. Rep. 242; [1931] A.C. 454.

(7) 2 R.R.C. at p. 219.

- A fur purchasers all over the world, which is such that the producer will get a great deal more money for his goods than if he sold his merchandise in an unassorted condition."

The bales of fur do not always have the same sort of fur. For instance, a bale from Canada will contain practically every kind of wild fur, and, even where a bale consists predominantly of one type of fur, e.g., of mink or Persian lamb, there would be a great variety in the type. There are, for instance, 250 recognised main grades and 880 sub-grades of Persian lamb and, in a single bundle of the same type from a consignor, there would be a large number of different grades. Thus, the components of one bale when sorted and graded would find their place in a number of different lots in which they would be matched with skins coming from a number of other bales. It may be emphasised that the job of sorting, grading and matching is a highly skilled one, the top sorters being paid a basic wage up to £12 2s. In the result, an individual skin arrives in a bale which has to be sorted and graded as described; it goes out in a lot consisting of a bundle of evenly matched similar skins. By this means it realises a price which it otherwise could by no means have realised. I think it desirable to set out certain questions put to the appellants' witness, Mr. Frayling, in cross-examination and his answers:

"Q.—From the moment you receive the skins to the moment you sell them, would it be fair to say the object of what you do is to achieve the best possible sale price for each individual skin? A.—Most certainly.

"Q.—That is what you are trying to do? A.—Exactly what we are trying to do, yes.

"Q.—As you indicated yesterday, the skin may vary enormously in value in one consignment. Your job is to try and get the best price, skin per skin? A.—Yes, by means of putting them with skins of equivalent value.

"Q.—And the way you do that is, whether the skin is good or bad in itself you sell it to the greatest advantage by selling in company with other skins as near as possible identical with it? A.—That is the object of the process, putting like and like together."

I set out these questions and answers at length because it appears to me that a misunderstanding of them has been the vital factor in leading the tribunal and the court to a wrong decision. For though, no doubt, it was possible to know how many of a lot of (say) one hundred mink skins had been consigned by a particular consignor and, perhaps, also to know, though this was not wholly clear, which of those skins had been consigned by that consignor, the price paid at the auction for that lot was a lump sum which was apportioned among the several consignors according to the number of skins consigned by them respectively which were in that lot. The skins were not sold skin by skin, though they were sold in a lot at a price per skin. If they had been sold skin by skin, they would not have realised a comparable price. In fact, the whole object of the process was to get a price which could not be got by individual sales. It is, therefore, in my opinion, wholly unrealistic to treat as the article which has to be adapted for sale a single mink skin which has arrived in a bale with other skins whether of mink or other animals. This is, to my mind, the decisive consideration in the case. For it might well be that, if one regards each skin as a single unit arriving at and departing from the premises, it would be difficult to say in the words of VISCOUNT DUNEDIN in *Grove (Dudley Revenue Officer) v. Lloyd's British Testing Co., Ltd.* (8) that anything is done to it on the premises "which, in some way, makes it in itself a little different from what it was before". It is, I think, just because this is what I have called an unrealistic way of looking at such a transaction, that a principle has been established which, in my opinion, governs the present case. It is that, where the process can fairly be regarded as a dealing with a collection or agglomeration of single things, then the scope for adaptation

for sale may be wider—I here use the language of LORD MACDERMOTT, C.J., in A
 his very valuable judgment in *Valuation Commr. v. McAllister* (9). That learned
 judge there decided that premises to which eggs are delivered in bulk for the
 purposes of testing, grading, stamping and packing are premises used for the
 purpose of adapting articles for sale and, therefore, are industrial hereditaments
 within the meaning of the Northern Ireland Act. He had already expressed the
 opinion that, if, in the words of the section, the “adapting for sale of any article” B
 meant the adapting for sale of each egg, there had been no such adaptation, but
 was able to come to the conclusion which I would say plainly accords with the
 common sense of the matter, viz., that the premises were used not for the receipt
 of single eggs and their subsequent sale egg by egg but for the receipt of a collec-
 tion of eggs in crates and their subsequent sale in lots which, since they had
 undergone the process of testing, grading, stamping and packing, differed widely C
 from the original collection. He held, in effect, that the “article” in such a case
 is the collection, and that it is that to which one must look to see whether there
 has been adaptation for sale. If so, the process to which the collection of eggs was
 subjected was an adaptation for sale. In coming to this conclusion the learned
 lord chief justice was amply supported by the authorities that he cited to some
 of which I will refer. In doing so I find myself adopting much that he has said. D

My Lords, it appears to me on an examination of the facts in the present case
 that there is as little justification for regarding a single skin as the article whose
 adaptation for sale is required as there was in *McAllister's* case (10) for so regard-
 ing a single egg or in *Kaye (Dewsbury Revenue Officer) v. Burrows & Dewsbury*
Assessment Committee (11) for so regarding rag or in *Hines (Ipswich Revenue Officer)*
v. Eastern Counties Farmers' Co-operative Assn., Ltd. (12) for so regarding a
 single seed. The words of SCRUTTON, L.J., in the seed case (13) cited with approval
 by LORD DUNEDIN (14) are precisely apposite: E

“In my view there was both alteration of substance and adapting for sale
 in sorting and making a substantially different article in bulk from that which
 existed before the processes were applied. In my opinion, you cannot deal
 with the case by saying there was a seed before the process and the same
 seed after the process. The process has altered the bulk and made it legally
 and commercially saleable.” F

The word “bulk” has crept into these cases and it is useful as signifying that the
 “article” may be something more than a single unit in a collection of more or
 less similar units. But the word is not in the statute, and should not be used to
 limit the cases in which something other than a single unit can qualify as the
 “article” which must be adapted. I am led to this observation by the reiteration
 in the decision of the tribunal and in the judgment of the Court of Appeal that
 this is not to be regarded as a “bulk case”. As has often been said, each case
 must depend on its facts. The processes which adapt the contents of crates of
 eggs, bales of furs, and “amorphous masses” of rags for sale are widely different, H
 but in all alike something takes place which transforms an unsaleable article
 into one that is legally and commercially saleable. (I interpolate that, when the
 statute speaks of adapting for sale, it must mean for commercial sale; presum-
 ably, even an “amorphous mass” of rags or an unsorted bale of furs might be
 saleable at some price to somebody.) But I must repeat that the primary facts
 as found by the tribunal or disclosed in the annexures to the Special Case lead
 neither to the conclusion that the *only* effect of the sorting and grading was to
 certify the quality of particular skins, nor that the skins are sent in bundles merely
 for the convenience of despatch, nor that it was not the intention that the skins
 should be made into a bulk and sold as a bulk, if by that was meant that the I

(9) [1954] N.I. at p. 60.

(11) [1931] All E.R. Rep. 242; [1931] A.C. 454.

(12) [1931] All E.R. Rep. 242; [1931] A.C. 456.

(10) [1954] N.I. 54.

(13) [1931] 1 K.B. at p. 504.

(14) [1931] All E.R. Rep. at p. 259; [1931] A.C. at p. 483.

- A consignor did not intend his skins to be matched with other skins and sold in a lot with them, nor that each skin was sold as a single skin nor that selling in lots was only for the convenience of the buyer. This complete misconception of an activity, which, in fact, transformed a bale of unsorted and ungraded furs, itself commercially unsaleable, into the constituent parts of a number of saleable lots, in my opinion vitiates the conclusion of both the tribunal and the Court of Appeal.
- B There was, in my view, no evidence which justifies the findings of fact made by the tribunal. It follows that it came to a conclusion which was erroneous in law.

I have referred, my Lords, only briefly to some of the many cases which were cited to us. They illustrate on the one side of the line or the other the principle that must guide our decision, and I do not think that any useful purpose would be served by a closer examination of them. That task has been performed better than I could do it by the lord chief justice of Northern Ireland in *McAllister's* case (15), and I respectfully endorse what he has said.

- C It remains, however, to say a word about an aspect of the case which has been ignored. The tribunal in its decision observed that counsel for the respondent submitted that the activity of the appellants was not what he called "a factory operation" for two reasons, first, because it did not involve "manual labour" as correctly understood and, secondly, that it did not involve an adapting for sale in accordance with the terms of the authorities. The tribunal, having decided in favour of the respondent on the second point, did not think it necessary to decide the first. The same course was followed by the Court of Appeal. A different view being taken on the second point by this House, the respondent by his counsel fairly enough contends that he is entitled to have a finding of fact made and a decision given by the tribunal on the first point. This is not to be gainsaid.
- E Therefore your Lordships should, in my opinion, allow the appeal with costs here and below in regard to the adapting for sale of the furs which arrive at Beaver House but remit to the tribunal for further determination the question whether, in the words of the statute, any manual labour is exercised on the premises for the purpose of the adapting for sale.

- F **LORD REID:** My Lords, the appellants carry on business at Beaver House, London, and they claim that, by reason of the operations which they carry on there, this is an industrial hereditament entitled to de-rating under the Rating and Valuation (Apportionment) Act, 1928. Under s. 3, it is an industrial hereditament if it is occupied and used as a factory or workshop. No question arises under the proviso to s. 3 (1), and the premises are not said to be a factory, so the question is whether they are a workshop within the meaning of s. 149 of the Factory and Workshop Act, 1901. The relevant parts of that section are:

- "(1) Subject to the provisions of this section, the following expressions have in this Act the meanings hereby assigned to them; that is to say:— . . . The expression 'workshop' means— . . . (b) any premises, room or place, not being a factory, in which premises, room or place or within the close or curtilage or precincts of which premises any manual labour is exercised by way of trade or for purposes of gain in or incidental to any of the following purposes, namely—(i) the making of any article or of part of any article; or (ii) the altering, repairing, ornamenting or finishing of any article; or (iii) the adapting for sale of any article; and to or over which premises, room or place the employer of the persons working therein has the right of access or control."

- I The appellants contend that these premises satisfy the requirements of that definition and, in particular, that they are used for "the adapting for sale of any article". Two questions arise under this definition; not only must it be shown that premises are used for one (or more) of the stated purposes, but it must also be shown that manual labour is exercised in or incidental to that

purpose. The Central London Local Valuation Court decided against the present appellants and this decision was affirmed by the Lands Tribunal (Sir W. FITZ-GERALD, Q.C., President). A Case Stated was asked for, and I must quote the following passages from the Case:

"3. At the hearing before me the facts, which were proved or admitted, and the contentions put forward by the parties, are contained in my decision, a signed copy of which is annexed hereto and forms part of this Case, save that the following further facts were admitted although not referred to in my decision:—[Then follow certain further findings of fact.]

"5. I am informed that the appellants desire to contend that there was in point of law no evidence to support my findings of fact set out hereunder:—

"(A) 'I put it this way—without the sorting and grading the buyer, unless he were himself an expert, would be taking a risk but the skins are still saleable . . . the conclusion I have come to is that the only effect of the sorting and grading was to certify that the skins were of such a quality as to merit being placed in the category in which they appear in the auction catalogue.'

"(B) 'What is emptied out of the bales that come into the Hudson's Bay Co. is not a huge amorphous mass. It is a bundle of easily identifiable individual skins. They are sent in bundles merely for the convenience of despatch. It is not like the rag case or the seed case (16) in that it is not what has come to be known as a "bulk" case at all. It is not the intention that the skins should be made into a bulk and sold as a bulk. Each skin is sent to the Hudson's Bay Co. to be sold as a skin, in fact the owner might send only one skin although admittedly this would be unusual. It is also bought as a single skin although the bidder bids for a lot that are matched. In a word selling in lots is only for the convenience of the buyer.'

"(C) 'All that has been done here was to arrange the skins. In my view the process carried out in Beaver House, highly technical as I concede it is, is merely an identification of skins and their arrangement in price classes for sale. Nothing has been done to any skin which in any way makes it a little different to what it was before—I ignore the cleaning of the skins in the drum because it applied to a negligible number of the skins dealt with in Beaver House. There has therefore been no adapting for sale.'

"An extract from the transcript of the shorthand notes containing the evidence relating to these matters (marked A) is annexed to and forms part of this Case."

It appears from the learned president's decision that counsel for the present respondents argued two points: first, that the appellants' operations did not (17) "involve manual labour as correctly understood", and secondly, that they did not "involve an adapting for sale in accordance with the terms of the authorities". The learned president decided against the appellants on the latter question and made no further reference to the first question—no doubt because that was unnecessary once he had decided the other question against the appellants. But there can be no decision that this is an industrial hereditament unless both questions are decided in favour of the appellants. The respondent still maintains his first point and, accordingly, if your Lordships are disposed to allow this appeal on the question of adapting for sale, either the first question must now be decided by this House on such material as is available, or the case must be sent back to the Lands Tribunal so that the learned president may decide the point. I agree with your Lordships that the latter course should be adopted. But, in considering whether there was "adapting for sale", the definition of "workshop" must be read as a whole and, while I express no opinion of any kind whether manual labour was exercised in this case, I must, I think, consider the general question of the meaning of "adapted for sale" on the footing that I am only dealing with cases where manual labour is being exercised; so I must

A leave out of account cases where there might seem to be "adapting for sale" without the exercise of manual labour.

The first question which we have to decide is whether there was evidence to support the findings which I have quoted. For reasons which I shall give in a moment, I am of opinion there was not. But I do not think that we can stop there. The second part of the question in the Case is "and whether upon the findings of fact I came to a correct decision in law". If we reject these findings of the tribunal we must, I think, come to our own conclusions on these matters and then determine whether there was "adapting for sale"—assuming, as I have said, that manual labour has been exercised in or incidental to the process.

I take first the facts other than those set out above. I think that they can be summarised in this way. Parcels of skins are sent to the appellants from all parts of the world with a view to each skin in the parcel being graded and then matched with and made up into a lot with skins sent by other consignors so that the lot can be sold by auction. The skins in any one lot, which may contain perhaps seventy to a hundred skins, are held to be of equal value. So the price, after deducting commission, etc., is divided in equal shares among those consignors whose skins form part of the lot. If only one skin in the lot came from a particular consignor he gets one share; if, say, ten skins in the lot came from him he gets ten shares. In fact, it appears that the lot is bid for and sold at a price per skin, but I can attach no importance to that. The price paid by the buyer is a single sum, the number of skins in the lot multiplied by the sum bid per skin. And the buyer has no concern with, and may have no knowledge of, who were the consignors of the various skins in the lot. When a consignment is received, the appellants label each skin in it to show from whom it came. This is necessary so that when lots are made up a record can be kept of how many skins in the lot came from a particular consignor. In the case of mink skins these identifications remain until the lot is sold; in the case of other skins the identifications are removed when they are made up into lots, and thereafter it is impossible to tell which skin in the lot came from which consignor.

F For a complete picture, I must notice three other kinds of consignments. They are not dealt with specially by the tribunal for the good reason that they are relatively unimportant. A number of the skins coming to these premises already belong to the appellants, having been bought by them in Canada and elsewhere. Then musquash skins are dealt with in a somewhat different way. And it appears that some skins have already been graded before arrival. I shall say no more about these cases. Grading and matching are highly skilled operations, and grading is done in stages. The miscellaneous skins which come in are separated on inspection into, say, six or ten groups. Then each of these groups is again inspected and subdivided into smaller groups and so on. This may entail five successive inspections of each skin, and this is necessary because there are no less than 250 main grades of Persian lamb and 468 main grades of mink. The importance of these operations may be seen from the fact that the appellants charge a commission of six per cent. on skins sent in in the ordinary way, whereas they only charge $1\frac{1}{2}$ per cent. in the few cases in which skins have been sorted and graded before arrival. The reason why consignors send in skins to be dealt with in this way is that they get a much better price for each skin than they could get if they sold ungraded and unmatched parcels or single skins. It appears that there is no market in London for ungraded and unmatched skins. They get a much better price because buyers can rely on the grading matching and cataloguing done by the appellants; they appear to require matched skins and in this way they get what they want. Buyers come to these sales from many countries.

I I can now return to the findings in fact which are challenged. In finding (A) it is said that

"the only effect of the sorting and grading was to certify that the skins were of such a quality as to merit being placed in the category in which they appear in the auction catalogue."

But the skins never appear in the auction catalogue. What appears in the catalogue and what is sold is a matched set of skins. No doubt the sorting and grading do certify the merit of each skin but, on my reading of the evidence, this is far from being its only effect. The real purpose of the sorting and grading is to enable individual skins to be assembled into matched lots such as buyers wish to buy. A

In finding (B) it is said: B

"It is not the intention that the skins should be made into a bulk and sold as a bulk. Each skin is sent to the Hudson's Bay Co. to be sold as a skin."

To my mind, the evidence contradicts that, and shows clearly that the intention was that the skins should be assembled into aggregates or matched sets, that no skins should be sold as a separate skin, but that all should be sold as parts of sets. I think that this was the intention, whether a consignor sent a single skin or a parcel of skins. Then it is said that the skin is also bought as a single skin, but the whole evidence is to the effect that what the buyer wants and buys is not single skins but matched sets. If each skin were sold and bought as a single skin, then a buyer who buys a lot of a hundred skins must enter into a hundred contracts. That seems to me an impossible interpretation of the facts. Suppose a lot does not conform to the description in the catalogue or to the sample shown before the auction because one or two skins have not been properly graded and matched. It was not disputed by counsel for the respondents that the buyer would be entitled to reject the whole lot. How could he reject those skins in the lot which conform to the description and sample if there were a hundred different contracts. As regards the skins to which no objection could be taken, there would be no breach of the contracts under which they were sold. Then it was argued that there might not be a hundred different contracts, but that, if the lot contained skins coming from, say, twenty different consignors, there would be separate contracts with each consignor, each contract including all the skins in the lot which came from him. That in itself would make little difference. But then it was said that each contract, whether for a single skin or for several skins in a lot, must be deemed to contain a condition that, if the buyer were entitled to reject any of the other skins in the lot, he could also reject the skins comprised in the contract although no exception could be taken to them individually. This appears to me to be a wholly artificial conception. Moreover, a buyer may have no means of knowing who the consignors were and who he is to sue if he finds it necessary to raise an action. Is he to sue a number of defendants in respect of a number of contracts with different people whose names he could only obtain from the appellants? In my opinion, the skins in the lot were clearly sold as one lot under one contract. We do not have either the conditions under which consignors sent their skins to the appellants or the conditions governing the sales by auction. I would be very surprised if there were anything in them to bear out this finding, and, in the absence of these conditions, I think that we must hold that these operations have been conducted in a reasonable manner and that no such complications as are suggested have been introduced. They might well make the whole scheme unworkable. I see no difficulty in law in the consignors making agreements with the appellants under which the appellants are entitled to sell their skins together with skins belonging to others to a buyer who buys the lot under a single contract. But I would not like to try to draft conditions which resulted in the fall of the hammer creating a hundred different contracts with the buyer. C D E F G H I

Finding (C) adds nothing new to the findings in fact, but perhaps it gives a clue as to how the learned president came to make these findings. He appears to have thought that, because the skins were readily identifiable when received by the appellants and also identifiable when sold to the buyers, a lot which was

A sold could not in law be regarded as anything other than a number of separate skins, and so he may have thought that, in fact, they were sold as separate skins. I shall have to deal with the legal position later, but it may be that the learned president's understanding is in accordance with some practice which has prevailed in the past and should not be imputed to him as a serious error.

Do the facts which I have summarised involve "adapting for sale" or not?
 B That depends on the proper construction of those words in the Act of 1901, and on that matter we find authoritative guidance in the series of cases reported as *Bailey (Stoke-on-Trent Revenue Officer) v. Potteries Electric Traction Co., Ltd* (18), and *Sedgwick (Camberwell Revenue Officer) v. Camberwell Assessment Committee & Watney, Combe, Reid & Co.* (19). I get most help from that part of the judgment of SCRUTTON, L.J., which deals with what he calls processes roughly
 C described as sorting (20) parts of which were expressly approved in this House (21) and no part of which was disapproved. We were construing words in the Factories Acts, and SCRUTTON, L.J., began by pointing out that, if we deprived the occupier of the benefit of de-rating, we were also depriving the workers of the protection of these Acts, and that, in construing these Acts, the courts had given a wide meaning to their words, e.g. (22),

D "Putting chocolates into a decorated box, in *Fuller's* case [*Fullers, Ltd. v. Squire* (23)] . . . [has] been treated as 'adapting for sale' to protect the workpeople employed in that occupation."

In reading this judgment and VISCOUNT DUNEDIN'S speech in this House, it should be borne in mind that they did not have to deal with a case where
 E individual things were assembled into an aggregate which was saleable when the individual things were not, or which at least fetched a much better price than the total of any sums which could have been got by selling the things separately. They were dealing with cases where things (rags and seeds) came in in bulk. SCRUTTON, L.J., said (24) that these cases

F "... cannot be determined simply by saying: 'no sorting is adaptation for sale'. The original bulk may be such that it cannot be sold either legally, as in mixed seeds, or commercially, because an unsorted bulk is not wanted, and the process of sorting may be so complicated and mechanical as to deserve the title of a manufacturing process, i.e., of 'adapting for sale'. On the other hand, the bulk and the article to be sold may be so
 G similar and of such a nature, such as taking a quarter of a pound of bulls-eyes out of a bulk in a bottle, that the separation or sorting may well be regarded as an entirely minor incident of the sale or distribution."

When he used the words "mechanical" and "manufacturing process", he was dealing with a question whether premises were a factory. The question here is whether they are a workshop, and I find in s. 149 (4) of the Act of 1901 reference
 H to "the manufacturing process or handicraft carried on in the factory or workshop", so it would, I think, be legitimate to adapt his words and ask whether this process deserves the title of "a handicraft". Then SCRUTTON, L.J., continued (25):

I "Where substantial changes are made in the article, as in the seed-cleaning case, I see no difficulty in holding the process to be adapting for sale. But in view of the fact that 'adapting for sale' is a separate head from altering, I see no reason for requiring alteration of substance to make 'adapting for sale'. If this were necessary, there would be no need to insert

(18) [1931] 1 K.B. 388.

(19) [1931] All E.R. Rep. 242; [1931] A.C. 447.

(20) [1931] 1 K.B. at pp. 492-495.

(21) [1931] All E.R. Rep. at p. 259; [1931] A.C. at pp. 483, 484.

(22) [1931] 1 K.B. at p. 493.

(23) [1901] 2 K.B. 209.

(24) [1931] 1 K.B. at p. 494.

(25) [1931] 1 K.B. at p. 495.

'adapting for sale'. Where the process of separation or sorting is complicated and substantial, again I think there is adapting for sale. In many cases, it is a question of degree, which is in my view fact and not law, and not properly the subject of a Special Case. Further, the section in the Factory Act, 1901, deals with an 'article', which I think means an article to be sold."

I may say in passing that it is unnecessary to deal in this case with the vexed question of what is fact and what is law because, if the findings in fact of the tribunal cannot stand, the whole matter is open for us. I shall return to the rest of the quotation when I come to the so-called bulk principle.

Following the line of that judgment, I would think the question in this case to be whether things which cannot be sold commercially because they are not wanted (individual skins or miscellaneous parcels of skins) have been made into articles readily saleable (matched sets of skins) by a process sufficiently complicated and substantial to deserve the title of "handicraft". And I would further think that there can be adapting for sale without alteration of substance, for the reason given in the passage I have quoted. But this is said to be in conflict with the view of LORD DUNEDIN in the cable testing case (26):

"I think 'adapting for sale' points clearly to something being done to the article in question which, in some way, makes it in itself a little different from what it was before."

In the cable testing case, the cable came in unassociated with any other article and it went out unassociated with any other. LORD DUNEDIN had set out the conflicting views between which he had to choose. SLESSER, L.J., had said (27): "The testing of the cables . . . was . . . part of the process of making them fit for . . . sale", and SCRUTTON, L.J., had said (28): "the cables . . . are not adapted for sale, but tested to see if they are fit for sale". LORD DUNEDIN's apt illustration was (29):

"If a horse is passed sound by a veterinary surgeon it becomes saleable in a way it was not before it was so passed, but no one would dream of saying that the veterinary surgeon by his certificate adapted the horse for sale."

Certainly testing or certifying is not adapting, and, where there is no question of association with other things, I wholly agree that adapting must involve some physical change—some alteration of the article. But I do not think that LORD DUNEDIN meant to say that, commercially at least, the whole can never be greater than or different from the sum of its parts. He was not dealing with any such question and I think it worth noting that at the end of his speech he said (30):

"It may be difficult or impossible to identify the essential quality of the operation described in s. 149 of the Factory and Workshop Act, 1901, 'as the adapting for sale of any article', nor, in my view, is it necessary for the purposes of this case to do so. The phrase was probably introduced to secure somewhat more flexibility than is to be found in the immediately preceding terms, namely, 'the altering, repairing, ornamenting or finishing of any article' . . ."

(26) *Grove (Dudley Revenue Officer) v. Lloyd's British Testing Co., Ltd.*, [1931] All E.R. Rep. at p. 252; [1931] A.C. at p. 467.

(27) [1931] 1 K.B. at p. 526.

(28) [1931] 1 K.B. at p. 515.

(29) [1931] All E.R. Rep. at p. 253; [1931] A.C. at p. 468.

(30) [1931] All E.R. Rep. at p. 263; [1931] A.C. at p. 493.

A I do not think that LORD DUNEDIN could have said that if he had intended his words in the cable testing case to be universally applicable. Making an article "in itself a little different from what it was before" is simply altering it, and the introduction of the phrase "adapting for sale" would have failed to introduce any more flexibility if adapting necessarily involved such alteration.

B The respondent's argument was that, if there has been no alteration of individual things, there can be no adapting for sale unless the case can be brought within the "bulk principle". This so-called principle appears to have been evolved by taking observations of LORD DUNEDIN and SCRUTTON, L.J., made in cases where the things to be adapted were "bulk" or aggregates (rags or mixed seeds) and regarding them as equally applicable where the process is the adaptation of individual things by combining them into readily saleable sets or aggregates. I see no justification for this. It would seem that the theory behind this so-called principle is that you must always have an article at the beginning of the process and the same article altered or adapted at the end. Where there is a bulk at the beginning and another bulk at the end you are entitled to regard the original bulk as persisting and merely emerging in a different form. This appears to me to be in many "bulk" cases nothing but a fiction. If six "bulks" of rags came in from different consignors and each is first sorted into ten different heaps and then the corresponding heaps from each bulk are mixed together for further sorting, surely the six original bulks have ceased to exist as bulks. And if a hundred bales, each different from the others, are produced at the end of the sorting process, it seems to me rather fantastic to say that any of the original bulks has continued to exist throughout the process. The individual rags have continued to exist physically unaltered but they emerge different from what they were at the beginning; they were originally parts of mixed aggregate and of little value but they are now parts of matched aggregates of much greater value.

E I said a few moments ago that I would return to the rest of a quotation from the judgment of SCRUTTON, L.J. (31):

F "The bulk bought at one price is altered or adapted for sale into a bulk of a smaller size and different character which can be sold because of the alteration or adaptation at a much higher price. It is this principle which I think should be applied to the various cases involving sorting, which I consider separately."

G That may be an adequate explanation where one bulk comes in and one goes out and it may have been sufficient for the cases he was then considering but I see no reason to deny adapting for sale in every case which it does not fit. The opinion of LORD SANDS on this matter in *Inland Revenue v. Easson Bros.* (32) was approved both in the Court of Appeal and in this House. He says (33):

H "If what had happened was that the papermaker had come into the premises saying 'I want a blue cotton rag' or 'a piece of brown paper', I could understand the argument that there had been no adaptation of the particular article for sale. All that had been done was to arrange the articles so as to avoid the trouble of having to rummage through the heap whenever a papermaker came in and asked for something. But that is not the condition of the problem. If one regards the whole mixed mass that comes into the works, that mass has been adapted for sale, or made saleable, by laborious assortment. If one regards the final bale, its contents have been adapted for sale by a process whereby each rag or each piece of paper, in itself worthless, has been associated with a thousand similar ones laboriously picked out."

The first of these two ways of regarding the matter may not fit the present case A but the second does. If the "bulk principle" has concentrated attention on the first of these two ways then it is not, in my judgment, wide enough to comprehend all the cases where there can properly be said to have been adapting for sale.

It does not follow that every case where there is laborious picking out of similar articles will qualify as adapting for sale. In *Davis Cohen & Sons, Ltd.* B v. *Hall* (34), an example was given of picking out pairs of boots from a mixed heap. I would agree that that falls far short of what is necessary. But if there had been several hundred different qualities of boots in the heap, if a lengthy process and great skill had been necessary to separate them, and if customers had required matched sets of a dozen pairs the case might well have been different. Apart from the question of manual labour, I am of opinion C that in the present case there clearly was adapting for sale and, therefore, this appeal should be allowed.

LORD TUCKER: My Lords, I agree with the opinions expressed by my noble and learned friends that the appeal should be allowed.

LORD KEITH OF AVONHOLM: My Lords, this appeal is concerned D with the assessment of certain premises in the City of London belonging to the appellants, whom I shall call "the company", assessed at £15,848 gross value and £13,178 rateable value. The appeal comes to this House after unsuccessful appeals by the company to the Lands Tribunal and to the Court of Appeal against a decision of the Central London Local Valuation Court confirming the assessment. The contention of the company is that it is entitled to de-rating E of its premises in whole or in part. The premises consist of three parts, known as Beaver Hall, Beaver House, and the Carpenter's Workshop respectively. In Beaver Hall, auction sales of furs, prepared for auction in Beaver House, take place. It is with Beaver House that the appeal is primarily concerned. I take the problem as stated by the Lands Tribunal (35):

"It is the company's contention that Beaver House is primarily occupied F and used by it for the sorting and grading of furs, that by means of that sorting and grading bales of assorted and ungraded skins sent in by trappers and breeders from various parts of the world are changed, and they are changed into saleable lots of sorted and graded skins. It may be said therefore that the real issue upon which this case will depend is whether G what is done to those skins is or is not adapting for sale within the meaning of the Factory Act."

What takes place in Beaver House is set out by the Lands Tribunal in a short passage, which I shall find it necessary in a moment to amplify, as follows (36):

"Bales of skins are addressed from almost all parts of the world except the Soviet Union. They arrive in lorries at the reception basement. There H they are unloaded on to lifts and conveyed to the first floor where the bales are opened and are sorted according to types—the bales consist of mixed skins of various animals. The sorted bundles are then passed up to the next floor, some of the skins which may be dusty or gritty are put in drums with clean sawdust and whirled round. This eliminates the dust and grit. This process is necessary only in the case of very few, indeed almost a negligible quantity of the skins that come in. Next comes the process I on which the [company] mainly rely to establish their contention that there is an adaptation for sale. The skins are passed along in trollies to the sorters' counters. The counters extend along the room which is especially lighted with artificial light and large windows. The sorters are men who

(34) [1952] 1 All E.R. 157.

(35) 2 R.R.C. at p. 214.

(36) 2 R.R.C. at pp. 214, 215.

- A have been specially trained in the art of sorting. It is said that it takes about ten years to make a man an entirely efficient sorter. The sorter takes the skin and grades it either by its feel or visual appearance. Immediately behind the sorter is a trolley with various shelves. Each shelf represents the class which the sorter assigns to the skin. These grades of skin are then conveyed to another sorting room where there are sorters who can be described as final specialists. These sorters examine the skins and either confirm the grading or up or down grade the skins again. After this final grading the skins are catalogued and passed down to the display room. There they are displayed for some days and prospective buyers come along to examine them and bid for them at the auctions which are held about three times yearly.
- B
- C "The skins are still in a raw state in the sense that they could not be used as furs. They have to undergo a highly technical process which converts them from skins into saleable furs. This process is not undertaken at Beaver House. It is carried out by the furriers who buy the skins at the auction."
- D The evidence relating to the processes carried out in Beaver House is annexed to and forms part of the Case. And for a fuller understanding of these processes, I would expand the findings of the Lands Tribunal set out above as follows:—Beaver House may be described as a sorting establishment. But it is a sorting establishment with a very definite object. The object is to sort the skins into lots so that every skin in the lot matches every other skin in the lot so nearly that every skin may be said to be identical with every other skin.
- E They are so identical as to be indistinguishable. It is known how many skins belonging to any consignor go into any particular lot. The price realised for any lot is divided equally among the particular consignors in proportion to the number of skins he has contributed to the particular lot, each skin being treated as of equal value with every other skin in the lot. Thus each skin in a lot may be said to have the same value, the same quality, the same colour, the same size, the same pattern, and, of course, the same class of animal. At present, the popular and largest classes of skin dealt with are Persian lamb and mink. Persian lamb is sorted first into size of curl—extra large, large, medium, small and extra small. These sizes, again, are divided into patterns or curl, of which there are a considerable number. Of one pattern, described as "A" pattern, in the highest class, it was said that out of 500,000 skins or thereby only three
- F hundred skins of that pattern might be obtained. There are no less than 250 main grades and 880 sub-grades of Persian lamb. Of mink, again, there are no less than 468 main grades, and of beaver, sixty main grades. Persian lamb skins are graded by sight and mink by touch and the process is a highly expert job. The lots vary greatly in value according to quality, with resulting differences in prices realised at the auction. It is of prime importance to the buyer that all the skins in a particular lot are precisely matched, for they are bought to be made after processing into coats or other articles of attire. As stated in evidence:
- G
- H "It is a mammoth undertaking to equalise these lots so that every buyer knows he is going to get the same quality. That is why there are so many sub-grades; it is equalisation really."
- I A good sorter, it was said, would put out 1,000 to 1,500 skins a day. This is a short resumé of the nature of the process. The result of it is that the prices obtained at auction for the furs and skins sold greatly exceed the prices that could be obtained by the producers or owners of the skins if they were sold direct to the trade in a mixed or unsorted quantity. What, in effect, happens is that producers from all over the world put their skins into a vast pool, from which a sufficient number of skins can be made up into a great number of lots of matched skins of different value and quality suitable to the

requirements and demand of the fur-making trade, whether wholesale or retail. The owners of the skins do not lose the property in the skins until they are sold by auction. It would seem that they are treated as owners in common of the respective lots in proportion to the extent of their individual contribution to the lot, and share in the price realised for each lot accordingly. In the case of Persian lamb, the identity indeed of the separate skins making up a lot is lost. In the case of mink, the identity of the owners of the separate skins is, for some reason not explained, retained by a tab on each skin. But if in each case the price realised is allocated in proportion to contribution, this difference would seem to be immaterial. A
B

The question of law raised by the Case is whether there has been such an adapting for sale of the skins that come into Beaver House as to make these premises an industrial hereditament within the meaning of s. 3 of the Rating and Valuation (Apportionment) Act, 1928. That, again, turns on whether the premises are occupied and used as a workshop within the meaning of the Factory and Workshop Acts, 1901 to 1920. The relevant provision is s. 149 (1) of the Factory and Workshop Act, 1901, which defines "workshop". The material words for this case are: C
D

"The expression 'workshop' means—. . . (b) any premises . . . not being a factory, in which premises . . . any manual labour is exercised by way of trade or for purposes of gain in or incidental to any of the following purposes, namely—. . . (iii) the adapting for sale of any article, and to or over which premises . . . the employer of the persons working therein has the right of access or control." E

This section has frequently been considered in connexion with claims for de-rating, and your Lordships had a full citation of the relevant authorities. I find it unnecessary to consider these in any detail. None of them, in my opinion, quite touches the problem in the present case. Those which were claimed as approaching the nearest to the circumstances of the present case were *Inland Revenue v. Easson Bros.* (37) and *Kaye (Dewsbury Revenue Officer) v. Burrows & Dewsbury Assessment Committee* (38) (rag sorting); *Hines (Ipswich Revenue Officer) v. Eastern Counties Farmers' Co-operative Assn., Ltd.* (39) (seed cleaning); and *Richardson & Son v. Middlesbrough Borough Assessment Committee* (40); and *Valuation Comr. v. McAllister* (41) (egg packing). I quote one passage from the judgment of SCRUTTON, L.J. (42), as indicating the general nature of the problem: F
G

"In my view the question whether sorting or separation of an article to be sold from a bulk is an adapting for sale depends on the facts of each particular case, and cannot be determined simply by saying: 'no sorting is adaptation for sale'. The original bulk may be such that it cannot be sold either legally, as in mixed seeds, or commercially, because an unsorted bulk is not wanted, and the process of sorting may be so complicated and mechanical as to deserve the title of a manufacturing process, i.e., of 'adapting for sale'. On the other hand, the bulk and the article to be sold may be so similar and of such a nature, such as taking a quarter of a pound of bulls-eyes out of a bulk in a bottle, that the separation or sorting may well be regarded as an entirely minor incident of the sale or distribution." H
I

At the risk of some repetition, I would also quote a well-known passage from

(37) 1930 S.C. 480, referred to at p. 169, post, as the "rag picking" case.

(38) [1931] 1 K.B. 469, 508; [1931] All E.R. Rep. 242; [1931] A.C. 454.

(39) [1931] 1 K.B. 446, 502; [1931] All E.R. Rep. 242; [1931] A.C. 456.

(40) [1947] 1 All E.R. 884; [1947] K.B. 958.

(41) [1954] N.I. 54. (42) [1931] 1 K.B. at p. 494.

A the opinion of LORD SANDS in *Easson's* case (43), in part quoted and approved by VISCOUNT DUNEDIN in *Hines's* case (44) and by GREER, L.J. (45):

“ On the counter emptied out of the collecting carts there is a huge amorphous mass of waste paper, rags, etc., mixed with dirt and rubbish, which no paper manufacturer would look at. The workers produce a number of orderly bales in eighty different classes, which the papermakers readily buy for substantial sums. Can it reasonably be said that there has been no adaptation for sale of the mass of material which was emptied out of the carts, and which, so far as not discarded as dirt or rubbish, is now arranged in orderly merchantable bales? I understand the argument to be that, if you look at one particular rag or one particular scrap of paper, that rag or that scrap of paper has not been subjected to any treatment which alters it or adapts it for sale. As it appears to me, this is an altogether artificial and superficial argument. The papermaker is not buying one rag or one piece of waste paper; he is buying a bale. If what had happened was that the papermaker had come into the premises saying ‘ I want a blue cotton rag ’ or ‘ a piece of brown paper ’, I could understand the argument that there had been no adaptation of the particular article for sale. All that had been done was to arrange the articles so as to avoid the trouble of having to rummage through the heap whenever a papermaker came in and asked for something. But that is not the condition of the problem. If one regards the whole mixed mass that comes into the works, that mass has been adapted for sale, or made saleable, by laborious assortment. If one regards the final bale, its contents have been adapted for sale by a process whereby each rag or piece of paper, in itself worthless, has been associated with a thousand similar ones laboriously picked out.”

The last sentence in this passage is not in the excerpt quoted by LORD DUNEDIN and GREER, L.J., but it has, I think, a significant relevance to the facts of this case.

F My Lords, the view of the Lands Tribunal is expressed in the following passages, which are expressly challenged by counsel for the company as being inadequately supported by the evidence in the case:

“(A) ‘ I put it this way—without the sorting and grading the buyer, unless he were himself an expert, would be taking a risk but the skins are still saleable . . . the conclusion I have come to is that the only effect of the sorting and grading was to certify that the skins were of such a quality as to merit being placed in the category in which they appear in the auction catalogue.’

“(B) ‘ What is emptied out of the bales that come into the Hudson's Bay Co. is not a huge amorphous mass. It is a bundle of easily identifiable individual skins. They are sent in bundles merely for the convenience of despatch. It is not like the rag case or the seed case (46) in that it is not what has come to be known as a “ bulk ” case at all. It is not the intention that the skins should be made into a bulk and sold as a bulk. Each skin is sent to the Hudson's Bay Co. to be sold as a skin, in fact the owner might send only one skin although admittedly this would be unusual. It is also bought as a single skin although the bidder bids for a lot that are matched. In a word selling in lots is only for the convenience of the buyer.’

“(C) ‘ All that has been done here was to arrange the skins.’

“ In my view the process carried out in Beaver House, highly technical as I concede it is, is merely an identification of skins and their arrangement in price classes for sale. Nothing has been done to any skin which in any

(43) 1930 S.C. at p. 485.

(44) [1931] All E.R. Rep. at p. 258; [1931] A.C. at p. 481.

(45) [1931] 1 K.B. at p. 520.

(46) [1931] All E. R. Rep. 242; [1931] A.C. 454, 456.

way makes it a little different to what it was before—I ignore the cleaning of the skins in the drum because it applied to a negligible number of the skins dealt with in Beaver House. There has therefore been no adapting for sale.”

The grounds on which the Court of Appeal upheld the findings of the Lands Tribunal would appear to be contained in the following passage (47):

“ If on the facts the articles to be sold could properly be regarded as a bulk of sorted, matched and graded skins produced by these operations from an aggregate of unsorted, unmatched and ungraded skins, then there would be much to be said for the view that there was here an adapting of the skins for sale on the principle of the various ‘ bulk ’ cases already quoted. But we cannot regard this as a ‘ bulk ’ case. We think that the article to be sold must on the facts consist of each individual skin belonging to each intending vendor. Each parcel delivered at the hereditament for sale comprises individual skins of the number and types particularised in the invoice, and each of those skins is marked as the property of the intending vendor and thenceforth dealt with as such. The auctioneer employed by the [company] when he sells each lot at so much per skin must be taken as selling each individual skin comprised in it as agent for and on behalf of the vendor to whom it belongs. We do not see how this can be treated as a ‘ bulk ’ case consistently with the system of sale in fact adopted. It is of the essence of the ‘ bulk ’ principle that the components of the bulk should lose their identity in the bulk, so that the bulk and not its individual components can properly be regarded as the article to be sold. That is plainly impossible here. The whole system of sale depends on the identity and ownership of individual skins being preserved. The elaborate system of sorting, matching and grading enables each individual skin to be sold to the best advantage as part of a uniform lot, but we cannot regard it as an adapting for sale.”

My Lords, I would accept it that this is not what is generally understood as a “ bulk ” case. What comes in is a large collection of parcels of individual skins from a large number of owners who wish their skins to be sold by the methods known to be adopted by the company. They retain throughout the ownership of their skins until sale, and the company is their agent to prepare these skins for sale. The skins are dealt with individually in the sense that they are picked out individually from their respective parcels, matched with other skins for fineness, quality, colour, size and pattern and put into lots for sale as lots in which each individual component of the lot is practically indistinguishable from its fellows. This results in an enhanced price for the individual skins which would otherwise be quite unobtainable. I have come to the view that, in spite of the individual treatment accorded to each skin and the fact that each skin may be said to be the subject of sale though only as an item in a lot which must be bought as a whole, there is here an adaptation for sale. It was contended that this would go contrary to the dictum of LORD DUNEDIN in *Grove (Dudley Revenue Officer) v. Lloyd's British Testing Co., Ltd.* (48):

“ I think ‘ adapting for sale ’ points clearly to something being done to the article in question which, in some way, makes it in itself a little different from what it was before.”

In my view, this must not be read too narrowly. The process here has enhanced the value of each individual skin and that is a change of a peculiar and unusual character. With the poet it may be said (49) that each skin has suffered

(47) [1958] 3 All E.R. at p. 260.

(48) [1931] All E.R. Rep. at p. 252; [1931] A.C. at p. 467.

(49) Shakespeare's “ Tempest ”, Act 1, Scene 2, Ariel's second song.

A

"... a sea change
Into something rich and strange."

B

The process by which this has been done may well be described in the words of the witness already quoted as "a mammoth undertaking", though the process may be the easily understood one of selection and arranging. In the rag picking case (50), different as it is, LORD SANDS used words with reference to the process which might easily be adapted here: "The papermaker is not buying one rag or one piece of waste paper, he is buying a bale." Here the buyer is not buying one skin, he is buying a lot of matched skins.

C

"If one regards the whole mixed mass that comes into the works, that mass has been adapted for sale, or made saleable, by laborious assortment." Here, if one regards the collection of parcels of unmatched skins that come into Beaver House, that collection had been adapted for sale, or made saleable, by laborious assortment. Or again, in the words of LORD SANDS, at the end of the passage already quoted, the skins

D

"have been adapted for sale by a process whereby each... has been associated with a thousand similar ones laboriously picked out."

E

Though this is not, in my opinion, a "bulk" case, it has many similarities to such a case. The Lands Tribunal was, I think, wrong in regarding the sorting and grading of the skins as a mere certificate of quality, or a mere arrangement of the skins. And the Court of Appeal, I think, went wrong in regarding the individuality of the skins and their continuing ownership until sale as a conclusive factor for refusing de-rating.

In the peculiar circumstances of this particular trade, I am prepared to hold that there was an adapting for sale. I would, accordingly, allow the appeal.

F

LORD DENNING: My Lords, the question whether premises are a "workshop" depends, to my mind, on the nature of the work that is carried on therein. It does not depend on the ownership of the articles which are worked on, nor on the contracts that are made in regard to them. And it is not to be solved, I think, by asking whether the articles come in or go out in bulk. It is to be solved by asking two questions: (i) What is the purpose of the work being done? (ii) How is that purpose being achieved? You must find the purpose to be one of three: Put shortly, these are (i) the making of any article or articles, (ii) the altering of them, (iii) the "adapting" of them "for sale". And you must find that the purpose is achieved "by means of manual labour" that is exercised by way of trade or for purposes of gain.

G

I ask myself, therefore, first, what was the purpose of the work done on these skins? It was, I think, clearly the adapting of them for sale. When they came into Beaver House, they were mixed up in bales containing skins of much variety. They varied according to the kind of animal, the place of origin, the size of skin, the length of hair, the thickness and density of fur, colour, pattern and durability. These skins, as mixed up, were virtually unsaleable in the London market. The work that was done on them consisted in splitting up the bales into the component skins, sorting them, grading them, matching them, and eventually making them up into lots in which each skin was the same as every other. As such, they were readily saleable in the

H

I

London market. If it were a question of putting these skins into categories according to "bulk", I must say that I would not myself put these skins into the same category as heaps of waste paper, sacks of seeds or piles of stones—where it may truly be said that the identity of each particle is lost in the mass. I would put these skins more in the category of eggs which come in for grading, or sweets which have to be packed attractively in boxes—where each item retains its identity and has to be handled individually. But I do not find

these categories to be of much help. No matter whether you consider the articles to be an amorphous mass or to be a group of items, you have still to answer the same question, what is the purpose of the work being done on them? Are they being adapted for sale? The answer in the case of these skins is clearly "Yes". They are being adapted for sale. So the first question must be answered in favour of the appellants. A

But there still remains the second question: How is this purpose being achieved? Is it by means of manual labour? This question is not left to your Lordships by the Case Stated. The facts relating to it have not been found. The arguments for and against have not been put before your Lordships. The case must go back to the Lands Tribunal for the question to be determined. B

I would allow the appeal accordingly.

Appeal allowed; Case remitted in part to Lands Tribunal. C

Solicitors: *Linklaters & Paines* (for the appellants); *Solicitor of Inland Revenue*.

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

D

ELECTRIX, LTD. v. ELECTROLUX, LTD.

[HOUSE OF LORDS (Viscount Simonds, Lord Reid, Lord Cohen, Lord Keith of Avonholm and Lord Somervell of Harrow), June 15, 16, 17, July 6, 1959.] E

Trade Mark—Registration—Phonetic equivalent of unregistrable word—Trade Marks Act, 1938 (1 & 2 Geo. 6 c. 22), s. 9 (1).

The phonetic equivalent of a word which is unregistrable as a trade mark is itself unregistrable.

F

Re Edward Ripley & Sons' Application ((1898), 15 R.P.C. 151) approved.

Appeal dismissed.

[As to registrable trade marks, see 32 HALSBURY'S LAWS (2nd Edn.) 543, para. 851; and for cases on the subject, see 43 DIGEST 136, 137, 2-11.]

For the Trade Marks Act, 1938, s. 9, see 25 HALSBURY'S STATUTES (2nd Edn.) 1187.] G

Cases referred to:

Clark, Son & Morland, Ltd.'s Trade Mark, Re, [1938] 2 All E.R. 377; sub nom. *Bailey & Co., Ltd. v. Clark, Son & Morland*, [1938] A.C. 557; 107 L.J.Ch. 193; 159 L.T. 361; 55 R.P.C. 253; Digest Supp.

Crosfield (J.) & Sons, Ltd., Re, [1910] 1 Ch. 130; 79 L.J.Ch. 211; 101 L.T. 587; 26 R.P.C. 837; 43 Digest 153, 114. H

Dunlop Rubber Co., Ltd.'s Application, Re, (1942), 59 R.P.C. 134; 2nd Digest Supp.

Garrett's Application, Re, [1916] 1 Ch. 436; 85 L.J.Ch. 350; 114 L.T. 976; 33 R.P.C. 117; 43 Digest 183, 336.

Orwoola Trade Mark, Re, [1910] 1 Ch. 137; 26 R.P.C. 850; 43 Digest 158, 162.

Ripley (Edward) & Sons' Application, Re, (1898), 15 R.P.C. 151; sub nom.

Re Ripley & Sons' Trade Mark, 78 L.T. 367; 43 Digest 142, 44.

Trade Marks Registrar v. du Cros (W. & G.), Ltd., [1913] A.C. 624; 83 L.J.Ch. 1; 109 L.T. 687; sub nom. *Re du Cros' Application, Registrar of Trade*

Marks v. Du Cros, 30 R.P.C. 660; 43 Digest 155, 138.

Yorkshire Copper Works, Ltd. v. Trade Marks Registrar, [1954] 1 All E.R. 570; 71 R.P.C. 150; [1954] 1 W.L.R. 554; 3rd Digest Supp. I

A Appeal.

Appeal by Electrix, Ltd. from an order of the Court of Appeal (JENKINS, ROMER and ORMEROD, L.JJ.), dated Mar. 14, 1958, reversing an order of WYNN-PARRY, J., dated July 30, 1957, whereby he dismissed an appeal by the respondents, Electrolux, Ltd., from a decision of the assistant comptroller (acting for the Registrar of Trade Marks) dated Jan. 21, 1957, directing that the appellants' applications for registration of trade marks No. 690730, No. B 718162 and No. B 718163 should proceed to registration. The facts are set out in the opinion of VISCOUNT SIMONDS.

K. E. Shelley, Q.C., and J. N. K. Whitford for the appellants.

Kenneth Johnston, Q.C., and G. W. Tompkin for the respondents.

C Their Lordships took time for consideration.

July 6. The following opinions were read.

VISCOUNT SIMONDS: My Lords, this appeal relates to three applications by the appellants, Electrix, Ltd., for the registration as a trade mark of the single word "Electrix". The first application which was made on July 11, 1950, was for its registration in respect of "electric domestic vacuum cleaners and parts thereof included in class 9". The other applications were of later date and were in respect of other electrically driven machines, one of them also in class 9, the other in class 7. It is conceded that the two later applications stand or fall with the earlier one; I will, therefore, say nothing more about them. All the applications were opposed by the respondents, Electrolux, Ltd., but were granted by the assistant comptroller, whose decision was affirmed on appeal by WYNN-PARRY, J. The respondents appealed to the Court of Appeal who unanimously reversed the decision of the learned judge. Hence the appeal to this House.

My Lords, I think that the real point in the case is a short one and not difficult to decide, but so much importance has been attached to what has been called the background of the case, that I must trouble your Lordships with a short history of some of the facts which preceded the relevant applications. In 1928 the respondents had registered the word "Electrux" as a trade mark in respect of a specification of goods which included the goods the subject of the appellants' applications. They renewed the registration in 1942 but made no use of it until 1947. In the meantime, the appellants had been incorporated and from 1933 onwards, except for a period of interruption caused by the war, sold vacuum cleaners under the mark "Electrix". They were unaware of the respondents' registered mark "Electrux". Their sales were said to have been substantially increased as the result of an exhibition in the autumn of 1946 under the title "Britain can make it". In 1947 the respondents, realising that their mark "Electrux" was in danger of being struck off the register for non-user and wishing to stop the use by the appellants of their mark "Electrix", began to use the mark "Electrux" in connexion with a certain model of vacuum cleaner. They were entitled to do so and their user was bona fide. Having done so, they challenged the user by the appellants of the mark "Electrix" on the ground that it infringed their mark and eventually brought an action to restrain it. In this action, it was held by LLOYD-JACOB, J., and on appeal by the Court of Appeal, that the mark "Electrix" was an infringement of "Electrux", that the latter mark was valid and that the conduct of the respondents did not amount to acquiescence. An injunction was, accordingly, granted as asked. The scope of the registration of "Electrux" was, however, limited in a way that does not concern the present appeal. These proceedings are relevant to the appeal in this way. The appellants as an additional defence to the action sought to obtain registration of their mark "Electrix" under the provisions of s. 12 (2) of the Trade Marks Act, 1938, having previously made an application to the registrar for such registration, and they served a motion in the action asking for an order to that effect. LLOYD-JACOB, J., refused to make the order, holding that the

application should first be determined by the registrar, but granted a stay of execution of the injunction pending the registrar's determination. The suspension was continued by the Court of Appeal. Thus the application came in due course before the registrar and I have already narrated what happened to it. The question is whether the Court of Appeal were right in holding that the word "Electrix" ought not to be registered. It is possible to feel some sympathy for the appellants, if the injunction now suspended becomes operative, for they appear to have built up a substantial goodwill in "Electrix" as a common law mark. But that cannot influence the decision which it falls to the House to make.

My Lords, I can conveniently state the problem to be solved by the citation of a single sentence from the judgment of the Court of Appeal:

"The doctrine as we understand it, is that, if a given word is for any reason unregistrable in its proper spelling, then, inasmuch as trade marks appeal to the ear as well as to the eye, the objection (whatever it may be) to the registration of the properly spelt word applies equally to a word which is merely its phonetic equivalent."

Applying that view of the law to the facts of the present case, the Court of Appeal held that, "electrix" being the phonetic equivalent of "electrics" and that word being unregistrable, "electrix" also was unregistrable.

In my opinion, the proposition or doctrine of law, on which the Court of Appeal founded, is accurately stated and supported by authority and reason, and it was correctly applied. The more important of the cases which establish it are cited in the exhaustive judgment of the Court of Appeal. At the risk of repetition I must refer to some of them. In *Re Edward Ripley & Sons' Application* (1), the question was whether the word "Pirle" should be registered for goods in class 34, namely, cloths and stuffs of wool, worsted and hair, the word "Pirle" being formed from the name "Ripley" with the omission of the "y". The application was refused on the ground that the word was identical in sound with "Pearl", and that "Pearl" itself was not eligible for registration, being a term of commendation. KEKEWICH, J., upheld the refusal and so did the Court of Appeal in words which I quote because they are directly apposite. LINDLEY, M.R., said (2):

"We do not see our way to accede to this application. We cannot do it, unless we are prepared to lay down a proposition that I do not think any court should. We cannot say that a man may register, in any class of goods, a word which sounds exactly like a word that could not be registered. The reason is obvious; it would be putting a monopoly upon the public, which would be utterly unjustifiable. That is the short reason."

My Lords, the reason was short and was obvious. The judgment, too, was short; I have cited the whole of it. There is not a word in it to suggest that it matters why the word is unregistrable which the word proposed to be registered sounds exactly like. And in the seventy years which have passed since those very learned judges gave that clear and emphatic judgment, there has never been a suggestion that it is material why the unregistrable word is unregistrable nor any attempt to qualify the generality of its language. That case was decided under the Acts of 1883 and 1888. The next cases that I cite were heard after the passing of the Trade Marks Act, 1905. That Act made no difference to the relevant principle. Thus in the "*Perfection*" and "*Orlwoola*" cases (*Re J. Crosfield & Sons, Ltd.* (3), and *Re Orlwoola Trade Mark* (4)), COZENS HARDY, M.R., dealing with both cases, said (5):

"There is one important distinction between word marks and other marks. The former appeals to the ear as well as, and indeed more than, to the eye.

(1) (1898), 15 R.P.C. 151.

(2) (1898), 15 R.P.C. at p. 155.

(3) (1909), 26 R.P.C. 837.

(4) (1909), 26 R.P.C. 844.

(5) (1909), 26 R.P.C. at p. 855.

A The latter appeal to the eye only. It seems to follow that a word, not being an invented word, ought not to be put on the register, if the spelling is phonetic and resembles in sound a word which in its proper spelling could not be put on the register."

B Here again the language is general. The learned Master of the Rolls goes on to deal separately with the two marks, of which one was of a laudatory character, the other had reference to the quality or nature of the goods. In regard to "Perfection" he said (6):

"It was admitted by counsel that 'Perfect' could not be registered and that admission is fatal to the case of the applicants",

C and in regard to "Orlwoola" he said (7):

"It is plain that 'All wool' could not be registered, and indeed it is disclaimed on the face of the register. This word is a mark which appeals to the ear far more than to the eye, and for the reasons which I stated in my general observations I think it is obviously not distinctive."

D That is to say "Orlwoola" could not be registered because to the ear it sounded like the unregistrable "All wool". I must pass over the judgments of FLETCHER MOULTON, L.J., and FARWELL, L.J., though there is much in them to support the doctrine laid down in the judgment of the Court of Appeal in the present case and nothing from which the appellants can derive comfort. But I cannot refrain from citing a short passage from the judgment of FLETCHER MOULTON, L.J. (8). With regard to "Orlwoola" he said:

E "The misspelling does not affect the words when spoken, so that we have only to decide whether the words 'All wool' are proper for registration in respect of such goods."

F That was for him the sole question, just as for your Lordships the sole question is whether the word, of which "Electrix" is the phonetic equivalent, is registrable—a question that in this case admits of only one answer. So, also, in the *Ogee* case (*Re Garrett's Application* (9)), LORD COZENS HARDY, M.R., reiterating that a trade mark appeals to the ear as well as to the eye, said:

G "If the letters O.G. could not be registered, it seems to me that the word 'Ogee' ought not to be registered . . . The applicant may or may not have a right to 'Ogee' as a common law mark, but it is not a registrable mark."

H It would be difficult to find words more directly applicable than these to the present case. Rather surprisingly, learned counsel for the appellants sought to rely on the speech of LORD PARKER OF WADDINGTON in the *W. & G. case* (*Re du Cros' Application, Registrar of Trade Marks v. Du Cros* (10)). In that speech there is much that is valuable. The noble and learned Lord had been counsel to the Board of Trade at the passing of the Act of 1905 and knew well the problem which led to its enactment. He pointed out that the definition of "distinctive" as meaning "adapted to distinguish" made no change in the law, for the word "distinctive" had been used in that sense in the earlier Acts. He emphasised that, in order to determine whether a mark is distinctive, it must be considered apart from the effects of registration, and I (what is more important to the present case) that present distinctiveness in fact is not conclusive that a mark is adapted to distinguish. But neither in his speech nor in those of the other learned Lords was there suggested any qualification of the general principle that the phonetic equivalent of an unregistrable word is itself unregistrable. That was not, in fact, the question which had to be decided.

(6) (1909), 26 R.P.C. at p. 855.

(7) (1909), 26 R.P.C. at p. 856.

(8) (1909), 26 R.P.C. at p. 860.

(9) (1916), 33 R.P.C. at p. 123.

(10) (1913), 30 R.P.C. 660.

The question was whether "W. & G.", not its phonetic equivalent, was registrable. The same may be said of the *Glastonbury* case (*Re Clark, Son & Morland, Ltd.'s Trade Mark* (11)) and of *Yorkshire Copper Works, Ltd. v. Trade Marks Registrar* (12) which recently came before the House, and to the *Trakgrip* case (*Re Dunlop Rubber Co., Ltd.'s Application* (13)) which it fell to me to decide. In these and other cases that were cited it was the question of distinctiveness that was elaborately discussed. It is obvious that, in observing the prescription of s. 9 (3) of the Act of 1938, viz., that

"In determining whether a trade mark is adapted to distinguish as aforesaid the tribunal may have regard to the extent to which—(a) the trade mark is inherently adapted to distinguish as aforesaid; and (b) by reason of the use of the trade mark or of any other circumstances, the trade mark is in fact adapted to distinguish as aforesaid"

there is room for wide difference of opinion. It has, nevertheless, been consistently laid down that the discretion of the registrar is not to be lightly overruled, and the general excellence of the judgment of the assistant comptroller in this case predisposes me to uphold it. But it appears to me that he has erred in principle. For, though he does not say in so many words that "electrics", of which "electrix" is the phonetic equivalent, could or could not be registered, saying merely "this does not mean that I necessarily regard 'Electrics' as a word which could properly be registered", it is clear that he would not regard it as decisive of the unregistrability of "Electrix" that "Electrics" is unregistrable. Here he was, in my opinion, clearly wrong and, if I read his judgment aright, the learned judge fell into the same error. So, also, the appellants have sought to ignore the unregistrability of "Electrics" and claimed nevertheless that "Electrix" was registrable. Thus in their formal Case they say: "The appellants do not contend that the word 'Electrics' would be registrable", and they did not resile from this position in argument before the House. Let it not be thought that I criticise them for making the admission. It appears to me that, whether or not distinctiveness in fact was or could be acquired by "Electrics" of which there was, of course, no evidence, it would be a hopeless task to persuade the tribunal that it was not inherently unregistrable. From this it follows that the word "Electrix" cannot be registered.

In my opinion, the appeal must be dismissed with costs.

LORD REID: My Lords, I agree.

LORD COHEN: My Lords, I agree.

LORD KEITH OF AVONHOLM: My Lords, I agree.

LORD SOMERVELL OF HARROW: My Lords, I agree.

Appeal dismissed.

Solicitors: *Frere, Cholmeley & Nicholsons* (for the appellants); *Steadman, Van Praagh & Gaylor* (for the respondents).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

(11) [1938] 2 All E.R. 377; (1938), 55 R.P.C. 253.

(12) [1954] 1 All E.R. 570; (1954), 71 R.P.C. 150.

(13) (1942), 59 R.P.C. 134.

A

CHING GARAGE, LTD. v. CHINGFORD CORPORATION.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J.), July 8, 10, 1959.]

B

Highway—Access—Refuge proposed to be erected by highway authority on access from garage to road—Erection proposed without compensation—Erection on soil of highway but not on carriageway—Obstruction of access from garage to road—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 149—Public Health Acts Amendment Act, 1907 (7 Edw. 7 c. 53), s. 18 (c)—Road Traffic Act, 1956 (4 & 5 Eliz. 2 c. 67), s. 45 (1).

C

D

E

F

Two highways, the S. road running approximately north and south and the V. road running approximately east and west, intersected. The plaintiffs were owners of a corner plot at the intersection, their land lying to the south of the V. road and to the west of the S. road. The highways were repairable by the inhabitants at large. The plaintiffs, or their predecessors, had erected a garage on the land in 1932 under planning permission. Access to the two highways was constructed in the same year pursuant to s. 18* of the Public Health Acts Amendment Act, 1907, in accordance with plans approved by the local authority. One access was a forty foot access to V. road. This access crossed a verge, which had been dedicated as part of the highway in 1928, and gave access to the carriageway of V. road. The kerb of the footway along V. road had been set down at this point for the purposes of the access. The defendants, who were the highway and urban authority, proposed to erect a street refuge in the middle of the forty foot access to V. road, where the access emerged into the carriageway of the highway. They contended that they had power to do this under s. 45† of the Road Traffic Act, 1956, without paying compensation or had power to do it under s. 149‡ of the Public Health Act, 1875. Section 45 (1) of the Act of 1956 provided that the highway authority should have power to construct works "in the carriageway . . . for providing places of refuge" for pedestrians crossing the road. Section 149 of the Act of 1875 provided that from time to time the urban authority should cause highways which were repairable by the inhabitants at large to be "altered".

Held: the defendants were not empowered by these enactments to construct the street refuge, because—

G

(i) though the refuge would be in the highway it would not be in the "carriageway" of V. road and therefore was not authorised by s. 45 of the Road Traffic Act, 1956, and

(ii) section 149 of the Public Health Act, 1875, did not authorise the construction of the proposed street refuge in the circumstances of the present case, even if it applied to street refuges at all.

H

Per CURIAM: paragraph (c) of s. 18 of the Public Health Acts Amendment Act, 1907, did not have the consequence that after the construction of works of access the access was deemed to be a carriageway of the highway (see p. 179, letters C and D, post).

I

[As to an adjoining owners' right of access to the highway, see 19 HALSBURY'S LAWS (3rd Edn.) 78-82, paras. 119-124; and for cases on the subject, see 26 DIGEST 332-336, 632-665.]

* The relevant terms of s. 18 of the Public Health Acts Amendment Act, 1907, are printed at p. 179, letter B, post. By virtue of the Essex County Council Act, 1952, the Act of 1907 no longer applied to the plaintiffs' access.

† The relevant terms of s. 45 of the Road Traffic Act, 1956, are printed at p. 178, letter I, post.

‡ The relevant terms of s. 149 of the Public Health Act, 1875, are printed at p. 179, letter E, post.

For the Public Health Act, 1875, s. 149, see 19 HALSBURY'S STATUTES (2nd Edn.) 69 and for the Public Health Acts Amendment Act, 1907, s. 18, see *ibid.*, 192.

For the Road Traffic Act, 1956, s. 45, see 36 HALSBURY'S STATUTES (2nd Edn.) 848.]

Cases referred to:

Marshall v. Blackpool Corpn., [1934] All E.R. Rep. 437; [1935] A.C. 16; 103 L.J.K.B. 566; 151 L.T. 286; 98 J.P. 376; Digest Supp.

Sellors v. Matlock Bath Local Board, (1885), 14 Q.B.D. 928; 52 L.T. 762; 26 Digest 332, 638.

Action.

In this action Ching Garage, Ltd., the plaintiffs, claimed against Chingford Corporation, the defendants, as highway authority, a declaration that the defendants were not entitled to obstruct, interfere with or otherwise limit, the use of the means of access enjoyed with the plaintiffs' premises, known as the Ching Garage, at the junction of Sewardstone Road and Lea Valley Road, Chingford, and an injunction restraining the defendants from causing any such obstruction, interference or limitation by themselves or through their agents or servants; the plaintiffs also claimed damages. The facts, which were not in dispute, were as follows. The plaintiffs were the owners of land on which were premises known as Ching Garage; the garage was situated at the junction of Sewardstone Road and Lea Valley Road, in the borough of Chingford, in the county of Essex. Sewardstone Road ran roughly from north to south and Lea Valley Road, from east to west; the northerly and easterly boundaries of the garage lay respectively along Lea Valley Road and Sewardstone Road. Both roads were repairable by the inhabitants at large, and the defendants were the highway authority for both roads. The verge between the plaintiffs' land and the carriageway of Sewardstone Road was formerly in the control of the conservators of Epping Forest, but the verge was dedicated by the conservators as part of the highway in 1928. No kerbed or paved footway on the frontage to Sewardstone Road had ever existed. The Lea Valley Road had had a kerbed and paved footway since before 1932 and was kerbed west of a point shown on a plan. Before the erection of the garage, the plaintiffs' land was occupied agriculturally and there were two field gates giving access across the verge to Sewardstone Road, and a field gate giving access to Lea Valley Road. The garage was erected by the plaintiffs, or their predecessors, in 1932 under permission granted under the Town and Country Planning Act, 1925. Means of access was constructed for the plaintiffs' predecessors pursuant to permission duly given on May 2, 1932, under s. 18 of the Public Health Acts Amendment Act, 1907. These works were ultimately carried out and certified as having been properly carried out by the surveyor of the highway authority. The access thus created was an access on to the carriageway of Sewardstone Road and an access on to the carriageway at the junction of Sewardstone and Lea Valley Roads. The latter access (the Lea Valley access) went first on to that part of the highway dedicated by the conservators of Epping Forest, and then went, over a frontage of about forty feet, on to the carriageway at the road junction. The defendants now proposed to erect a street refuge in the middle of the forty foot Lea Valley access, where the access emerged on to the carriageway. The kerb was set down into the road with inset granite blocks because of the opening from the garage on to the carriageway.

The defendants contended that by reason of certain statutory powers, in particular s. 149 of the Public Health Act, 1875, and s. 55 of the Road Traffic Act, 1930, they were entitled to erect the proposed street refuge without paying compensation. During the course of the trial it appeared that s. 55 of the Road Traffic Act, 1930, had been amended by the Road Traffic Act, 1956, so as to make s. 55 of the Act of 1930 inapplicable to the present case: accordingly, the defendants relied on s. 45 of the Road Traffic Act, 1956.

A *G. D. Squibb, Q.C., and D. P. Kerrigan for the plaintiffs.*
D. G. H. Frank and G. W. Seward for the defendants, the highway authority.

Cur. adv. vult.

July 10. LORD PARKER, C.J., read the following judgment: This is an action brought by the plaintiffs, Ching Garage, Ltd., against the defendants, the Mayor, Aldermen and Burgesses of the Borough of Chingford, for a declaration and for an injunction in regard to what is said to be an obstruction which the defendants propose to erect in the means of access from the garage to the highway.

[His LORDSHIP then shortly stated the agreed facts, and continued:] I do not know whether the proposed action by the defendants will really damage the plaintiffs, and I am not concerned with that. It may be that they will suffer some damage. At any rate, the plaintiffs object to it being done without payment of compensation. There seems little doubt that if certain machinery had been exercised and the matter had been approached in a certain way, there was power to do what the defendants propose to do, but always subject to the payment of compensation. The defendants, on the other hand, say that they are perfectly entitled to do what they propose to do, and to do it without payment of compensation.

The starting point in this matter must be the common law position, that everyone who owns and occupies land adjoining a highway has a right of access to any part of the highway. It is best stated by LORD ATKIN in *Marshall v. Blackpool Corpn.* (1) where he sets out what he conceives to be the legal position in these words:

E "The owner of land adjoining a highway has a right of access to the highway from any part of his premises. This is so whether he or his predecessors originally dedicated the highway or part of it and whether he is entitled to the whole or some interest in the ground subjacent to the highway or not. The rights of the public to pass along the highway are subject to this right of access just as the right of access is subject to the rights of the public, and must be exercised subject to the general obligations as to nuisance and the like imposed upon a person using the highway."

F Then, a little further down on the same page, he says:

G "As was pointed out by the lord chief justice, it would be remarkable to find this well-established right of an adjoining owner taken away and without compensation, especially in a local Act, unless there were very plain words to that effect."

On the other hand, it is undoubtedly true that many statutory powers given to local authorities in these matters clearly contemplate interference with private rights of access, and in those circumstances, must be treated as giving powers of interference.

H The principle is set out at p. 127 of PRATT & MACKENZIE'S LAW OF HIGHWAYS, (19th Edn.), where it says:

I "Where there is a statutory authority to erect obstructions in the highway such as lamp posts, electricity poles or bus shelters, the adjoining owner has no right to restrain the exercise of the statutory authority to obstruct the highway where they bona fide think it necessary, and if by the terms of the statute and the nature of the obstruction the legislature must be taken to have contemplated the probability if not the certainty that the obstructions erected under the statute would interfere with rights of adjacent property owners, then the statute impliedly authorises interference with those rights in the reasonable exercise of the statutory powers, notwithstanding the absence of any provision for compensation."

(1) [1934] All E.R. Rep. at p. 439; [1935] A.C. at p. 22.

It therefore becomes necessary—and this is the sole point in this case—to see whether, by statute, the defendants have the powers which they claim that they have, to erect this obstruction in the access which was constructed to plans approved by them in 1932. A

The defence sets out a great number of statutory provisions, but only three have been relied on in this court. The first that is relied on is s. 149 of the Public Health Act, 1875; secondly, the Road Traffic Act, 1930, s. 55; and thirdly, the Road Traffic Act, 1956, s. 45. B

I propose to deal, in the first instance, with s. 55 of the Road Traffic Act, 1930. On being referred to that section as set out in PRATT & MACKENZIE (19th Edn.) (2) it seemed to me to give the defendants power to do what they now propose to do. Counsel for the defendants naturally relied on the following words in s. 55: C

“ . . . a highway authority [as were the defendants] as respects any road vested in them may, for the purpose of . . . making the crossing of any road less dangerous to foot passengers, erect . . . places of refuge in the road . . . ”

It is true that, in the ordinary way, one thinks of a refuge as something in the middle of a crossing, that is to say, somewhere where a pedestrian in crossing a highway can stop and look the other way before crossing the other part of the highway; but it seems equally clear that a refuge may be necessary at the beginning or at the end of a crossing. To take the present case, those pedestrians who, if the scheme goes through, come down Sewardstone Road from north to south and cross the Lea Valley Road, will, if there is no refuge where the defendants propose to erect one, come on to some sunken granite sets in the middle of a wide, forty foot, access. They have thus no safe place to which to go or from which to start. They have crossed the road, but they are nevertheless in the middle of this access. In those circumstances, it seemed perfectly clear that this would be a refuge “ for the purpose of making the crossing of any road less dangerous to foot passengers.” It seemed that counsel for the plaintiffs’ argument, that there was no refuge within the meaning of the Act of 1930 except in the case of pedestrians who are in course of crossing, was based on too narrow a construction of the words in s. 55 of the Act, and that any refuge which made the crossing of a road more safe, whether at the beginning or at the end of, or in the course of the actual crossing, was within the section. As a result, I had almost completed giving judgment on the basis that the so-called obstruction which the defendants seek to erect was a refuge which they had power to erect under s. 55 of the Road Traffic Act, 1930, when it was discovered for the first time that the section had been amended. Indeed, it appears that as amended by the Road Traffic Act, 1956, that section (3) has now no application to refuges at all. D
E
F
G

That being so, I have felt it right to commence my judgment again, the position now being that only two statutory provisions are relied on by the defendants, namely, s. 149 of the Public Health Act, 1875, and s. 45 of the Road Traffic Act, 1956. H

I will deal with the latter provision first. Section 45 provides (4), by sub-s. (1):

“ The highway authority for any road repairable by the inhabitants at large shall have power to construct and maintain works in the carriageway . . . (c) for providing places of refuge for the protection of foot passengers crossing the road.” I

(2) See *ibid.* (1952), p. 593.

(3) Section 55 of the Road Traffic Act, 1930, is amended by s. 45 (7) and s. 55 of and Sch. 9 to, the Road Traffic Act, 1956 (see Second Supplement (1957) to PRATT & MACKENZIE ON HIGHWAYS (19th Edn.) 593); the terms of s. 45 of the Act of 1956 are set out at p. B80 of that supplement.

(4) 36 HALSBURY'S STATUTES (2nd Edn.) 848.

- A There again, I should be prepared to read "places of refuge" as places for the safety of pedestrians who are about to cross or who have just crossed, the road. But the difficulty is, that the power there given is only to "construct and maintain works in the carriageway"; and the place where this refuge is proposed to be erected, though in the highway, is not in the carriageway. Reliance was, however, placed on s. 18 of the Public Health Acts Amendment Act, 1907,
- B the provision under which the access in question was originally made, because by para. (c) of that section it is provided that:

C "After the completion of the works [i.e., in this case, after 1932, when the works were done] the new means of access may be used, subject to the conditions which, in pursuance of any provisions of the law relating to highways, attach to the use for the like purpose of any carriageway forming part of a highway repairable by the inhabitants at large."

In fact, that section does not now apply, by virtue of the Essex County Council Act, 1952; but, be that as it may, I do not read the words in para. (c) as saying that after the construction of the works the access is deemed to be a carriageway, so that this obstruction, if erected, would be in the carriageway. Accordingly

D I do not think that the defendants have any power to do what they propose to do under s. 45 of the Road Traffic Act, 1956.

I turn now to s. 149 of the Public Health Act, 1875. That section, which is dealing with the vesting of streets in urban authorities, provides, *inter alia*, that:

E "The urban authority shall from time to time cause all such streets to be levelled paved metalled flagged channelled altered and repaired as occasion may require."

The only words in that section on which the defendants can rely are "shall cause all such streets to be altered"; and reference has been made to *Sellors v. Matlock Bath Local Board* (5). In that case the plaintiff had some land and buildings consisting of an inn and stables abutting on the high road. These stood back from the road and in front of them was a space which had been left open to and on a level with the road until recently, when the defendants had made a footpath on the road outside the plaintiff's land, with raised kerbstones, but leaving openings so that carriages could still go in from and out to the road, but not at every part of the boundary. The plaintiff contended that this was an interference with her right at common law. In the course of his judgment,

G DENMAN, J., said (6):

"Looking at the whole of the clause together, I think it cannot be contended that wherever any person has land adjoining the road which has remained undistinguished from the road, perhaps for centuries, he can as a matter of course restrain the local authorities from making a raised footpath for the accommodation of the public on a part of the road which is vested in them, merely because by so doing they may render it impossible for the time, for the owner of the land, to draw up a carriage close to the exact boundary of his land, or to enter his land, at every inch of the boundary."

H

I I appreciate that in that case a wide meaning was given to the word "altered" but so far as the present case is concerned, the facts are entirely different. There is a footpath there already and the access has been permitted and constructed pursuant to s. 18 of the Public Health Acts Amendment Act, 1907. Reading the section as a whole, I find it difficult to think that the words used cover the construction of this street refuge in these circumstances. Indeed, the construction of any street refuge was probably not within the contempla-

tion of the legislature in 1875, and their construction has been specifically dealt with by later statutes. A

In my judgment, the defendants cannot justify the proposed construction under s. 149 of the Act of 1875, but even if I am wrong they would have to pay compensation for any resulting injury under s. 308 of the same Act.

Finally, it was submitted, albeit faintly, on behalf of the defendants that they are not proposing to do anything which interferes with any right that the plaintiffs have. They say: "True, the plaintiffs have always had at common law a right of access at any point on to the highway, but they will still have that right since they will be able to emerge through the opening D to E on the plan on to the highway without any interference." In other words, they maintain that the proposed construction will not prevent the plaintiffs from having access to the highway, but will only interfere with them when they get out into the highway. I myself cannot accede to this argument, since it seems to me that in this connexion access to the highway must mean access to the carriageway. B C

In these circumstances, I do not think that either of the statutory provisions now relied on enable the defendants to do what they propose to do in regard to this street refuge. D

Declaration that the defendants are not, by virtue of their powers under s. 149 of the Public Health Act, 1875, or s. 45 of the Road Traffic Act, 1956, entitled to obstruct, interfere with or otherwise limit the use of the means of access enjoyed with the plaintiffs' premises as constructed, formed and laid out.

Solicitors: *Hillearys* (for the plaintiffs); *C. G. Dennis* (for the defendants, the highway authority). E

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

NOTE.

F. v. F. G

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), July 3, 1959.]

Divorce—Custody—Local authority—Child committed to care of local authority—Exceptional circumstances—Matrimonial Proceedings (Children) Act, 1958 (6 & 7 Eliz. 2 c. 40), s. 5 (1).

[For the Matrimonial Proceedings (Children) Act, 1958, s. 5 (1), see 38 HALSBURY'S STATUTES (2nd Edn.) 480.] H

Summons adjourned into open court.

This was an application by the husband for custody. As it was one of the first applications to be heard since the court had jurisdiction under s. 5 of the Matrimonial Proceedings (Children) Act, 1958, to commit the care of a child to the council of a county or county borough, KARMINSKI, J., adjourned the summons into open court for judgment. The facts appear in the judgment. I

The husband appeared in person.

F. M. Drake for the wife.

KARMINSKI, J.: I do not propose in open court to say more about the facts of this case than are strictly necessary. The wife obtained a decree nisi

A in this court on June 1, 1959, on the grounds of cruelty. I heard the case and I entrusted the one infant child of the marriage, a boy, to the home of a grown-up brother who was living with his wife in suitable circumstances. The reason why at that stage I did not entrust the child to the custody of the mother was no reflection on her general fitness as a person but because she was living under conditions which, in my view, made it undesirable, indeed impossible, for the child to live there with her. So far as the respondent father is concerned I thought, for reasons given in evidence, that he was not a fit and proper person to have custody of the child though in fact he was, and still is, living in a home where the material conditions are better than those enjoyed by the wife.

B Under the order which I made on the decree the boy, who is either twelve or thirteen years of age (there has been some debate as to his correct age), went to live with his grown-up brother and that brother's wife and he has lived there perfectly happily. The brother and his wife have to leave the premises where they are now living and are going to a new home where they will have no room for this boy. The fact that they cannot take the boy with them is no criticism of their fitness but it is a fact which I have had to take into account. I have come to the conclusion that the circumstances of this case make it virtually impossible, and certainly undesirable, that this boy should be entrusted to the custody for the time being of either parent. It is not even suggested that there is any other member of the family who can take the child, so that I have had to consider the application of s. 5 of the Matrimonial Proceedings (Children) Act, 1958.

D I have had not only a full report by the court welfare officer but I have also had the assistance of the senior children's officer of Middlesex County Council, the county involved, and I have had assistance from their solicitors. The council have expressed their willingness, at very short notice, to take this child under their care and in the circumstances of the present case I have not the slightest doubt that that is what is best for this child in these particular circumstances for the time being. I say that advisedly because a time may come when the wife, the child's mother, may successfully establish a suitable home of her own and I have no doubt that if that were achieved it might well be the time to hand the child over to her. In those circumstances, therefore, I am exercising the power of this court under s. 5 of the Matrimonial Proceedings (Children) Act, 1958, and I shall commit the care (1) of the child to Middlesex County Council.

Order accordingly.

Solicitors: *J. A. H. Powell* (for the wife).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

(1) The consequence was that Part 2 of the Children Act, 1948, thereafter applied as if the child had been received by the council into care under s. 1 of that Act; see, generally, as to children so received into care, 21 HALSBURY'S LAWS (3rd Edn.) 274 et seq.

SIZE HAI TONG BANK, LTD. v. RAMBLER CYCLE CO., LTD. A

[PRIVY COUNCIL (Lord Denning, Lord Jenkins and Mr. L. M. D. de Silva), May 6, 7, 8, June 22, 1959.]

Privy Council—Singapore—Shipping—Bill of lading—Exemption clause—Contract to deliver goods on production of bill of lading to person entitled under bill of lading—No delivery by shipping company to such person—Construction of exemption clause. B

A bill of lading for the carriage of goods by sea to Singapore and their delivery there to the order of the respondents, the sellers, provided by cl. 2 that "the responsibility of the carrier . . . shall be deemed . . . to cease absolutely after [the goods] are discharged" from the ship. The goods were discharged from the ship at Singapore and were placed in go-downs of the Singapore Harbour Board. On the order of the agents of the carriers the goods were released to the buyers, an indemnity being given to the carriers by the appellant bank. The buyers never paid for the goods. The appellant bank contended that the responsibility of the carriers ceased, under cl. 2 of the bill of lading, when the goods were delivered to the buyers without payment, and that, therefore, the bank was not liable on its contract of indemnity. C

Held: the general exemption provided by the words "cease absolutely after [the goods] are discharged" in cl. 2 of the bill of lading did not permit the carriers deliberately to disregard one of the prime obligations of the contract, viz., the obligation to deliver the goods to the order of the respondents; therefore, the carriers were liable to the respondents in damages and the appellant bank was liable to indemnify the respondents against the liability of the carriers. D

Principle of construction stated by LORD HALSBURY in *Glynn v. Margetson & Co.* ([1893] A.C. at p. 357) applied. E

Chartered Bank of India, Australia & China v. British India Steam Navigation Co., Ltd. ([1909] A.C. 369) distinguished. F

Appeal dismissed.

[As to the obligation of a shipowner to deliver goods under a bill of lading, see 30 HALSBURY'S LAWS (2nd Edn.) 529, para. 681; and for cases on the subject, see 41 DIGEST 529-531, 3571-3594.]

As to the construction of exemption clauses, see 11 HALSBURY'S LAWS (3rd Edn.) 393, para. 641; and as to repugnancy and the correction of language to give effect to intention, see *ibid.*, 413, para. 670.] G

Cases referred to:

Albion, The, France, Fenwick Tyne & Wear Co., Ltd. v. Swan, Hunter & Wigham Richardson, Ltd., [1953] 2 All E.R. 679; [1953] 1 W.L.R. 1026; 3rd Digest Supp. H

Alexander v. Railway Executive, [1951] 2 All E.R. 442; [1951] 2 K.B. 882; 2nd Digest Supp.

Ashby v. Tolhurst, [1937] 2 All E.R. 837; [1937] 2 K.B. 242; 106 L.J.K.B. 783; 156 L.T. 518; Digest Supp.

Bontex Knitting Works, Ltd. v. St. John's Garage, [1943] 2 All E.R. 690; *affd.* C.A., [1944] 1 All E.R. 381, n.; 2nd Digest Supp. I

Cap Palos, The, [1921] P. 458; 91 L.J.P. 11; 126 L.T. 82; 41 Digest 683, 5126.

Chartered Bank of India, Australia & China v. British India Steam Navigation Co., Ltd., [1909] A.C. 369; 78 L.J.P.C. 111; 100 L.T. 661; 41 Digest 538, 3653.

Glynn v. Margetson & Co., [1893] A.C. 351; 62 L.J.Q.B. 466; 69 L.T. 1; 41 Digest 311, 1715.

- A** *Karsales (Harrow), Ltd. v. Wallis*, [1956] 2 All E.R. 866; [1956] 1 W.L.R. 936; 3rd Digest Supp.
- Renton (G. H.) & Co., Ltd. v. Palmyra Trading Corpn. of Panama*, [1955] 3 All E.R. 251; [1956] 1 Q.B. 462; [1955] 3 W.L.R. 535; *reversd.* C.A., [1956] 1 All E.R. 209; [1956] 1 Q.B. 462; [1956] 2 W.L.R. 232; *affd.* H.L., [1956] 3 All E.R. 957; [1957] A.C. 149; [1957] 2 W.L.R. 45; 3rd Digest Supp.
- B** *Smackman v. General Steam Navigation Co.*, (1908), 98 L.T. 396; 13 Com. Cas. 196; 41 Digest 427, 2684.
- United Africa Co., Ltd. v. Saka Owode*, [1957] 3 All E.R. 216; [1955] A.C. 130; [1955] 2 W.L.R. 13; 3rd Digest Supp.

Appeal.

- C** Appeal by Sze Hai Tong Bank, Ltd. from an order of the Court of Appeal of the Colony of Singapore (KNIGHT, Acting C.J. of Singapore, THOMPSON, C.J., of Malaya, and CHUA, J.), dated Sept. 24, 1957, dismissing the appellants' appeal from part of a judgment of WHITTON, J., dated Jan. 17, 1957, and from an amended order dated Jan. 23, 1957. The respondents had brought an action against a shipping company, Glen Line, Ltd., for damages for breach of contract or for conversion. Glen Line, Ltd. brought in the Southern Trading Co. and the appellants as third parties, claiming that they were entitled to be indemnified by the third parties. WHITTON, J., gave judgment for the respondents against Glen Line, Ltd., and made a declaration that Glen Line, Ltd. were entitled to be indemnified by the third parties. The appellants only appealed to the Court of Appeal. The facts are set out in the judgment of the Board.
- D**
- E**

T. G. Roche, Q.C., and *G. R. F. Morris, Q.C.*, for the appellants.
Sir David Cairns, Q.C., and *M. R. E. Kerr* for the respondents.

LORD DENNING: The respondents manufacture bicycles in England

- and export them to various parts of the world, and, in particular, to Singapore, where they have customers called the Southern Trading Co. In 1954, these customers ordered bicycle parts to the value of nearly £3,000 from the respondents. Payment was to be ninety days, documents against payment. The respondents made the goods and sent them off to Singapore. They shipped the goods on the steamship *Glenгарry*, which belongs to Glen Line, Ltd., and they paid the freight in advance. The steamship company issued a bill of lading dated July 30, 1954, in which they acknowledged that the goods were shipped by the respondents and were to be conveyed by the ship *Glenгарry* and were to be delivered at the port of Singapore "unto order or his or their assigns". There was noted on the bill of lading a request by the respondents saying: "Notify: Southern Trading Co., C Short Street, Singapore". The respondents insured the goods through Lloyd's and obtained an insurance certificate. This covered the goods during the voyage and for ninety days thereafter. The respondents also drew a bill of exchange on the Southern Trading Co. for the amount due. This was payable ninety days after acceptance. The respondents also made out an invoice for the goods. The respondents took all these documents to the Bank of China in London, who passed them on to their branch in Singapore. This branch was to hold them until the bill of exchange was paid and also any charges.
- F**
- G**
- H**

- I** On Sept. 1, 1954, the ship *Glenгарry* arrived in Singapore. The shipowners had agents there called Boustead & Co., who acted for them in every way. On the authority of these agents, on Sept. 2 and 3, 1954, the goods were discharged from the ship and placed in the go-downs of the Singapore Harbour Board. (This was done, no doubt, under cl. 10 of the bill of lading "at the risk and expense of the owners of the goods".) These shipping agents also wrote to the Southern Trading Co. to notify them of the arrival of the goods. The Southern Trading Co. wished to get possession of the goods but did not want to pay for them at that time. So they went along to their own bank, the appellants, and

got that bank to sign a form of indemnity in favour of the shipowners, agreeing that, if the goods were released to the Southern Trading Co., they would indemnify the shipping company against any loss thereby occasioned. The indemnity was signed both by the Southern Trading Co. and the appellants and dated Sept. 3, 1954. When the shipping company's agents received that indemnity, they authorised the harbour board to deliver the goods to the Southern Trading Co. The shipping company's agents never saw the bill of lading. It was not produced to them. It was, of course, still in the hands of the Bank of China, who would not deliver it except against payment. Yet the shipping company's agents issued a delivery order for the goods in favour of the Southern Trading Co. On Sept. 4 and 6, 1954, the goods were removed from the harbour board premises by the Southern Trading Co. The shipping company's agents were quite frank about what they did. Their representative said in evidence:

"In issuing delivery orders and in everything we do we act as agents of the Glen Line. It is an accepted fact that in the absence of bills of lading goods are released on an indemnity. I agree we are supposed to deliver on the bill of lading being produced to us. I agree that when we do not have the bill of lading produced we cover ourselves by getting an indemnity. When it is suggested to me that we get these indemnities because we know we are doing what we should not do I say that if no risk we would not need indemnity. I agree we get indemnity because we are doing something we know we should not do—but it is common practice. It is an everyday occurrence . . . We rely on the bank's guarantee."

The Southern Trading Co. never did pay for the goods. They did not pay the draft. The respondents did not know the goods had been delivered to the Southern Trading Co. They assumed that the goods had remained in warehouse at Singapore. They arranged for the insurance to be extended beyond the ninety days for two further periods of thirty days each consecutively. Eventually, in January, 1955, they discovered what had happened, and in August, 1955, they brought an action against the shipping company claiming damages for breach of contract or for conversion. The shipping company brought in the Southern Trading Co. and the appellants as third parties, claiming that they were entitled to be indemnified by them.

The action was tried by WHITTON, J., in the High Court of Singapore. He gave judgment for the respondents against the shipping company for £3,005 11s. 6d., and also made a declaration that the shipping company were entitled to be indemnified by the third parties. The shipping company did not appeal but the appellants did so. The Court of Appeal of Singapore (KNIGHT, Acting C.J. of Singapore, THOMPSON, C.J. of Malaya, and CHUA, J.) dismissed the appeal. The appellants now appeal to Her Majesty in Council. The contest before their Lordships has been solely whether judgment was properly entered against the shipping company; for, if it was, the appellants recognise they are bound to indemnify the shipping company.

It is perfectly clear law that a shipowner who delivers without production of the bill of lading does so at his peril. The contract is to deliver, on production of the bill of lading, to the person entitled under the bill of lading. In this case it was "unto order or his or their assigns", that is to say, to the order of the respondents, if they had not assigned the bill of lading, or to their assigns, if they had. The shipping company did not deliver the goods to any such person. They are, therefore, liable for breach of contract unless there is some term in the bill of lading protecting them. And they delivered the goods, without production of the bill of lading, to a person who was not entitled to receive them. They are, therefore, liable in conversion unless likewise so protected.

A In order to escape the consequences of the misdelivery, the appellants say that the shipping company is protected by cl. 2 of the bill of lading, which says that:

B “During the period before the goods are loaded on or after they are discharged from the ship on which they are carried by sea, the following terms and conditions shall apply to the exclusion of any other provisions in this bill of lading that may be inconsistent therewith, viz., (a) so long as the goods remain in the actual custody of the carrier or his servants [here follows a specified exception]; (b) whilst the goods are being transported to or from the ship [here follows another specified exemption]; (c) in all other cases the responsibility of the carrier whether as carrier or as custodian or C bailee of the goods shall be deemed to commence only when the goods are loaded on the ship and to cease absolutely after they are discharged therefrom.”

The exemption, on the face of it, could hardly be more comprehensive, and it is contended that it is wide enough to absolve the shipping company from responsibility for the act of which the respondents complain, that is to say, the delivery D of the goods to a person who, to their knowledge, was not entitled to receive them. If the exemption clause, on its true construction, absolved the shipping company from an act such as that, it seems that, by parity of reasoning, they would have been absolved if they had given the goods away to some passer-by or had burnt them or thrown them into the sea. If it had been suggested to the parties that the condition exempted the shipping company in such a case, they would both E have said: “Of course not”. There is, therefore, an implied limitation on the clause, which cuts down the extreme width of it; and, as matter of construction, their Lordships decline to attribute to it the unreasonable effect contended for. But their Lordships go further. If such an extreme width were given to the exemption clause, it would run counter to the main object and intent of the contract. For the contract, as it seems to their Lordships, has, as one of its main F objects, the proper delivery of the goods by the shipping company, “unto order or his or their assigns”, against production of the bill of lading. It would defeat this object entirely if the shipping company was at liberty, at its own will and pleasure, to deliver the goods to somebody else, to someone not entitled at all, without being liable for the consequences. The clause must, therefore, be limited G and modified to the extent necessary to enable effect to be given to the main object and intent of the contract: see *Glynn v. Margetson & Co.* (1); *G. H. Renton & Co., Ltd. v. Palmyra Trading Corpn. of Panama* (2).

To what extent is it necessary to limit or modify the clause? It must, at least, be modified so as not to permit the shipping company deliberately to disregard its obligations as to delivery. For that is what has happened here. The shipping H company's agents in Singapore acknowledged: “We are doing something we know we should not do”. Yet they did it. And they did it as agents in such circumstances that their acts were the acts of the shipping company itself. They were so placed that their state of mind can properly be regarded as the state of mind of the shipping company itself. And they deliberately disregarded one of the prime obligations of the contract. No court can allow so fundamental a I breach to pass unnoticed under the cloak of a general exemption clause: see *The Cap Palos* (3). The appellants placed much reliance, however, on a case which came before their Lordships' Board in 1909 of *Chartered Bank of India, Australia & China v. British India Steam Navigation Co., Ltd.* (4). There was

(1) [1893] A.C. at p. 357.

(2) [1956] 1 All E.R. at p. 222; [1956] 1 Q.B. at p. 501; H.L. [1956] 3 All E.R. at p. 961; [1957] A.C. at p. 164.

(3) [1921] P. at p. 471.

(4) [1909] A.C. 369.

there a clause which said that "in all cases and under all circumstances the liability of the company shall absolutely cease when the goods are free of the ship's tackle . . ." The goods were discharged at Penang and placed in a shed on the jetty. Whilst there a servant of the landing agents fraudulently misappropriated them in collusion with the consignees. Their Lordships' Board held that the shipping company were protected by the clause from any liability. Their Lordships are of opinion that that case is readily distinguishable from the present, as the courts below distinguished it, on the simple ground that the action of the fraudulent servant there could in no wise be imputed to the shipping company. His act was not its act. His state of mind was not its state of mind. It is true that, in the absence of an exemption clause, the shipping company might have been held liable for his fraud: see *United Africa Co., Ltd. v. Saka Owoade* (5). But that would have been solely a vicarious liability. Whereas in the present case the action of the shipping agents at Singapore can properly be treated as the action of the shipping company itself.

The self-same distinction runs through all the cases where a fundamental breach has disentitled a party from relying on an exemption clause. In each of them there will be found a breach which evinces a deliberate disregard of his bounden obligations. Thus, in *Bontex Knitting Works, Ltd. v. St. John's Garage* (6), the lorry driver left the lorry unattended for an hour, in breach of an express agreement for immediate delivery. In *Alexander v. Railway Executive* (7), the cloakroom official allowed an unauthorised person to have access to the goods, in breach of the regulations in that behalf. In *Karsales (Harrow), Ltd. v. Wallis* (8), the agent of the finance company delivered a car which would not go at all, in breach of its obligation to deliver one that would go. In each of those cases it could reasonably be inferred that the servant or agent deliberately disregarded one of the prime obligations of the contract. He was entrusted by the principal with the performance of the contract on his behalf; and his action could properly be treated as the action of his principal. In each case it was held that the principal could not take advantage of the exemption clause. It might have been different if the servant or agent had been merely negligent or inadvertent: see *Smackman v. General Steam Navigation Co.* (9) *Ashby v. Tolhurst* (10) by SIR WILFRID GREENE, M.R., and *The Albion, France, Fenwick Tyne & Wear Co., Ltd. v. Swan, Hunter & Wigham Richardson, Ltd.* (11).

For these reasons, their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the costs.

Appeal dismissed.

Solicitors: *Lawrance, Messer & Co.* (for the appellants); *Ingledew, Brown, Bennison & Garrett* (for the respondents).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

(5) [1957] 3 All E.R. 216; [1955] A.C. 130.

(6) [1943] 2 All E.R. 690; C.A. [1944] 1 All E.R. 381, n.

(7) [1951] 2 All E.R. 442; [1951] 2 K.B. 882.

(8) [1956] 2 All E.R. 866.

(9) (1908), 98 L.T. 396.

(10) [1937] 2 All E.R. at p. 843; [1937] 2 K.B. at p. 253.

(11) [1953] 2 All E.R. at pp. 682, 683.

CASSIDY v. CASSIDY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Phillimore, J.), June 22, 1959.]

Magistrates—Husband and wife—Aggravated assault—Husband conditionally discharged after pleading guilty to assaulting wife and causing her grievous bodily harm—Case dealt with summarily—Whether an aggravated assault within Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 43—Whether a conviction for the purposes of the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 4—Criminal Justice Act, 1948 (11 & 12 Geo. 6 c. 58), s. 12 (1).

A husband pleaded guilty to a charge under s. 20 of the Offences against the Person Act, 1861, of causing grievous bodily harm to his wife. His case was dealt with summarily by justices and he was given a conditional discharge, being bound over for twelve months. By s. 12 (1) of the Criminal Justice Act, 1948, the conviction was deemed not to be a conviction for purposes other than those of subsequent proceedings under previous provisions of that Act. The wife applied under s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, for a non-cohabitation order and for maintenance on the ground that her husband had been convicted of an aggravated assault on her contrary to s. 43 of the Act of 1861.

Held: (i) the wife was not entitled to the order that she sought because, by reason of s. 12 (1) of the Criminal Justice Act, 1948, the conviction did not rank as a conviction for the purposes of s. 4 of the Summary Jurisdiction (Married Women) Act, 1895.

(ii) the conviction under s. 20 of the Offences against the Person Act, 1861, was a conviction of an aggravated assault contrary to s. 43 of the Act of 1861, and was not rendered something less than that merely by the fact that the punishment imposed was one that could be imposed for common assault.

Woods v. Woods ((1884), 10 P.D. 172) and *Powell v. Powell* ((1889), 14 P.D. 177) applied.

Appeal dismissed.

[As to the grounds of application for a summary order for non-cohabitation etc., see 12 HALSBURY'S LAWS (3rd Edn.) 485, para. 1073; and for cases on the subject, see 27 DIGEST (Repl.) 696, 6647-6649.

For the Summary Jurisdiction (Married Women) Act, 1895, s. 4, see 11 HALSBURY'S STATUTES (2nd Edn.) 849; and for the Criminal Justice Act, 1948, s. 7 (1), s. 12 (1), see 28 HALSBURY'S STATUTES (2nd Edn.) 358, 363.]

Cases referred to:

Crocker v. Raymond, (1886), 3 T.L.R. 181; 33 Digest 344, 548.

Holden v. King, (1876), 46 L.J.Q.B. 75; 35 L.T. 479; 41 J.P. 25; 27 Digest (Repl.) 88, 672.

Lewin v. Lewin, [1891] P. 254; 60 L.J.P. 85; 64 L.T. 834; 55 J.P. 296; 27 Digest (Repl.) 729, 6962.

Powell v. Powell, (1889), 14 P.D. 177; sub nom. *Re Powell*, *Powell v. Powell*, 61 L.T. 436; 53 J.P. 519; 27 Digest (Repl.) 732, 6983.

R. v. Harris, [1950] 2 All E.R. 816; [1951] 1 K.B. 107; 114 J.P. 535; 14 Digest (Repl.) 412, 4023.

R. v. Taylor, (1869), L.R. 1 C.C.R. 194; 38 L.J.M.C. 106; 20 L.T. 402; 33 J.P. 358; 14 Digest (Repl.) 359, 3497.

Woods v. Woods, (1884), 10 P.D. 172; 50 J.P. 199; 27 Digest (Repl.) 696, 6647.

Appeal.

This was an appeal by the wife from an order by the justices of Newcastle-upon-Tyne dismissing her complaint under s. 4 of the Summary Jurisdiction (Married Women) Act, 1895.

The parties were married on Aug. 3, 1956; there were no children of the marriage. On Dec. 12, 1958, the husband found separation papers and a marriage certificate relating to the wife's first marriage with a man since presumed dead. As a result of this discovery a quarrel ensued. On Jan. 25, 1959, the husband pleaded guilty to having assaulted his wife on this occasion, causing her grievous bodily harm contrary to s. 20 of the Offences against the Person Act, 1861. On Feb. 2, 1959, the justices conditionally discharged the husband, the condition being that he should commit no further offence within the next twelve months. They ordered him to pay £3 18s. costs.

On Apr. 2, 1959, the wife applied under s. 4 of the Act of 1895, for an order that she should be no longer bound to cohabit with the husband and for maintenance, on the ground that he had been convicted of an aggravated assault on her contrary to s. 43 of the Act of 1861. A different panel of justices heard the case and dismissed the application stating that it was not within s. 4 of the Act of 1895 on the ground that the offence of Jan. 25 was not an aggravated assault within s. 43 and that the offence could not be regarded for present purposes in view of s. 12 (1) of the Criminal Justice Act, 1948.

J. R. Johnson for the wife.

D. A. Orde for the husband.

LORD MERRIMAN, P.: This is a wife's appeal from the dismissal by the magistrates for the city and county of Newcastle-upon-Tyne on Apr. 2, 1959, of her complaint for an order under s. 4 of the Summary Jurisdiction (Married Women) Act, 1895. The particular ground on which she complained for an order was that her husband had been convicted summarily of an aggravated assault on her within the meaning of s. 43 of the Offences against the Person Act, 1861.

The magistrates found that that section was not complied with for two reasons. First that the assault (I will call it an "assault" without prejudice) committed on the wife did not come within s. 43 because the magistrates who heard the assault charge against the husband chose only to impose a conditional discharge, and secondly that it was a conviction which could not be regarded for the purposes of s. 4 by reason of the provisions of s. 12 of the Criminal Justice Act, 1948. Those two points are quite distinct. I think that they were completely wrong about the first and that they were right about the second, and I should say shortly why I take that view. Either reason, of course, is sufficient to oblige us to dismiss this appeal.

The material parts of s. 43 are as follows:

"When any person shall be charged before two justices of the peace with an assault . . . upon any female, either upon the complaint of the party aggrieved or otherwise, the said justices, if the assault or battery is of such an aggravated nature that it cannot in their opinion be sufficiently punished under the provisions hereinbefore contained as to common assaults . . . may proceed to hear and determine the same in a summary way, and, if the same be proved, may convict the person accused; and every such offender shall be liable to be imprisoned . . . for any period not exceeding six months, or to pay a fine not exceeding (together with costs) the sum of £20 . . ."

In fact, this man was charged with the more serious offence of an assault occasioning grievous bodily harm. It is very unfortunate that, no exhibits having been sent up, we have not even seen, and do not know whether the magistrates saw, the certificate of conviction. The matter stands thus. The wife said in evidence that her husband had been convicted, on his own confession, of this assault occasioning grievous bodily harm. We do not know the precise detail of

A it, and I do not know that that matters, because, if a certificate to that effect had been produced that, I think, would have been all that s. 4 demands. In my opinion s. 4 does not demand a re-trial of the circumstances in which the particular assault was committed. All that is required is that the man should have been convicted of it.

B I ought to say in passing that it has been the law for a great number of years, ever since the decision of *R. v. Taylor* (1), that it is open to a court on indictment for grievous bodily harm to find a common assault. I am only going to read the last sentence of the judgment, which is as follows (2):

C “On an indictment for a misdemeanour the jury may find the prisoner guilty of any lesser misdemeanour that is necessarily included in the offence as charged.”

On that basis it was held that an assault was necessarily included in the offence charged, and I should say without any hesitation so far as that is concerned that an assault occasioning grievous bodily harm contains, as the lesser offence, an aggravated assault.

D The magistrates have declined to act on that basis. The conviction was admitted and the whole case proceeded, as this appeal has proceeded, on the footing that the justices had before them evidence of what otherwise should have been proved. The magistrates, having heard the husband's confession, for he was convicted on his own confession of the offence of assault occasioning grievous bodily harm, had before them material from which, so it is suggested, it should have been inferred as the almost inevitable inference, that he had at least pleaded guilty to something which could be described as an aggravated assault. The law has, however, been changed in one respect. This offence has been made one which can, with the consent of the accused person, be dealt with summarily (3) instead of that offence having necessarily to go to quarter sessions or assizes on indictment, and thus coming within the next sentence of s. 4 of the Act of 1895, i.e.,

E “... [Any married woman] whose husband shall have been convicted upon indictment of an assault upon her, and sentenced to pay a fine of more than £5 or to a term of imprisonment exceeding two months . . .”

F It is common ground, though it is not proved as it should have been proved, that the husband did consent that the charge against him of an assault occasioning grievous bodily harm should be dealt with summarily on his plea of guilty of that offence. Accordingly, it is said that in accepting that plea the magistrates must at least have found him guilty of an aggravated assault, on the principle that the greater includes the less. They only imposed, however, the penalty, if it can be called a penalty, of a conditional discharge. It is necessary, therefore, to refer to s. 7 (1) of the Criminal Justice Act, 1948:

G “Where a court by or before which a person is convicted of an offence . . . is of opinion, having regard to the circumstances including the nature of the offence and the character of the offender, that it is inexpedient to inflict punishment . . . the court may make an order discharging him absolutely, or, if the court thinks fit, discharging him subject to the condition that he commits no offence during such period, not exceeding twelve months from the date of the order, as may be specified therein.”

H Acting on that section, the magistrates gave him a conditional discharge, with the period, as I understand it, of twelve months.

I Although the magistrates appear to have taken the view that there is the right to call an assault an aggravated assault and to deal with it accordingly by virtue of s. 43—i.e., “of such an aggravated nature that it cannot in their opinion be

(1) (1869), L.R. 1 C.C.R. 194.

(2) (1869), L.R. 1 C.C.R. at p. 196.

(3) See, now, s. 25 of the Magistrates' Courts Act, 1952; 32 HALSBURY'S STATUTES (2nd Edn.) 443.

sufficiently punished under the provisions hereinbefore contained as to common assaults"—yet they imposed a penalty which could perfectly well have been imposed in respect of a common assault, thereby, so it is suggested, negating the condition precedent to regarding it as an aggravated assault. A

That would have been a very interesting argument if it had been advanced for the first time, but unfortunately it was advanced in two cases to which we have been referred. One is *Woods v. Woods* (4) and the other is *Powell v. Powell* (5) which is precisely the opposite effect, for in *Woods v. Woods* (4) it was decided that: B

"If a husband has been convicted of an aggravated assault the magistrates may grant a judicial separation, even though they do not fine or imprison him."

Put the other way round, s. 4 of the Act of 1895 applies because of the conviction for an aggravated assault, even though the penalty actually imposed was such as could have been imposed for a simple assault, and BUTT, J., said this (6): C

"It seems to me that the reason of the thing is this. The man was found guilty of an assault and the magistrates thought that the penalties under s. 42 would by themselves be inadequate. But inasmuch as they were going further to order a weekly payment, and also to make an order about cohabitation and the custody of children, they thought they need only impose a nominal fine. The recital in the order seems to me quite sufficient, and the appeal therefore will be dismissed." D

In this case, not having the order before us, we have not got the benefit of any such recital, but it certainly seems to me to follow from the decision of CLEASBY, B., in *Holden v. King* (7), that it is open to the subsequent tribunal (in that case it was a judge of the High Court) to say for itself whether the conviction was or was not of an aggravated assault, and at any rate that was the view adopted by CLEASBY, B., in that case. So, here, I think that we are in a position to say, for the reasons which I have already given, that the offence of an assault occasioning grievous bodily harm ipso facto is an aggravated assault. E

That was followed by BUTT, J., in *Powell v. Powell* (5), and I need only read one sentence from the argument and the learned judge's reply to it (8). "Finally", the argument ran, "the order for separation was wrong, because the justices only inflicted the penalty for a common assault under s. 42". To this BUTT, J., replied "That is answered by *Woods v. Woods* (4)" and in a later decision still, *Lewin v. Lewin* (9), JEUNE, J., said in effect that he was bound by the conviction. As a matter of fact he also held himself to be bound by *Woods v. Woods* (4) and *Powell v. Powell* (5). In other words, the mere fact that the magistrates chose not to impose a higher penalty than they could perfectly well have imposed for a common assault is immaterial if the thing to which the accused pleaded guilty was, and ought to be held to be, an aggravated assault. If that were the only ground of appeal I should feel, speaking for myself, no hesitation in saying that that was not a ground for dismissing the wife's complaint; but, as I have already indicated, it is not the only ground of appeal. F

On the contrary, we are confronted by another section of the Criminal Justice Act, 1948, with which I will now proceed to deal. That is s. 12 (1), which reads G

"... a conviction of an offence for which an order is made under this Part of this Act, discharging [the offender] absolutely or conditionally shall be deemed not to be a conviction for any purpose other than the purposes of H

(4) (1884), 10 P.D. 172.

(6) (1884), 10 P.D. at p. 173.

(8) (1889), 14 P.D. at p. 178.

(5) (1889), 14 P.D. 177.

(7) (1876), 46 L.J.Q.B. 75.

(9) [1891] P. at p. 256. I

A the proceedings in which the order is made and of any subsequent proceedings which may be taken against the offender under the foregoing provisions of this Act."

B Those words "shall be deemed not to be a conviction for any purpose other than the purposes of the proceedings" are very clear and definite. The note in ARCHBOLD CRIMINAL PLEADING, EVIDENCE & PRACTICE (34th Edn.), p. 267, para. 728, to that section reads as follows:—"Section 12 absolves an offender from legal consequences which would otherwise flow from a conviction". I pause there, without reading on for a moment, to say that the making a complaint under s. 4 of the Act of 1895 is in terms "a legal consequence which would otherwise flow from a conviction". I need not read the words of the section again. It is plain that the complaint is based on a conviction under s. 43 of the Offences against the Person Act, 1861, by a court of summary jurisdiction for an aggravated assault. Those words "absolves the offender from legal consequences which would otherwise flow from a conviction" are taken wholesale from *R. v. Harris* (10), a decision of the Court of Criminal Appeal to which we have been referred. The judgment was given by HUMPHREYS, J. Quoting from MORRISON AND HUGHES ON THE CRIMINAL JUSTICE ACT, 1948, p. 35, where, in a note to s. 12, it is said "the section absolves the offender from legal consequences which otherwise would flow from the conviction", HUMPHREYS, J., said (11) "That is exactly what it does do".

E If that is so, it follows that this wife cannot produce to the magistrates' court dealing with her complaint a conviction for an aggravated assault or an assault occasioning grievous bodily harm, because the document which theoretically she produces is one in which the husband is given a conditional discharge, and, therefore, it is deemed by s. 12 of the Act of 1948 not to be a conviction. That being so, it seems to me that we have no option but to support the magistrates' decision on this ground, and to dismiss the appeal.

F PHILLIMORE, J.: I agree. So far as the second point is concerned it seems to me quite clear from the wording of s. 7 (1) of the Criminal Justice Act, 1948, that the intention of Parliament was to provide that where the court thinks it inexpedient to inflict punishment it should be able to discharge a man conditionally on his committing no further offence within twelve months, and with the benefit that he should not be stigmatised as having been convicted.

G That was the course which the justices took in this case. Having convicted this husband, on his own confession, of an assault occasioning grievous bodily harm, they discharged him conditionally. It would be strange in those circumstances if he was exposed to the legal consequences which would flow from a conviction, namely, the consequence that his wife could obtain an order that she might live separate and apart from him and that he should be bound to maintain her. It seems to me that such a position would fly directly in the face of the intention of the Act of 1948. I would accordingly dismiss this appeal.

H On the other point I would add a few words out of deference to the argument of counsel for the wife and to the fact that we are differing from the justices. The justices, as I understand it, took the view that inasmuch as the conviction (assuming it was a conviction) of the husband was for an assault occasioning grievous bodily harm, that was a conviction for an offence totally different from the offence of committing an aggravated assault. That is referred to in s. 43 of the Act of 1861. It is quite clear from the authorities to which we were referred, *Crocker v. Raymond* (12), and *Holden v. King* (13), that s. 43 does not create an offence separate from the offence of common assault created by s. 42. It merely

(10) [1950] 2 All E.R. 816; [1951] 1 K.B. 107.

(11) [1950] 2 All E.R. at p. 818; [1951] 1 K.B. at p. 113.

(12) (1886), 3 T.L.R. 181.

(13) (1876), 46 L.J.Q.B. 75.

enables the court, where it has found a person guilty of common assault, if it thinks that there were circumstances which were of an aggravating nature, to treat it accordingly and to inflict a heavier penalty. As the court found in *Crocker v. Raymond* (14) the section of the statute did not make two specific offences, but simply gave power to the justices, if they thought an assault to be of an aggravated character, to inflict adequate punishment for it. A

As my Lord has already pointed out, the authority of *Woods v. Woods* (15) and all the cases in which it has been followed, make it clear that even if the justices do not choose to inflict a heavier penalty than they were able to do for a common assault, nevertheless, if they choose to describe it as an aggravated assault the conviction is sufficient for the purposes of s. 4 of the Summary Jurisdiction (Married Women) Act, 1895. B

The husband was convicted on his own confession of causing grievous bodily harm under s. 20 of the Offences against the Person Act, 1861 (16), and we have the clear authority of *R. v. Taylor* (17), to show that where a man is convicted under that section it is open to a court to convict him instead, if it thinks the matter not of any serious character, of a common assault. Well, here the justices did not take that course. They convicted of the full offence under s. 20. It must follow that their conviction was of an assault more serious than an ordinary common assault, and must at least have amounted to an aggravated assault within the meaning of s. 43, and, if that point had stood alone, I should have felt unable to agree with the decision of the justices. C D

As it is, however, for the reasons which I have ventured to give to supplement those already given by my Lord in regard to the question whether this was a conviction, this appeal should be dismissed. E

Appeal dismissed.

Solicitors: *Robinson & Bradley*, agents for *Smirk, Thompson & Craigs*, Newcastle-upon-Tyne (for the wife); *Gibson & Weldon*, agents for *L. Mulcahy*, Gateshead (for the husband).

[*Reported by N. P. METCALFE, Esq., Barrister-at-Law.*]

(14) (1886), 3 T.L.R. 181.

(16) 5 HALSBURY'S STATUTES (2nd Edn.) 795.

(15) (1884), 10 P.D. 172.

(17) (1869), L.R. 1 C.C.R. 194.

A

SCOTT v. MUSIAL.

[COURT OF APPEAL (MORRIS, Ormerod and Willmer, L.J.J.), July 3, 6, 1959.]

Court of Appeal—Damages—Assessment by jury—Test for intervention of appellate court—Whether comparable awards in trials by judges alone may establish a level against which to test jury's award.

B

In a motor accident for which the defendant was wholly responsible the plaintiff suffered very severe injuries and at a trial by judge and jury was awarded by the jury £18,000 damages. The defendant appealed as to damages, referring to comparable awards in cases tried by judges alone and contending that from them a standard emerged which this award exceeded; he relied particularly on *Waldon v. The War Office* ([1956] 1 All E.R. 108), as showing a maximum comparable figure (£17,000)*.

C

Held: (i) (per MORRIS, L.J., WILLMER, L.J., concurring) an award of a jury which does not conform to a pattern or level of awards of damages by judges in cases tried by judges alone is not thereby shown necessarily to be wrong, for the views of juries may form a valuable corrective to the views of judges, and juries may not know of, and are not bound by, any level that judges have thought to be appropriate (see p. 196, letter C, post), and

D

(ii) the court would not interfere with the jury's award in this case because, applying the settled test (stated by LORD WRIGHT in *Mechanical & General Inventions Co., Ltd. & Lehwess v. Austin & Austin Motor Co., Ltd.*, [1935] All E.R. Rep. at p. 37, and *Davies v. Powell Duffryn Associated Collieries, Ltd.* (No. 2), [1942] 1 All E.R. at p. 664), the award was not out of all proportion to the circumstances of the case.

E

Appeal dismissed.

[As to review of damages awarded by a jury, see 11 HALSBURY'S LAWS (3rd Edn.) 310-312, paras. 504-507; and for cases on the subject, see 17 DIGEST (Repl.) 177-193, 721-912.]

F

Cases referred to:

Bocock v. Enfield Rolling Mills, Ltd., [1954] 3 All E.R. 94; [1954] 1 W.L.R. 1303; 3rd Digest Supp.

Davies v. Powell Duffryn Associated Collieries, Ltd. (No. 2), [1942] 1 All E.R. 657; [1942] A.C. 601; 111 L.J.K.B. 418; 167 L.T. 74; 2nd Digest Supp.

G

Dolbey v. Goodwin, [1955] 2 All E.R. 166; [1955] 1 W.L.R. 553; 3rd Digest Supp.

Mechanical & General Inventions Co., Ltd. & Lehwess v. Austin & Austin Motor Co., Ltd., [1935] All E.R. Rep. 22; [1935] A.C. 346; 104 L.J.K.B. 403; 153 L.T. 153; Digest Supp.

Waldon v. The War Office, [1956] 1 All E.R. 108; [1956] 1 W.L.R. 51; 3rd Digest Supp.

H

Appeal.

The plaintiff brought an action for damages for personal injuries sustained by him alleged to be due to the negligent driving of the defendant and at the trial of the action by PAULL, J., and a jury on Oct. 13, 14 and 15, 1958, obtained judgment for £18,487 10s. and costs.

I

The defendant appealed against part of the verdict and the judgment claiming an order for a new trial on the issues of damages, or alternatively an order varying the verdict and judgment by substituting for the £18,487 10s. such lower sum as might seem proper to the court having regard to the extent of the damage which the plaintiff had suffered. The grounds of appeal were that the judge had misdirected the jury in directing them in terms which suggested that the plaintiff's existing employment was only of limited duration and that after a

* See p. 199, letters A and B, post.

reasonable time he would have to find other work; and that the general damages awarded of £18,000 were a wholly erroneous estimate of the damage suffered by the plaintiff and out of all proportion to the facts and ought to be reduced.

As the result of the motor accident the plaintiff, who was twenty-nine years of age, suffered the following injuries: (i) severe concussion, the plaintiff remaining unconscious for a week and having as a result no interest in anything and hallucinations of sight for six weeks thereafter, with the possibility that that might mean that there was damage to certain centres of the brain and that he might become an epileptic, although the danger was receding after eighteen months at the date of the trial, the evidence being that epilepsy usually occurred within two years of the accident in such cases; (ii) a fracture of the spine resulting in damage to the "telephone communication" between the brain and the limbs, so that the brain could not send signals down to the limbs and the limbs could not make signals up to the brain; (iii) at first total paralysis below the waist, which in due course showed improvement; paralysis of the bladder made it permanently impossible to control, so that urine came away as it was formed, day and night, even in the middle of the sexual act; the condition requiring, according to the surgeon's evidence, a serious operation to enable the urine to be brought out at the side into a contraption to be fastened there, which would periodically need to be taken off, emptied and replaced; damage to the kidneys, which the surgeon hoped would not result in their infection (a serious matter), especially if the operation was carried out; paralysis in the rectum involving inability to feel motions but partly controlled by the plaintiff's constipating himself so as to reduce motions to one every two days; (iv) limb injuries for which he wore a full length metal calliper down the right leg to his boot and a contraption on his foot to prevent its dropping; he could not sit comfortably for more than a few minutes; he had a stick and was in peril of falling and had fallen and broken his wrist a few days before the trial; it was hoped that his leg condition would get better, that his muscles would get stronger and that he would be able to dispense with the calliper and have a kind of T-iron fitting to his heel; (v) three broken ribs resulting in injury to the lung which had collapsed; the ribs had healed and the lung was restored. Though able to perform the sexual act he was unable to feel it and he was deformed to some extent.

N. J. Skelhorn, Q.C., and V. B. Watts for the defendant.

Martin Jukes, Q.C., and B. C. Sheen for the plaintiff.

MORRIS, L.J.: The principal contention raised in this appeal is that an award of damages made by a jury was excessive. On May 4, 1957, the plaintiff in the action, while riding a motor cycle, was gravely injured as the result of a collision with a motor van. He alleged negligence against the defendant. The defendant denied negligence, and alleged that the plaintiff was himself negligent to an extent that, either wholly or partly, caused his injuries. The decision was made that the trial of the action should be with a jury. It therefore became the province of the jury first to decide as to liability, and, if they found liability established, to decide what damages should be awarded.

When someone has suffered the torment of having his body so crushed or battered that the whole course of his life will be changed, it is a task of supreme difficulty to endeavour to assess the monetary sum which will fairly compensate him. A judge or jury can but essay to preserve a sense of proportion, of moderation, and of fairness. It will be reasonable to bear in mind what relation the injuries under consideration bear to other injuries to which the misfortunes of life may make man subject. It will be essential to make calm reason gain the mastery over the urges which pity may inspire. It will be necessary to harness those qualities of balanced common sense which form a sure guide to decision. It will be proper to have regard to what a particular sum of money may produce or may secure.

A In these days, in the great majority of cases, the responsibility of assessing the amounts of damages rests with judges sitting alone. In recent times, some eminent judges have voiced the opinion that determinations by juries would often be helpful. Thus SINGLETON, L.J., said in this court in *Bocock v. Enfield Rolling Mills, Ltd.* (1)

B "...it has been said more than once that, where damages have to be assessed, a judge sitting by himself is not in as good a position as are twelve members of a jury. They have an opportunity of discussing the matter among themselves, and, though they may not have great experience in the matter, twelve heads should be better than one."

In the following year, in *Dolbey v. Goodwin* (2), LORD GODDARD, C.J., said:

C "The court is always reluctant to interfere in these cases, because we know the difficulty that all judges have in coming to a decision. I think it is one of the most difficult tasks that any judge can have. I have often felt that in really serious cases of this kind it is better to have a jury, because the opinion of twelve people is probably more satisfactory than the opinion of one."

D In the present case there was a jury. It is now said that their award was excessive. In considering this matter, the approach of the court is different from its approach in cases tried by a judge alone. Where there is an appeal from the decision of a judge sitting alone, the appeal is by way of re-hearing. The re-hearing applies to the issue of damages as well as to other issues. But it is recognised that the fixation of damages is so largely a matter of opinion or of impres-

E sion that differences of calculation or assessment are to be expected. There is to some extent an exercise of judicial discretion. It is for this reason that, if three judges of the Court of Appeal consider that the amount of general damages that they would have awarded would have been a figure different from that decided by the trial judge, they will not, for that reason alone, give preference to their own figure; they will only do so if satisfied that the judge has acted on a wrong

F principle of law or has misapprehended the facts, or has, for those or other reasons, made a wholly erroneous estimate of the damage suffered (see the speech of LORD WRIGHT in *Davies v. Powell Duffryn Associated Collieries, Ltd.* (No. 2) (3)). But, if there has been an assessment of damages by a jury, the function of the Court of Appeal on a complaint that the damages are too high or too low is different. Where the order of the court has been that trial is to be with a jury,

G then twelve jurors have collectively (and, be it remembered, unanimously) to decide on an assessment. On appeal, always assuming that the trial has been properly conducted and that the jury have been properly directed, it is not for the members of the Court of Appeal to seek to substitute their assessment and their judgment for that of the jury; the function of the Court of Appeal is then directed to considering whether or not the figure stated by the jury is out of all proportion to the circumstances of the case. Unless it is, this court must not

H interfere. The jury do not have to give reasons, and it may be impossible to deduce how the jury have regarded the particular individual features of a claim, such as, e.g., in a personal injuries case, pain and suffering, deprivation of the amenities of life, and future possible loss of earnings. To warrant any interference with the award of a jury it is not enough to say that the award is more, or even much more, or less, or even much less, than what the judges of the Court of

I Appeal would consider to be the appropriate amount. The Court of Appeal will not interfere if the figure is one which a jury, acting properly, might award. Interference will be justified if it is made to appear that the jury must have acted improperly and so have brought about a palpably wrong result. If the figure of an award seems to be outrageous, or so extravagant that no other jury would repeat it, then there might, in some cases, be ground for suspecting that a jury

(1) [1954] 3 All E.R. at p. 95.

(2) [1955] 2 All E.R. at p. 167.

(3) [1942] 1 All E.R. at p. 664; [1942] A.C. at p. 616.

has been partial or perverse. But, as the Court of Appeal will only have to consider the figure as announced by the jury, the court will have to decide, on a consideration of the figure itself, whether it appears so excessive or so inadequate that no twelve reasonable jurors could reasonably have awarded it; or, stated otherwise, whether the figure appears to be out of all proportion to the circumstances of the case (see the speech of LORD WRIGHT in *Mechanical & General Inventions Co., Ltd. & Lehuess v. Austin & Austin Motor Co., Ltd.* (4)).

In the present case we were referred by Mr. Skelhorn in, if I may be allowed to say so, a most powerful address, to some figures of awards in cases resembling the present one which had been tried by judges alone. He submitted that the award of the jury in the present case should be regarded as being higher than those awarded by judges in comparable cases. Whether this be so or not cannot be in any way decisive in this case. In cases which are comparable but which are decided by different judges, a certain pattern or level of awards of damages may emerge. If, however, an award of a jury does not seem to conform to such pattern, that is not to prove that the jury is necessarily wrong. The views of juries may form a valuable corrective to the views of judges. The jury will not necessarily have knowledge of any pattern or level which judges have thought to be appropriate, and the jury are not bound by any such pattern or level. It is inevitable that members of the Court of Appeal, when considering a complaint against the award of a jury, will formulate individual views as to the figure of damages which they themselves would have deemed appropriate. That will be comprehended within, and will be one part of, the process of deciding whether the jury's award is out of all proportion to the circumstances of the case. It must, however, be no more than a part of that process. The figure of an award by a jury is not to be deemed to be wrong merely because judges might have arrived at a different figure. Where, therefore, a jury is charged with the responsibility of assessing damages, their conclusion will only be assailed or displaced if attack can be made on it on the lines that I have mentioned.

With that approach, I now consider the facts in the present case. The jury found in favour of the plaintiff on the issue of liability, and therefore had to assess the figure of damages. The figure of special damages was not much in contest. The injuries sustained by the plaintiff were undoubtedly extremely grave. He had a fracture of his spine, broken ribs, and the left lung was collapsed. At first there was total paralysis below the waist. The plaintiff was about twenty-eight or twenty-nine years of age at the time of the accident. He was in bed for many weeks, but he was discharged from hospital on Nov. 11, 1957, the accident having been on May 4, 1957. He was then able to walk with a calliper and by using a stick, though he was somewhat unsteady. He showed a courage and determination which were applauded by all concerned in the litigation, and his anxiety to get back to work was assisted by those who had previously employed him. They took him back at his previous rate of remuneration, although he was only able to do one part of the work that he was employed to do. He was in charge of the maintenance department in the garage belonging to The Nestlé Co., Ltd. He was a skilled artificer, but, after the accident, he was unable to do the practical side of his work; he had to concentrate on clerical or administrative work. Although his employers were in no way connected with the accident, they were generous indeed. They sent a car for him each morning, they allowed him to work less than a full day (although soon he was able to be at his business for a great many hours each day), and they gave him the wage that he had previously earned.

Now I mentioned in my approach to the matter that, of course, there must be no misdirection if the award of a jury is to stand. The appeal was brought on two grounds. It was said that there was misdirection, and also it was said that the figure of the general damages awarded to the plaintiff, £18,000, was a wholly

A erroneous estimate of the damage suffered by the plaintiff and out of all proportion to the facts, and ought to be reduced. But there was one further complaint. It was said that the learned judge misdirected the jury in that he directed them in terms which suggested that the plaintiff's present employment was only of limited duration, and that after a reasonable time he would have to find other work.

B [HIS LORDSHIP read from the summing-up to the jury and from the evidence of the manager of The Nestlé Co., Ltd., and continued:] The jury heard all that evidence, and it seems to me that all that the learned judge was telling the jury was that, though The Nestlé Co., Ltd. had treated the plaintiff very well, it did not follow that his income was safe—" ' for a reasonable time ' was the evidence, and after that he has to shift for himself ". It does not seem to me that these words were out of conformity with the evidence given, which showed that The Nestlé Co., Ltd. were behaving most generously; they had promised to keep him on for a reasonable time, and they were keeping him on. But was his employment safe? Other people might become in authority in the company who were not able to behave so generously; the fortunes of the company might be different; the necessities might change. The learned judge was merely reminding the jury that the plaintiff's employment was not safe. I do not feel that there was any misdirection.

The main issue therefore is whether, on the approach which I have endeavoured to state, the court ought to interfere and say that this award should be set aside.

E The learned judge dealt most carefully with the injuries which the plaintiff has suffered. I do not propose to go through them all in detail. There is no question that they were grave indeed, and counsel for the defendants, in his very fair address, has not minimised the gravity of them. The learned judge first pointed out that there was a fracture of the spine, very severe concussion, and three broken ribs resulting in injury to the lung. But he pointed out that the ribs had healed and that the lung was all right. In regard to the concussion, F he pointed out, quite accurately, that the plaintiff had been unconscious for a week, and that after that, for a period of some six weeks, he suffered hallucinations as a result of his severe concussion. The learned judge went on to say this:

G " The evidence is that may mean that there is damage to certain centres of the brain, and it may mean, unfortunately—and you must bear this in mind, members of the jury—that he will become an epileptic. On the other side, that danger is fading away, because epilepsy usually comes, according to the evidence, within two years after an accident of this sort ",

and he went on to point out that already eighteen months had elapsed and that no epilepsy had occurred. Then he referred to the really serious injury to the spine. [HIS LORDSHIP described the plaintiff's injuries and continued:] Then H there was another very distressing and serious part of the matter relating to his future sexual life. I do not want to read what the learned judge said. He described the position quite fairly, and no complaint is made of the treatment of the matter in the summing-up. He said that the members of the jury might think that that was a very serious aspect of the matter for a young man of twenty-nine.

I Mr. Skelhorn submitted most powerfully that this case was different from the cases which are sometimes referred to as " wheel-chair cases ". He made that submission when putting before us a comparison between some awards of learned judges in such cases and the award here. For the reasons that I have given, such comparison cannot be decisive. Counsel for the plaintiff in reply said that, though this is not a wheel-chair case, the plaintiff had some afflictions that do not beset those who are condemned to a wheel-chair existence. Counsel for the defendant says: " Well, at least this man can go about and can do his work ".

The learned judge was careful to invite the jury to be moderate. He said: "So you have to arrive at a sum which is fair, to cover all three"—the three being pain and suffering, loss of the amenities of life and the disabilities to which this man is now subject, and possibly loss of future earnings. In regard to the last, there was first a risk that the man would lose his position with The Nestlé Co., Ltd., and then be less well placed; and there was further the fact that, even if he stayed with The Nestlé Co., Ltd., he must be debarred from prospects of advancement—of rising to a better position. That was for the jury to consider. [His LORDSHIP read the judge's direction to the jury on the measure of damages, stressing the need to avoid an extravagant or fantastic as opposed to a substantial but reasonable sum and to be fair to the defendant and to the plaintiff and continued:]

The summing-up of the learned judge, as to which there is no complaint save that to which I have referred and which in my judgment is not substantiated, was a fair and balanced summing-up which left the matter to the jury for their good judgment. The injuries are undoubtedly grave; the figure of the award is certainly high. On the principles that must guide us, I do not feel that it would be right for us to upset that decision of the jury or to say that their award cannot stand. For these reasons I think that the appeal fails.

ORMEROD, L.J.: I agree that this appeal should be dismissed. The appeal was founded on two grounds. The first one was that the judge misdirected the jury on a question of fact as to the plaintiff's employment. As to that, I agree with everything my Lord has said, and I agree that there is really no substance in that criticism of the summing-up of the learned judge. The second ground on which the defendant founded this appeal was that, in the circumstances of this case, the figure was altogether too high—so high that this court would be justified in reducing it.

I would not attempt to improve on the appreciation of the difference between the duty of this court in dealing with an appeal on the issue of damages from a judge alone on the one hand and from a judge and jury on the other which has just been made by my Lord. But there is really no issue between the parties in this case as to the test which this court must apply in deciding whether to interfere with the verdict of a jury. It was laid down by LORD WRIGHT in *Davies v. Powell Duffryn Associated Collieries, Ltd.* (No. 2) (5), and cited by SINGLETON, L.J., in *Bocock v. Enfield Rolling Mills, Ltd.* (6). SINGLETON, L.J., says:

"In *Davies v. Powell Duffryn Associated Collieries, Ltd.* (No. 2), LORD WRIGHT considered cases in which the Court of Appeal should, or ought to, interfere with a judgment on damages of a judge sitting by himself, and said (5): 'There is an obvious difference between cases tried with a jury and cases tried by a judge alone. Where the verdict is that of a jury, it will only be set aside if the appellate court is satisfied that the verdict on damages is such that it is out of all proportion to the circumstances of the case . . .'"

There are many other passages in the reports of cases, both in the House of Lords and in this court, setting out the test to be applied, but they all amount to the same thing, that this court will only interfere if the award of damages is out of all proportion to the circumstances of the case.

The real argument in this case was how that test should be applied. Counsel for the defendant agreed that the injuries were very serious indeed, but argued that they were not as serious as in the cases of total paralysis from the waist downwards which have been described for convenience as "wheel-chair cases", and therefore, in considering the maximum beyond which no award, even of a jury, should go, it was proper to consider the damages which had been awarded by judges from time to time in what have been described as the wheel-chair

(5) [1942] 1 All E.R. at p. 664; [1942] A.C. at p. 616.

(6) [1954] 3 All E.R. at p. 96.

A cases. He relied strongly on the decision of this court in *Waldon v. The War Office* (7), where the injured man was approximately the same age as the plaintiff in this case and the injuries were such that he was condemned to spend the rest of his life in a wheel-chair, and this court increased the amount of general damages from £12,000 to £17,000. Counsel for the defendant argued that this should really be the maximum figure which should be awarded in cases of serious injury of this kind. Also he submitted that, from decisions of judges alone and judges sitting with juries in similar cases, a pattern has emerged which at least determines the standard of reasonableness which must be applied and, therefore, the damages in this case were very much in excess of that standard of reasonableness, and out of all proportion to the circumstances of the case.

C On the other hand, counsel for the plaintiff argued that here no standard could be applied. The damages were entirely at large. He adopted as part of his argument some words from one of the Hamlyn Lectures recently delivered by DEVLIN, J., when he said that a jury was not supposed to conform to a standard that it cannot know about. Be that as it may, it is of course well-established practice in the courts that a judge in summing-up shall give the jury no indication of the kind of figure at which they should arrive in determining damages. It is left to them entirely, and they have to do the best they can from the knowledge they have of the circumstances of the case, being, presumably, reasonable men and women.

But, from time to time, as in this case, this court has the duty of deciding whether a sum awarded by a jury is out of all proportion to the circumstances of the case. I fail to see how that duty can be discharged unless the court has in mind a general idea of the damages which are being awarded day by day by the courts in cases of this kind. In my view, to say that there is a standard or pattern in accordance with which damages are awarded would be using language which is much too precise. But, in my judgment, it would also be departing from reality to expect this court to decide whether an award was out of all proportion to the circumstances of the case without having in mind a general comparison with the damages awarded in cases of a similar nature. Clearly the margins of that comparison must be wide, for the cases vary infinitely in their circumstances. One tribunal, be it judge alone or a judge and jury, may take a different view from another of a plaintiff's future earning capacity, or may be differently impressed by the loss of some faculty affecting the plaintiff's enjoyment of life. But, after considering all these matters, I think that there does emerge a general idea of the sort of figure which, by experience, is regarded as reasonable in the circumstances of a particular case, and that is how a case of this kind must be approached by this court.

Having regard to the difference in considering on the one hand an appeal from a decision of a judge alone, and on the other hand an appeal from a decision by a jury, and approaching the matter as I have endeavoured to set out, how is the test to be applied in this case? There is no doubt that the injuries were serious. There was very serious physical impairment; not perhaps so complete as in the wheel-chair cases, but none the less very serious indeed. There is apparently the necessity for a serious operation, to which my Lord has referred, to mitigate, so far as possible, the bladder trouble which the plaintiff now has. There is the pain, and the possibility of increasing pain, which he will suffer through the years as the result of the deformity of the spine. There is, of course, the head injury, with the possibility, which fortunately grows less and less as time goes on, of traumatic epilepsy. There is the very serious impairment, to which reference has already been made, of his sexual capacity. It is impossible for us to say what regard the jury had to the various items of incapacity, all of which were put before them very clearly in the summing-up of the learned judge. But, having regard to the overall picture of the disability and the discomfort this man will have to endure for the rest of his life, and attempting to

approach the matter in what appears to me to be the proper way, I have come to the conclusion that, although the sum of £18,000 for general damages is in the circumstances of this case a high one, it is not so high as to be out of all proportion to the circumstances of the case. I too, therefore, would dismiss the appeal. A

WILLMER, L.J.: I have reached the same conclusion, and agreeing, as I do, entirely with what has fallen from my Lords already, I find it quite unnecessary to add any words of my own. B

Appeal dismissed.

Solicitors: *Harold M. Storer* (for the defendant); *White & Co.* (for the plaintiff).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*] C

R. v. BAINBRIDGE.

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Byrne and Winn, J.J.), June 8, 1959.] D

Criminal Law—Accessory before the fact—Direction to jury—Whether knowledge of type of crime or of precise crime essential.

Oxygen cutting equipment used by thieves for breaking into a bank had been bought for them, some six weeks earlier, by the appellant. He was charged with being an accessory before the fact to office-breaking, the case against him being that he had bought the cutting equipment on behalf of the thieves with full knowledge that it was to be used for breaking and entering premises. He admitted that he had suspected that the equipment was required for something illegal, i.e., breaking up stolen goods, but he denied having any knowledge that the equipment would be used for any such purpose as that for which it was used. In his summing-up, the judge said that, as well as proving that the felony itself had been committed, the prosecution had to prove (i) that the appellant knew that a felony of that kind (breaking and entering premises and stealing property from the premises) was intended, but that it was not enough that he should have known merely that some crime was going to be committed; and (ii) that with that knowledge he did something to help the felons commit a felony of the kind that in fact was committed, but knowledge of the precise crime (i.e., that the particular bank was going to be broken and entered) did not have to be proved. The appellant was convicted of the offence. On appeal, it was contended that the judge's direction was wrong and that, for the appellant to be convicted as an accessory before the fact, it had to be shown that he knew that the cutting equipment was to be used for breaking into the particular bank on the particular date. E

Held: it was not necessary to prove that the appellant knew the date on which the felony was to be committed or the particular premises which were to be broken and entered, and the judge's direction to the jury was correct. F

Appeal dismissed. G

[**Editorial Note.** The decision in the present case should be considered with that in *R. v. Bullock* ([1955] 1 All E.R. 15), where a direction distinguishing between a particular and a general unlawful purpose was, in the circumstances, unnecessary. H

As to accessories before the fact, see 10 HALSBURY'S LAWS (3rd Edn.) 300, para. 558; and for cases on the subject, see 14 DIGEST (Repl.) 105, 684-695, and 645, 6551.] I

A Appeal.

The appellant, Alan Bainbridge, was convicted at the Central Criminal Court of being accessory before the fact to office-breaking and was sentenced to four years' imprisonment. He appealed against conviction.

R. M. G. Simpson for the appellant.

J. M. G. Griffith-Jones for the Crown.

B

LORD PARKER, C.J., delivered the following judgment of the court: The appellant in this case was convicted at the Central Criminal Court of being accessory before the fact to office-breaking and was sentenced to four years' imprisonment. He now appeals against his conviction only on a point of law.

C

The facts were these. On the night of Oct. 30, 1958, the Stoke Newington branch of the Midland Bank was broken into by cutting the bars of a window, the doors of the strong room and of a safe inside the strong room. They were opened by means of oxygen cutting equipment and nearly £18,000 was stolen. The cutting equipment was all left behind, and it was later found that that cutting equipment so left behind by the thieves had been purchased by the

D

appellant some six weeks earlier. The case against him was that he had bought this cutting equipment on behalf of one or more of the thieves with the full knowledge that it was going to be used, if not against the Stoke Newington branch of the Midland Bank, at any rate for the purposes of breaking and entering premises. The appellant's case, as given in his evidence, was this: "True, I had bought this equipment from two different firms. I had gone there with a man called Shakeshaft to buy it for him. As a result of conversation which I had with him, I was suspicious that he wanted it for something illegal. I thought it was for breaking up stolen goods which Shakeshaft had received, and, as the result, in making those purchases I gave false names and addresses; but I had no knowledge that the equipment was going to be used for any such purpose as that for which it was used".

E

The complaint here is that JUDGE AARVOLD, who tried the case, gave the jury a wrong direction in regard to what it was necessary for them to be satisfied of in order to hold the appellant guilty of being an accessory before the fact. The passages in question are these:

F**G**

"To prove that, the prosecution have to prove these matters: first of all, they have to prove that the felony itself was committed. Of that there is no doubt. That is not contested. Secondly, they have to prove that the [appellant] knew that a felony of that kind was intended and was going to be committed, and with that knowledge he did something to help the felons commit the crime. The knowledge that is required to be proved in the mind of [the appellant] is not the knowledge of the precise crime. In other words, it need not be proved that he knew that the Midland Bank, Stoke Newington branch, was going to be broken and entered, and money stolen from that particular bank, but he must know the type of crime that was in fact committed. In this case it is a breaking and entering of premises and the stealing of property from those premises. It must be proved that he knew that that sort of crime was intended and was going to be committed. It is not enough to show that he either suspected or knew that some crime was going to be committed, some crime which might have been a breaking and entering or might have been disposing of stolen property or anything of that kind. That is not enough. It must be proved that he knew that the type of crime which was in fact committed was intended."

H**I**

There are other passages to the same effect; in particular, when the jury returned for further directions before they came to their verdict, the learned judge said this:

"If in fact, before it has happened, [the appellant], knowing what is going to happen, with full knowledge that a felony of that kind is going to take

place, deliberately and wilfully helps it on its way, he is an accessory . . .
 If he was not present he would not be guilty as a principal, but then you
 would have to decide whether he helped in purchasing this equipment for
 Shakeshaft knowing full well the type of offence for which it was going to be
 used, and, with that knowledge, buying it and helping in that way.

Counsel for the appellant, who argued this case very well, contended that that
 direction was wrong. As he put it, in order that a person should be convicted
 of being accessory before the fact, it must be shown that, at the time when he
 bought the equipment in a case such as this, he knew that a particular crime
 was going to be committed; and by "a particular crime" counsel meant that
 the premises in this case which were going to be broken into were known to the
 appellant and contemplated by him, and not only the premises in question but
 the date when the crime was going to occur; in other words, that he must have
 known that on a particular date the Stoke Newington branch of the Midland
 Bank was intended to be broken into.

The court fully appreciates that it is not enough that it should be shown that
 a person knew that some illegal venture was intended. To take this case, it
 would not be enough if the appellant knew—he says that he only suspected—
 that the equipment was going to be used to dispose of stolen property. That
 would not be enough. Equally, this court is quite satisfied that it is unnecessary
 that knowledge of the intention to commit the particular crime which was in
 fact committed should be shown, and by "particular crime" I am using the
 words in the same way as that in which counsel for the appellant used them,
 namely, on a particular date and particular premises.

It is not altogether easy to lay down a precise form of words which will cover
 every case that can be contemplated, but, having considered the cases and the
 law, this court is quite clear that the direction of JUDGE AARVOLD in this case
 cannot be criticised. Indeed, it might well have been made with the passage in
 FOSTER'S CROWN CASES (3rd Edn.) (1792) at p. 369 in mind, because there the
 learned author says:

"If the principal totally and substantially varieth, if being solicited to
 commit a felony of one kind he *wilfully and knowingly* committeth a felony
 of another, *he* will stand single in that offence, and the person soliciting will
 not be involved in his guilt. For on *his* part it was no more than a
 fruitless ineffectual temptation."

The converse of course is that, if the principal does not totally and substantially
 vary the advice or the help and does not wilfully and knowingly commit a
 different form of felony altogether, the man who has advised or helped, aided or
 abetted, will be guilty as an accessory before the fact.

JUDGE AARVOLD in this case, in the passages to which I have referred, makes it
 clear that there must be not merely suspicion but knowledge that a crime of the
 type in question was intended, and that the equipment was bought with that
 in view. In his reference to the felony of the type intended it was, as he states,
 the felony of breaking and entering premises and the stealing of property from
 those premises. The court can see nothing wrong in that direction.

Appeal dismissed.

Solicitors: *L. Dawson & Co.* (for the appellant); *Director of Public Prosecutions*
 (for the Crown).

[Reported by KEVIN WINSTAIN, ESQ., Barrister-at-Law.]

A

R. v. WALDEN.

[COURT OF CRIMINAL APPEAL (Hilbery, Havers and Thesiger, JJ.), July 27, 30, 1959.]

Criminal Law—Capital murder—Diminished responsibility—Direction to jury—

B

Whether direction to jury may include illustration of what can constitute abnormality of mind—Homicide Act, 1957 (5 & 6 Eliz. 2 c. 11), s. 2 (1).

Where a person charged with murder raises under s. 2* of the Homicide Act, 1957, the defence of diminished responsibility, although it is a sufficient direction if the trial judge draws the attention of the jury to the exact terms of s. 2, it is not a misdirection on his part if he also points out to the jury, by way of illustration or explanation, the sort of things which they have to consider in deciding whether the defence has proved that the accused "was suffering from such abnormality of mind . . . as substantially impaired his mental responsibility" within s. 2 (1). (See p. 205, letter E, post.)

C

R. v. Spriggs ([1958] 1 All E.R. 300) explained.

D

[For the Homicide Act, 1957, s. 2 (1), see 37 HALSBURY'S STATUTES (2nd Edn.) 174.]

Cases referred to:

H.M. Advocate v. Braithwaite, 1945 S.C. (J.) 55; 14 Digest (Repl.) 65, 238.

M'Naghten's Case, (1843), 10 Cl. & Fin. 200; 8 E.R. 718; sub nom.

E

McNaughton's Case, 4 State Tr. N.S. 847; 14 Digest (Repl.) 60, 246.

R. v. Spriggs, [1958] 1 All E.R. 300; [1958] 1 Q.B. 270; 42 Cr. App. Rep. 69; [1958] 2 W.L.R. 162.

Application for leave to appeal.

The applicant, Bernard Hugh Walden, was convicted under s. 5 (1) (b) of the Homicide Act, 1957, at Sheffield Assizes on July 1, 1959, before PAULL, J., sitting with a jury, of two capital murders, namely, capital murder of Joyce Moran by shooting and of Neil Saxton by shooting, and was sentenced to death. He applied for leave to appeal against the convictions on the ground of misdirection by the judge on the defence of diminished responsibility under s. 2 of the Act of 1957.

F

G

After hearing argument on July 27, 1959, the Court of Criminal Appeal dismissed the application and intimated that the reasons for dismissal would be put into writing and announced later.

H. C. Scott and *J. F. S. Cobb* for the applicant.

G. S. Waller, Q.C., and *J. B. Willis* for the Crown.

H

Cur. adv. vult.

I

July 30. **HILBERY, J.**, read the following judgment of the court: The applicant, aged thirty-three and a well-educated man, was an assistant lecturer at Rotherham Technical College. He had proposed marriage to Joyce Moran, a girl of twenty-one, employed in the office at the college, who had declined his proposal, and favoured a student at the college of the same age as herself, Neil Saxton. A week or so later the applicant left a class which he was taking and passed in the corridor, on his way to his locker, Neil Saxton, who was talking to Joyce Moran through a window. Returning from his locker he shot Neil Saxton

* Section 2 (1) of the Homicide Act, 1957, reads: "Where a person kills . . . another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing . . . the killing."

through the back and then went into the office and shot Joyce Moran through the back six times, the last three shots being fired into her back as she lay on the ground. Neil Saxton and Joyce Moran died from gunshot wounds. The applicant then ran off to his car, which he later abandoned at Leeds with the pistol which he had used and some spare cartridges. He was found three weeks later by a police constable in a shelter at Reading. A

The evidence that the applicant had shot and killed Joyce Moran and Neil Saxton was overwhelming, and, indeed, was not disputed by the defence. At the trial evidence was adduced for the defence with a view to proving that the applicant was suffering from such abnormality of mind as substantially impaired his mental responsibility for his acts in doing the killing, within the meaning of s. 2 (1) of the Homicide Act, 1957. Dr. Valentine, a consultant psychiatrist, was of opinion that the applicant was suffering from a severe abnormal type of personality and had a chronic paranoid development, and that he was grossly abnormal so that his mental responsibility for his acts was substantially impaired. For the prosecution Dr. Walker, the senior medical officer of the prison, who had the applicant under observation from the time of his arrest until the trial, could not detect any signs of chronic paranoid development or any signs of mental disorder or defect and was of the opinion that the applicant was not suffering from any abnormality of mind. Dr. Fraser, a consultant psychiatrist, was of the opinion that the applicant was not suffering from any abnormality of mind and that all his reactions were within the limits of normality. It was, therefore, for the jury to decide on the evidence whether the applicant had proved on balance of probability that he was suffering from such abnormality of mind as substantially impaired his mental responsibility for his acts. The jury convicted the applicant of capital murder on each count. B C D E

The applicant sought leave to appeal against his conviction on the ground that the trial judge had misdirected the jury in the following respects. (i) That the judge attempted to define or re-define what Parliament had already defined in s. 2 (1) of the Homicide Act, 1957. (ii) That the judge was not entitled to do more than call the attention of the jury to the exact words of the section and leave them to say whether, on the evidence, they were satisfied that the case came within the section, and, accordingly, if the judge said anything whatever to the jury by way of explanation or illustration (as he did) it was a misdirection. (It was contended that the decision of the Court of Criminal Appeal in *R. v. Spriggs* (1) established these two propositions.) (iii) That the judge gave an incorrect definition of and misconstrued the words contained in the said section in that he construed the words as amounting to "Poor fellow, he is not insane, but not far from it; his mental condition is one which is bordering on, but not amounting to, insanity". (iv) That the judge directed the jury that, if they disagreed with his construction of the subsection, they could ignore it. F G H

It is to be observed that in s. 2 (1) of the Homicide Act, 1957, Parliament has set out the matters of fact which must collectively be proved in order to establish a plea of diminished responsibility. It has not, however, defined in the section or elsewhere "abnormality of mind" or "mental responsibility" or, indeed, any of the other expressions used in the section. Indeed, the expression "such abnormality of mind . . . as substantially impaired his mental responsibility" connotes a question of degree, and questions of degree are questions of fact in each case. I

In our opinion, the decision of this court in *R. v. Spriggs* (1) must be examined in the light of the argument addressed to the court. In that case it was con-

A tended that the judge did not give a sufficient direction as to the meaning of the expression "abnormality of mind" or "mental responsibility" and did not distinguish to the jury between emotional instability or gross personality disorder, and so forth. In that case the judge had prepared and handed to the jury the terms of the section, so that they could see it, and had told the jury that it was for them to decide whether or not the appellant suffered from such an abnormality of mind as substantially to impair his responsibility, and had reviewed the evidence given on one side and the other. By its judgment this court rejected the contention of the appellant that there was any duty on the trial judge to define or re-define "abnormality of mind" or "mental responsibility" and held that it was a sufficient direction if the trial judge drew the attention of the jury to the exact terms of the section and told them that it contained the tests which they were to apply and left it to them to decide whether on the evidence the case came within the section or not.

We are of opinion that this is all that *R. v. Spriggs* (2) decided. It did not (in our view) decide that the judge was not entitled, in order to assist the jury on the facts of the case before them, to point out to them by way of illustration or explanation the sort of thing for which they could look in order to see whether the case came within the section. Indeed, in *R. v. Spriggs* (2), LORD GODDARD, C.J., in giving the judgment of the court, referred (3) to the direction given by LORD COOPER in *H.M. Advocate v. Braithwaite* (4) as to the sort of things for which the jury would have to look. *R. v. Spriggs* (2) does not establish either of the two propositions raised by counsel for the applicant, and, though it is a sufficient direction if the judge draws the attention of the jury to the exact terms of the section, it is not, in our view, a misdirection if he points out to the jury the sort of things which they could look for in order to decide whether, on the facts, the case comes within the section. Moreover, *R. v. Spriggs* (2) certainly did not decide that the course taken by the judges in Scotland to which we have referred would be inappropriate for use by an English judge when directing a jury on this section.

The trial judge in the case before us, as in *R. v. Spriggs* (2), had prepared and handed to the jury a copy of the section. He directed them that it was for them to say whether, on the evidence, the applicant had brought himself within the section. In the course of his summing-up, the judge, after referring to the definition of insanity in *M'Naghten's Case* (5), said:

"There are some cases, you may think, where a man has nearly got to that condition, but not quite; where he is wandering on the borderline between being sane and insane, where you can say to yourself, 'Well, really, it may be he is not insane, but he is on the borderline, poor fellow. He is not fully responsible for what he has done.' Now you may think, and it is entirely a matter for you, that that is what is meant by these words in the Act of Parliament, 'such abnormality . . . as substantially impaired his mental responsibility'. In other words, he is not really responsible for what he is doing. His responsibility, if not wholly gone, has been impaired."

I These words closely approximate to the passage from the direction given by LORD COOPER in *H.M. Advocate v. Braithwaite* (6) cited by LORD GODDARD, C.J., in *R. v. Spriggs* (7).

(2) [1958] 1 All E.R. 300; [1958] 1 Q.B. 270.

(3) [1958] 1 All E.R. at p. 303; [1958] 1 Q.B. at p. 274.

(4) 1945 S.C. (J.) 55 at p. 57.

(5) (1843), 10 Cl. & Fin. 200.

(6) 1945 S.C. (J.) 55.

(7) [1958] 1 All E.R. at p. 303; [1958] 1 Q.B. at p. 275.

In our view, in this passage from the summing-up the judge was only giving an illustration of the sort of thing which the jury might consider in deciding whether on the facts the case came within the section, and the passage was not a misdirection by the judge. We think that the judge was right in directing the jury as he did that it was a question for them, and not for him, whether on the facts, they found that the applicant brought himself within the section or not.

Application dismissed.

Solicitors: *J. W. Fenoughty, Dunn & Co.*, Rotherham (for the applicant);
Director of Public Prosecutions (for the Crown).

[*Reported by KEVIN WINSTAIN, ESQ., Barrister-at-Law.*]

FRANCIS v. FRANCIS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Phillimore, J.), June 17, 1959.]

Legitimacy—Presumption of legitimacy—Rebuttal—Adultery by wife—Marital intercourse also at time of conception—Use of contraceptives—Parties regarding child as illegitimate—Whether presumption of legitimacy rebutted.

After a wife had committed adultery she and her husband still slept together and they had marital intercourse at the material time when the child was conceived. The husband used contraceptive sheaths during the relevant period and when the child was born the wife registered the child's birth in her name leaving the name of the father blank. Both parties accepted the probability that the child was the daughter of the adulterer and not of the husband. In summary proceedings subsequently by the wife for desertion and wilful neglect to maintain, the justices refused to make an order in the wife's favour for custody of the child, considering the child to be illegitimate. The wife appealed.

Held: that an order for custody should have been made in the wife's favour, for the evidence was not sufficient to rebut the presumption of legitimacy of a child born in lawful wedlock.

Dictum of BARNARD, J., in *W. v. W.* ([1953] 2 All E.R. at p. 1016) applied. *Cotton v. Cotton* ([1954] 2 All E.R. 105) followed.

Appeal allowed.

[**Editorial Note.** The child not having been accepted by the husband (as it would seem) as one of the family the provisions of s. 1 (1) of the Matrimonial Proceedings (Children) Act, 1958, extending the jurisdiction of the High Court to an illegitimate child of a party to a marriage, would not be applicable.

As to the rebuttal of the presumption of legitimacy, see 3 HALSBURY'S LAWS (3rd Edn.) 89, para. 141; and for cases on the subject, see 3 DIGEST 358-364, 1-53 and SUPPLEMENTS.

As to the magistrates' court's power in relation to custody of children, see 12 HALSBURY'S LAWS (3rd Edn.) 487, para. 1087.]

Cases referred to:

Bromage, Re, Public Trustee v. Cuthbert, [1935] All E.R. Rep. 80; [1935] Ch. 605; 104 L.J.Ch. 299; 153 L.T. 313; Digest Supp.

Cotton v. Cotton, [1954] 2 All E.R. 105; [1954] P. 305; [1954] 2 W.L.R. 947; 3rd Digest Supp.

- A *Gordon v. Gordon*, [1903] P. 141; 72 L.J.P. 33; 89 L.T. 73; *subsequent proceedings*, [1904] P. 163; 3 Digest 360, 17.
Morris v. Davies, (1837), 5 Cl. & Fin. 163; 7 E.R. 365; 3 Digest 359, 12.
W. v. W., [1953] 2 All E.R. 1013; [1954] P. 48; [1953] 3 W.L.R. 708; 3rd Digest Supp.

Appeal.

- B This was an appeal by the wife against the refusal by the Eastleigh justices on Mar. 11, 1959, to make an order in her favour for the custody of a child born to her on July 27, 1958, under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949. The parties were married on Oct. 3, 1953, and there were three children of the marriage. The subsequent facts relevant to the appeal are set out in the first judgment.

- C *K. C. L. Smithies* for the wife.
 The husband appeared in person.

- D LORD MERRIMAN, P.: This is a wife's appeal of a curious character, for it is of a very limited nature. On the hearing of a complaint before the justices for the Eastleigh Petty Sessional Division of Hampshire on Mar. 11, 1959, she obtained a finding that her husband had deserted her and had been guilty of wilful neglect to maintain her.

- E She also had another complaint of adultery, with which, for some reason which remains entirely unexplained to me, the justices did not deal and on which they did not make any finding, although really, on the evidence before them, there could not be any doubt about it. Although I am jumping ahead a little, the husband has told us quite frankly that he is still living with the woman. He has said that that is one of the difficulties about the money.

- F However, at present we are simply dealing with a finding that the complaints of desertion and wilful neglect to provide reasonable maintenance are established, and the wife complains on this appeal that on those findings she was only given custody of two of the three children, and not of the third, a child named Dawn, who was born to the wife on July 27, 1958, and for whose custody she had also asked in her complaint. The magistrates, in a very careful and closely reasoned judgment, have come to the conclusion, after considering two recent cases on the subject, that they were entitled, if not bound, to find that the child was illegitimate, and it is solely for that reason that they have declined to give custody of that child to the wife, in whose care the child is at this moment. Consequently, they have disabled themselves from making any order for the payment of maintenance for the child, and that is the sole question in this case.

- I Though the husband has appeared on this appeal in person he did not attend, and was not represented, at the hearing below. Putting it very shortly, the evidence was that the wife had, on her own confession, committed adultery with another man. She said she was provoked by the fact that she had caught her husband in the act of adultery with another woman (not the woman with whom he is living now), and she says that this, though we do not have to inquire into it on this appeal, was the matter which conduced to her own adultery with this named man. There is no doubt that it would have been physically and medically possible for that man to be the father of the child. Yet after her adultery (and, incidentally, the adultery in the act of committing which she had caught her husband) had been discussed between her and her husband, they nevertheless went on sleeping together at the time that was material so far as the conception of this child was concerned. There is this to be said in the husband's favour, that the wife gave positive evidence, which she made more positive still when she was asked the specific question by the court, that each time when she and her husband had had sexual intercourse at the material time her husband had used contraceptives, and by referring back to the early part of her evidence it was plain that she was referring to sheath contraceptives. There

had been talk of pessaries being used and of the supply having given out; but I approach this on the basis that it is established in the husband's favour that at the material time he was using rubber sheaths in sexual intercourse with his wife. On that the magistrates have held in a reasoned decision, on the basis of two cases to which I will refer in a moment, that they ought to find, and that they were entitled to find, that this child was illegitimate. I have come to precisely the opposite conclusion as a matter of law, and I think that the justices have misdirected themselves on this point. I think that the matter, particularly in relation to the use of rubber sheaths, is really concluded by the Court of Appeal's approval in *Cotton v. Cotton* (1), of a decision of BARNARD, J., in *W. v. W.* (2). He said, with reference to a case in which the principal issue was the use of rubber sheaths (3):

"If I had to decide this issue merely on a balance of probability I would decide in the husband's favour [meaning that the child was illegitimate] but the presumption of law—which means that he must satisfy me beyond all reasonable doubt—has not been displaced, and, therefore, I decide the issue in favour of the wife."

That is, he decided in favour of the child's legitimacy.

Now in this case there is, I think, no doubt that the parties certainly accepted the probability that this child was the child of the adulterer and not of the husband, and the question is whether that is good enough. Against that one has to take a sentence or two in the wife's evidence when, in answer to the court when she was pressed about this statement of hers about the habitual use of sheath contraceptives she said, first of all "You cannot always rely on these contraceptives", and secondly, "I cannot tie down who the father is". That was said rather in the context that when she came to register the birth she left the name of the father blank. But there is no doubt, I think, that between themselves they had accepted the probability that the child was or certainly might be the child of the man with whom the wife had committed adultery.

In *Cotton v. Cotton* (4) the Court of Appeal, adopting as they did in a similar case the passage which I have read from the judgment of BARNARD, J., emphasised the words of LORD COTTENHAM, L.C., in *Morris v. Davies* (5):

"The evidence must . . . 'be such as to exclude all doubt, that is, of course, all reasonable doubt in the minds of the court or jury, to whom that question is submitted.'"

Now, those words of the lord chancellor are taken from the quotation of them by LUXMOORE, J., in *Re Bromage, Public Trustee v. Cuthbert* (6), where they are followed by a quotation from the opinion of LORD LYNDHURST in the same case (7):

"That presumption of law is not lightly to be repelled. It is not to be broken in upon, or shaken by a mere balance of probability; the evidence for the purpose of repelling it must be strong, distinct, satisfactory, and conclusive."

It is on that basis that I think that we are bound to hold here that there was no such repelling of the legal presumption, and that this child, actually born in wedlock, must be taken to be legitimate.

The result of that is that the only ground on which no custody order was made for this child being this finding of illegitimacy, we ought to vary the magistrates' order by adding that the wife should be given the custody of this child. We

(1) [1954] 2 All E.R. at p. 107; [1954] P. at p. 309.

(2) [1953] 2 All E.R. 1013; [1954] P. 48.

(3) [1953] 2 All E.R. at p. 1016; [1954] P. at p. 55.

(4) [1954] 2 All E.R. at p. 108; [1954] P. at p. 311.

(5) (1837), 5 Cl. & Fin. 163.

(6) [1935] All E.R. Rep. at p. 82; [1935] Ch. at p. 611.

(7) (1837), 5 Cl. & Fin. at p. 265.

A have not the child represented before us. If we had had any doubt about the propriety of the decision at which we are arriving, with which I have reason to believe PHILLIMORE, J., agrees, before coming to an opposite conclusion we should certainly have taken steps to have the child independently represented. Having regard, however, to the conclusion at which we have arrived there is no need, in our opinion, to do so. As I have already said, the mother has the child in
B her care at the moment. She is obviously the proper custodian, and in the child's interest it is plain that some proper custodian should be appointed, and it seems to me the inevitable conclusion that we must give the mother the custody.

There then remains the point about which the husband is more particularly anxious. I have said that he was not represented in the court below when an order
C for £3 for the wife and 30s. each for the two elder children was awarded to her, together with the custody of those children. That is £6 in all as things stand, and apparently he has already run into trouble, because the wife has taken enforcement proceedings, under which he has been ordered to pay within a month and pay off the arrears at 10s. a week. We are not dealing with those proceedings at all, but if the magistrates are asked to make any main-
D tenance order in respect of the child of whom the wife is given custody by this court they will no doubt take into account what the state of the husband's finances may be, and if he is really and truly unable to pay the existing order —(and, of course, it must be remembered that rightly or wrongly he has placed on himself the burden of supporting another household)—they will take those facts into account and do whatever may be just in the circumstances. It is not
E for us to order or to suggest either the award of any particular amount or that no amount should be awarded, nor even to say that a nominal amount should be awarded. That is a matter for the justices themselves.

I propose that we vary the justices' order by giving the custody of Dawn to the wife for the reasons that I have given.

F **PHILLIMORE, J.:** I agree, and I would only add a word out of deference to the decision of the justices and the very careful assessment of their reasons which we have had put before us.

As my Lord has said, where a child is born in wedlock there is a presumption that it is a child of the two spouses, and that is a presumption which is not lightly to be dispelled. In this case I think the justices felt that both spouses were,
G and certainly the husband was, of the opinion that this child was not the child of the husband but was the child of another man, and the fact that the parties took this view weighed heavily with the justices, more especially as the wife herself admitted that whenever she and her husband had had intercourse he had used contraceptives. I think that the justices, thinking that both the husband
H and the wife believed that the child was not the child of the husband, and thinking that that was rendered all the more unlikely by the fact that the husband had used contraceptives, came to the conclusion that this entitled them to find that the presumption was dispelled.

In my judgment that was clearly wrong. Whether one chooses to call the measure of proof which has to be adduced "strong, distinct, satisfactory, and conclusive" or to use the word of SINGLETON, L.J., in *Cotton v. Cotton* (8) "strict",
I it must be wrong where a woman, albeit committing adultery, is every night sharing a bed with her husband and from time to time having intercourse with him, albeit he may use contraceptives, to suggest that a child born in those circumstances can safely be said to be a child of the other man, or that there is evidence to rebut the very strong presumption which rightly stands to cover the interests of the child.

I take the words of SIR FRANCIS JEUNE, P., quoted by BARNARD, J., in *W. v. W.* (9), to which my Lord has referred. The learned President, giving the judgment in *Gordon v. Gordon* (10), said this: A

“If the husband could, from circumstances of time, place, and health, have had nuptial intercourse with his wife, and there be no evidence to prove that he did not have such intercourse, he must be considered the father of her child, even if she had committed adultery with one, two or twenty other men (11).” B

In the present case the husband, at the material time when this child was conceived, was sharing a bed with his wife and having intercourse with her, albeit using contraceptives. In such circumstances, in my judgment, the presumption in favour of the child's legitimacy is not dispelled, and this child must be treated as the child of the husband in this case. C

For these reasons I agree with the course my Lord proposes.

Appeal allowed. Order varied.

Solicitors: *Hewitt, Woollacott & Chown*, agents for *Page, Gulliford & Gregory*, Southampton (for the wife).

[*Reported by N. P. METCALFE, Esq., Barrister-at-Law.*] D

BARNET GROUP HOSPITAL MANAGEMENT COMMITTEE v. EAGLE STAR INSURANCE CO., LTD. E

[QUEEN'S BENCH DIVISION (Salmon, J.), July 21, 30, 1959.]

Insurance—Motor insurance—Third-party risks—Passenger injured—Voluntary passenger—Policy extending to voluntary passengers—Hospital expenses of passenger's treatment sought to be recovered by hospital from insurers—Insurers ignorant of hospital treatment at time when they paid passenger—Whether hospital subsequently entitled to recover their expenses from insurers—Whether payment by insurers made in consequence of policy issued under Act of 1930—Whether voluntary passenger was a person within s. 36 (2) of the Act of 1930—Road Traffic Act, 1930 (20 & 21 Geo. 5 c. 43), s. 36 (2), as substituted by the Road and Rail Traffic Act, 1933 (23 & 24 Geo. 5 c. 53), s. 33. F

Hospital—Motor accident—Expenses incurred by hospital in treating person injured in accident—Insurance against third-party risks, covering voluntary passengers—Insurers not aware of hospital treatment at time when they made payment to person injured—Whether hospital entitled to recover expenses from insurers—Road Traffic Act, 1930 (20 & 21 Geo. 5 c. 43), s. 36 (2), as substituted by the Road and Rail Traffic Act, 1933 (23 & 24 Geo. 5 c. 53), s. 33—National Health Service Act, 1946 (9 & 10 Geo. 6 c. 81), s. 76 and Sch. 10. G H

While G. was travelling as a voluntary passenger in a car, he was injured in a motor accident. He received treatment at a hospital. The owner and driver of the car was insured against third-party risks by a policy issued by the defendants, which not only complied with the requirements of s. 36 (1)* of the Road Traffic Act, 1930, in relation to such policies but also extended to cover liability to voluntary passengers. The defendants made a payment I

(9) [1953] 2 All E.R. 1013; [1954] P. 48.

(10) [1903] P. at p. 143.

(11) The learned President was quoting from SIR HARRIS NICOLAS' TREATISE ON THE LAW OF ADULTERINE BASTARDY (1836), p. 186.

* The relevant terms of s. 36 (1) and s. 36 (2) of the Road Traffic Act, 1930, are printed at p. 212, letter H, to p. 213, letter A, and p. 214, letter B, post.

A under the policy to G. At that time they did not know that G. had received hospital treatment. The appropriate hospital authority sued the defendants for the expenses of treating G., claiming under s. 36 (2)* of the Act of 1930, whereby they would be entitled to the expenses if the payment that the
 B defendants had made to G. were a payment "in consequence of a policy issued under [Part 2 of the Act of 1930] in respect of . . . bodily injury to any person" and if G. had "to the knowledge of" the defendants received treatment at a hospital. At the date of the issue of the writ the defendants knew that G. had received such treatment.

Held: (i) the insurer's knowledge required to satisfy s. 36 (2) of the Road Traffic Act, 1930 (viz., knowledge that the person injured in a motor accident had received treatment at a hospital), was knowledge existing at the
 C time when payment was made by the insurer to the person injured; therefore, since the defendants had not such knowledge at the time when they paid G., the hospital authority was not entitled to recover the expenses of G.'s treatment from the defendants.

(ii) the fact that the cover afforded by the policy extended beyond what was required by s. 36 (1) of the Act of 1930 (that is, extended to voluntary
 D passengers) did not make it any the less a policy "issued under" Part 2 of the Act of 1930 within s. 36 (2).

(iii) the words "any person" in s. 36 (2) of the Act of 1930 covered voluntary passengers and were not confined to persons compulsorily insured.

Royal Victoria Hospital v. London Guarantee & Accident Corpn., Ltd. ([1937] N.I. 64) followed.

E [As to insurers' payments for hospital expenses of persons injured in motor accidents, see 22 HALSBURY'S LAWS (3rd Edn.) 371, para. 761.

For the Road Traffic Act, 1930, s. 36 (2), as substituted by the Road and Rail Traffic Act, 1933, s. 33, see 24 HALSBURY'S STATUTES (2nd Edn.) 605.

For the National Health Service Act, 1946, Sch. 10, see 15 HALSBURY'S STATUTES (2nd Edn.) 417.]

F Case referred to:

Royal Victoria Hospital v. London Guarantee & Accident Corpn., Ltd., [1937] N.I. 64; Digest Supp.

Action.

G By a specially indorsed writ, dated May 28, 1958, Barnet Group Hospital Management Committee, the plaintiffs, claimed from Eagle Star Insurance Co., Ltd., the defendants, expenses amounting to £12 12s. 6d. incurred by the plaintiffs in treating, as an in-patient at Barnet General Hospital, one George Groom who had been injured while travelling as a passenger in a motor car owned and driven by a Mr. Boost. The plaintiffs relied on s. 36 (2) of the Road Traffic Act, 1930, as substituted by s. 33 of the Road and Rail Traffic Act, 1933, in support
 H of their claim. The facts, and the contentions of the parties, are set out in the judgment of SALMON, J.

J. R. Cumming-Bruce for the plaintiffs.

Gerald Gardiner, Q.C., and *Michael Lee* for the defendants.

Cur. adv. vult.

I July 30. SALMON, J., read the following judgment: On Jan. 28, 1955, Mr. George Groom, whilst travelling as a passenger in a motor car owned and driven by Mr. Boost, sustained certain bodily injuries. He was on that day taken to Barnet General Hospital where he received treatment as an in-patient until he was discharged on Feb. 2, 1955. The hospital reasonably incurred expenses amounting to £12 12s. 6d. in respect of this treatment.

At the time of the accident Mr. Boost was insured with the insurers, the

* See p. 214, letter B, post.

defendants, in respect of the use of his motor car against all such liability as is required to be covered by the provisions of the Road Traffic Act, 1930, s. 36 (1) (b), and also against liability to voluntary passengers travelling in his motor car. The insurers made a payment under the policy to Mr. Groom in respect of his injuries. At the time they made the payment they did not know that Mr. Groom had been treated in hospital, although they knew of that fact before the issue of the writ (1).

The plaintiffs (hereafter referred to as "the hospital"), who administer Barnet General Hospital under the National Health Service Act, 1946, claim that they are entitled to recover their expenses of £12 12s. 6d. from the insurers by virtue of the Road Traffic Act, 1930, s. 36 (2), as substituted by the Road and Rail Traffic Act, 1933, s. 33, and applied by Sch. 10 to the National Health Service Act, 1946.

The case turns largely on the construction of s. 33 of the Act of 1933, which is as follows:

"Section 36 of the Road Traffic Act, 1930 (which relates to requirements in respect of policies of insurance) shall be amended by substituting for sub-s. (2) thereof the following subsection:—'(2) Where any payment is made (whether or not with an admission of liability) by—(a) an authorised insurer under or in consequence of a policy issued under this Part of this Act' [and then I omit words which in my view are immaterial to the case] 'in respect of the death of or bodily injury to any person arising out of the use of a motor vehicle on a road or in a place to which the public have a right of access, and the person who has so died or been bodily injured has to the knowledge of the authorised insurer or such owner as the case may be received treatment at a hospital, whether as an in-patient or as an out-patient, in respect of the injury so arising, there shall also be paid by the authorised insurer . . . to such hospital the expenses reasonably incurred by the hospital in affording such treatment . . .'"

Then there are some provisions limiting the amount which the hospital can recover (2).

The first question for decision is whether the payment by the insurers (who admittedly are authorised insurers within the meaning of the Act) is a payment in consequence of a policy issued under the Act. There can be no doubt that the payment was made under the policy of insurance (3) dated Mar. 3, 1955, but was this a policy issued under Part 2 of the Road Traffic Act, 1930?

Section 35 (1) of the Act of 1930 reads as follows:

"Subject to the provisions of this Part of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance . . . in respect of third-party risks as complies with the requirements of this Part of this Act."

Then s. 36 (1) of the same Act reads as follows:

"In order to comply with the requirements of this Part of this Act, a policy of insurance must be a policy which—(a) is issued by a person who is an authorised insurer within the meaning of this Part of this Act; and (b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle on a road: Provided that such a policy shall

(1) The writ was issued on May 28, 1958.

(2) Under s. 36 (2) of the Road Traffic Act, 1930, the amount of expenses recoverable by a hospital from insurers is limited to £50 for each person treated as an in-patient and £5 for each person treated as an out-patient.

(3) The policy was signed on this date but the period of indemnity ran from Dec. 25, 1954.

A not be required to cover . . . (ii) except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arise."

B Subsection (5) of s. 36 reads:

C "A policy shall be of no effect for the purposes of this Part of this Act unless and until there is delivered by the insurer to the person by whom the policy is effected a certificate (in this Part of this Act referred to as a 'certificate of insurance') in the prescribed form and containing such particulars of any conditions subject to which the policy is issued and of any other matters as may be prescribed . . ."

D It seems to me beyond argument that the policy in question is a policy issued under Part 2 of the Road Traffic Act, 1930. It is true that it includes cover in respect of liability in respect of death or bodily injury of passengers which it is not required to include by s. 36 (1) which I have just read. I can, however, see
E no reason why a policy which gives the cover required by the Act and complies with all the requirements of the Act fails to qualify as a policy issued under the Act merely because it includes cover beyond that made compulsory by the Act. The language of the proviso strongly supports this view. The words: "Provided that such a policy shall not be required to cover," seem to envisage that such a policy may cover liability in respect of voluntary passengers, although it need not do so. It is also to be observed that the certificate of insurance, which is in the prescribed form, states that the policy is issued in accordance with the provisions of the Act. Accordingly, in my view the payment to Mr. Groom was made by an authorised insurer under a policy issued under Part 2 of the Road Traffic Act, 1930.

F The next question that arises is whether or not Mr. Groom was "any person" within the meaning of s. 36 (2) of the Act of 1930. Prima facie, Mr. Groom clearly is "any person". Counsel for the insurers argues, however, that "any person" means any person of the class required to be covered by the Act. Why should the court give such a limited construction to the meaning of the words "any person"? In my view, such a construction involves writing words into the statute that are not there. If the legislature had intended the payment mentioned in s. 36 (2) to be confined to persons of the class required to be covered by the Act, it could have expressed that intention in plain language. Indeed, where the legislature does intend to confine the operation of the Act to such liability as is required to be covered by the Act, it expresses that intention clearly. See, for example, s. 10 and s. 11 of the Road Traffic Act, 1934. In my judgment, the words "where any payment is made . . . by an authorised insurer under . . . a policy issued under this Part of this Act in respect of . . . bodily injury to any person" are as wide as they can be and I can see no reason for cutting down their meaning.

I I think that counsel for the hospital is right when he suggests that the object of Parliament in passing the Road Traffic Acts was to protect not only persons injured in motor car accidents but also the hospitals who treat such persons for their injuries. I can see no reason why the provisions of s. 36 (2) should be confined to persons compulsorily insured and exclude voluntary passengers. The hospital treatment is no less valuable to the voluntary passengers than it is to any other third parties. Moreover, the insurers obviously benefit as much from the treatment of a voluntary passenger as they do from the treatment of any other third party. But for such treatment injuries would have graver consequences and accordingly damages payable by the insurers would be higher. I hold that the words "any person" in s. 36 (2) include voluntary passengers.

Although, curiously enough, there is no authority on this point in England, I am supported in the view I have formed by the majority judgments of the

Court of Appeal in Ireland in *Royal Victoria Hospital v. London Guarantee & Accident Corpn., Ltd.* (4). A

I have thought it right, out of respect for the careful arguments which I have heard, and because this case may well go further, to express my conclusions on the points with which I have already dealt. These conclusions cannot, however, affect the result of this case having regard to the view that I have formed on the other point with which I will now deal. B

The hospital's difficulty in this case arises out of the words in s. 36 (2):

"Where any payment is made . . . by—(a) an authorised insurer under or in consequence of a policy issued under this Part of this Act . . . in respect of . . . bodily injury to any person arising out of the use of a motor vehicle on a road . . . and the person who has so . . . been bodily injured has to the knowledge of the authorised insurer . . . received treatment at a hospital . . . in respect of the injury so arising, there shall also be paid by the authorised insurer . . . the expenses reasonably incurred by the hospital in affording such treatment . . ."

The strict grammatical interpretation of the words of the statute which I have read is that in order for any liability to fall on the insurers in respect of hospital treatment, the insurers must have knowledge of the treatment before paying the third party. This is conceded by counsel for the hospital, who argues, however, that there is an obvious grammatical mistake on the part of the draftsman. He invites me, in effect, to re-write the section—an invitation which, however attractive counsel makes it sound, I find myself compelled to decline. It is easy to see why Parliament should have required that the insurers' knowledge of the hospital treatment should precede payment to third parties for that payment to render them liable for those expenses. Many thousands of claims by third parties are settled each year by insurance companies. In assessing the value of the claim it is important for the insurers to appreciate their possible total liability. For example, it might be thought that the most a claim was worth in order to avoid litigation was £x. If the hospital expenses are £y, the insurers, with knowledge of the hospital treatment, would settle the claim on the basis of paying the third party £x minus £y and paying the hospital £y. It would be a hardship if, after paying the whole sum of £x to the third party in ignorance of his having received hospital treatment, the insurers should have to pay out a further £y in respect of such treatment. There seems to me to be no reason for the legislature to insert in s. 36 the provision as to knowledge of the hospital treatment unless the knowledge is to precede the payment to the third parties. Counsel for the hospital suggests that the knowledge need precede only the issue of the writ, and that the object of the legislature was to prevent a writ being issued by the hospital against the insurer before the insurer had received notice of the hospital treatment. Ingenious as this argument may be, it does not carry conviction to my mind. It seems to me inconceivable that any hospital which had a statutory right to recover its expenses against an authorised insurer would go to the trouble and expense of issuing a writ without first asking the insurer to discharge his statutory obligation. I cannot think that Parliament inserted words in a statute merely to guard against an eventuality which no reasonable man would consider in the least likely to arise. D E F G H

Accordingly, since it is admitted that the insurers in this case did not know of the hospital treatment until after they made their payment to Mr. Groom, they are under no statutory obligation to pay the expenses of that treatment to the hospital. There will accordingly be judgment for the insurers. I

Judgment for the insurers, the defendants.

Solicitors: *Morton Jones, Lewsey & Jefferies* (for the plaintiffs); *Simmons & Simmons* (for the defendants).

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

A

RACECOURSE BETTING CONTROL BOARD v. YOUNG
(INSPECTOR OF TAXES).

RACECOURSE BETTING CONTROL BOARD v. INLAND
REVENUE COMMISSIONERS.

B

[HOUSE OF LORDS (Viscount Simonds, Lord Reid, Lord Radcliffe, Lord Tucker and Lord Keith of Avonholm), July 13, 14, 29, 1959.]

Income Tax—Deduction in computing profits—Distribution by statutory body—Distribution pursuant to statute from funds after deduction of working expenses—Distribution benefiting body's trading activities—Whether deductible as expense for income tax purposes—Racecourse Betting Act, 1928 (18 & 19 Geo. 5 c. 41), s. 3 (6)—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), s. 137 (a).

C

D

E

F

G

H

I

The Racecourse Betting Control Board was constituted by the Racecourse Betting Act, 1928, and carried on the trade of operating totalisators at racecourses. By s. 3 (4) of that Act, it was provided that the board should establish a fund known as the totalisator fund, into which it was to pay a percentage of the moneys staked by means of the totalisator and any other moneys received by the board. By s. 3 (6), it was provided that, subject to the payment out of the fund of all taxes, rates, charges and working expenses and to the retention of such sums as it thought fit to meet contingencies and to the payment out of the fund of such sums as it thought fit for charitable purposes, the board should apply the moneys comprised in the totalisator fund in accordance with a scheme to be prepared by it and approved by the Secretary of State for purposes conducive to the improvement of breeds of horses or the sport of horse-racing. Out of the moneys made available for application in these ways, the board made the following payments, all of which were voluntary payments: (i) sums paid to racecourse owners for use by them in the rehabilitation of racecourses and buildings, the provision of various amenities and latterly for increasing the prize money for races; (ii) contributions to owners and trainers in reduction of the cost of travelling racehorses to race meetings; (iii) runners' allowances, £1 per runner being paid to owners of horses who ran horses in any race; (iv) contributions towards the administrative expenses of the Jockey Club and the National Hunt Committee and the cost of the race finish recording camera; (v) payments towards expenses of point-to-point meetings; and (vi) sums paid for the assistance of racing under the rules of the Pony Turf Club. The distinctive feature of payment (iii), the runners' allowances, was that it was not part of the distribution made under a scheme sanctioned by the Secretary of State but was treated in account as part of the working expenses of the trade. The board claimed to deduct these payments in arriving at its profits for the purposes of income tax and the profits tax as "money wholly and exclusively laid out or expended for the purposes of the trade" within s. 137 (a) of the Income Tax Act, 1952.

Held: in computing the board's profits for the purposes of income tax and the profits tax, no deduction should be made in respect of the six classes of payments made by the board for the following reasons—

(i) the board's trade was that of operating totalisators on racecourses, not the assisting of racecourse executives or the encouraging of racing, and the payments or appropriation out of profits of the board's trade towards these latter purposes, made in accordance with s. 3 (6) of the Racecourse Betting Act, 1928 (viz., items (i), (ii) and (iv)-(vi)) could not be treated also as expenditure wholly and exclusively incurred for the purposes of the board's trade and deductible before the profits were ascertained, and

(ii) the payments under head (iii), the runners' allowances, were not

"working expenses" within s. 3 (6) of the Racecourse Betting Act, 1928, and, being made without the approval of the Secretary of State, were ultra vires. A

Decision of the COURT OF APPEAL ([1958] 2 All E.R. 385) affirmed.

[As to deducting expenditure to earn future profits and not deducting expenses unconnected with trade for income tax purposes, see 20 HALSBURY'S LAWS (3rd Edn.) 169, 170, paras. 290, 291; as regards expenses not incurred for commercial reasons, see *ibid.*, 170, para. 292; and for cases on the subject of the deduction of expenses for income tax purposes, see 28 DIGEST 42-45, 215-226. B

For the Racecourse Betting Act, 1928, s. 3, see 10 HALSBURY'S STATUTES (2nd Edn.) 783.

For the Income Tax Act, 1952, s. 137, see 31 HALSBURY'S STATUTES (2nd Edn.) 134.] C

Cases referred to:

A.-G. v. Racecourse Betting Control Board, [1935] Ch. 34; 104 L.J.Ch. 13; 152 L.T. 146; Digest Supp.

Inland Revenue Comrs. v. Dowdall, O'Mahoney & Co., Ltd., [1952] 1 All E.R. 531; [1952] A.C. 401; 33 Tax Cas. 259, 273; 3rd Digest Supp. D

Inland Revenue Comrs. v. Stonehaven Recreation Ground Trustees, 1930 S.C. 206; 15 Tax Cas. 419; Digest Supp.

Mersey Docks & Harbour Board v. Lucas, (1883), 8 App. Cas. 891; 53 L.J.Q.B. 4; 49 L.T. 781; 48 J.P. 212; 2 Tax Cas. 25; 28 Digest 21, 104.

Appeals. E

Consolidated appeals by the taxpayers, Racecourse Betting Control Board, from an order of the Court of Appeal (LORD EVERSHED, M.R., MORRIS and ORMEROD, L.JJ.), dated May 7, 1958, and reported [1958] 2 All E.R. 385, affirming an order of UPJOHN, J., dated Dec. 6, 1957, and reported [1958] 1 All E.R. 274. UPJOHN, J., allowed two appeals by the Crown and dismissed two cross-appeals by the appellants by way of Case Stated by the Special Commissioners of Income Tax under the Finance Act, 1937, Sch. 5, Part 2, para. 4, and the Income Tax Act, 1952, s. 64, relating to assessments to income tax and the profits tax in respect of the appellants' trade as totalisator operator for the years 1953-54 and 1954-55. F

Charles Russell, Q.C., *Heyworth Talbot, Q.C.*, and *D. C. Miller* for the board. *F. N. Bucher, Q.C.*, *A. S. Orr* and *Hubert H. Monroe* for the Crown. G

Their Lordships took time for consideration.

July 29. The following opinions were read.

VISCOUNT SIMONDS: My Lords, the main issue in these consolidated appeals, of which one relates to income tax and the other to profits tax, is whether the appellants, the Racecourse Betting Control Board (whom I will call "the board"), were entitled in computing the profits of the trade of totalisator operator for the years 1953-54 and 1954-55 to deduct certain payments which I will describe in due course. This they could do only if the payments were of "money wholly and exclusively laid out or expended for the purposes of the trade" within s. 137 (a) of the Income Tax Act, 1952. If your Lordships were of opinion that the payments were of this character, the further question would arise whether any of the payments were of a capital nature and for that reason not deductible in computing the amount of the profits and gains. But, as will presently appear, this question does not arise. H

It is first necessary to consider the constitution and functions of the board. They were constituted a body corporate under the Racecourse Betting Act, 1928, which, by s. 1 (2), enacted that, notwithstanding any rule of law or enactment to the contrary, it should be lawful on any approved racecourse, and whether in a building or not, for the board and any person authorised by them I

- A to set up and keep a totalisator. The expression "totalisator" is defined to mean the contrivance for betting known as the totalisator or pari-mutuel, or any other machine or instrument of betting of a like nature, whether mechanically operated or not. Section 3 is all important for the determination of this appeal. After providing for certificates of approval of racecourses and other matters not immediately relevant, it enacted, by sub-s. (3), that the board should distribute
- B the whole of the moneys staked by means of a totalisator on any race among the persons winning bets made by means of the totalisator on that race, after deducting or causing to be deducted such percentage of those moneys as the board might from time to time determine either generally or with respect to any particular racecourse, by sub-s. (4) that the board should establish a fund known as the totalisator fund, into which should be paid the percentage deducted as
- C aforesaid of moneys staked by means of the totalisator, and any other moneys received by the board, and by sub-s. (6) that the board should (subject to the payment out of the totalisator fund of all taxes, rates, charges, and working expenses, and to the retention of such sums as they thought fit to meet contingencies and to the payment out of the said fund of such sums as they thought fit to charitable purposes) apply the moneys from time to time comprised in the totalisator fund in accordance with a scheme prepared by the board and approved by the Secretary of State for purposes conducive to the improvement of breeds of horses or the sport of horse-racing. Subsection (7) empowered the board to do all such things as were incidental to the foregoing matters, and sub-s. (8) required them to submit annually to the Secretary of State a report of their proceedings, together with an account, in such form as might be prescribed, of the moneys
- E received and expended by them during the year, such report and account to be laid by the Secretary of State before both Houses of Parliament. By s. 18 (5) of the Betting and Lotteries Act, 1934, the purposes for which the board might under s. 3 (6) of the Act of 1928, in accordance with a scheme approved by the Secretary of State, apply moneys included in the totalisator fund were extended to include purposes conducive to the advancement and encouragement of veterinary
- F science and education.

From the time that the board were established, they have operated totalisators on many racecourses and have, by deducting a percentage of money staked, created a totalisator fund. Out of this fund they have paid the working expenses of running the totalisator and such other administration expenses as were necessary. In addition, they have made the payments with which this appeal

G is concerned. They claim that such payments were wholly and exclusively laid out or expended for the purposes of their trade, and their claim was upheld by the Commissioners for the Special Purposes of the Income Tax Acts. It was, however, rejected on Case Stated by UPJOHN, J., and by the Court of Appeal.

- I will briefly describe the payments in question, all of which were voluntary payments. They fall under six heads and are not in any relevant way distinguishable from each other except that the third head "runners' allowances" has a special feature which will require consideration. The first of these heads is described in the board's accounts as "To racecourse executives from the racecourse fund". This is a fund created by contributions from the totalisator fund and from it payments are made to each of the seventy-three racecourses on which the board operated a totalisator. I need not state in any detail the
- H purposes for which the money was used; it is sufficient to say generally that it was used for the rehabilitation of racecourses and buildings, the provision of various amenities and latterly for increasing the prize money for races. The second head is described as "To owners and trainers in reduction of the cost of travelling racehorses to race meetings". No further explanation of this title is necessary. The third head is "Runners' allowance". This was first introduced in 1954. It was an allowance to owners of horses who ran their horses in any race, the amount being fixed at £1 per runner. The distinctive feature of this payment is that it was not part of the distribution made under a scheme which

the Secretary of State sanctioned but was treated in account as part of the working expenses of the trade. The fourth head is described as "Towards the administrative expenses of the Jockey Club and National Hunt Committee, and the cost of the race finish recording camera". Payments in this category were used to meet the salaries of racing officials, starters, judges and clerks of the course who were provided by the Jockey Club or the National Hunt Committee and for similar purposes. The fifth and sixth heads were sums paid towards expenses of point-to-point meetings and "For the assistance of racing under the rules of the Pony Turf Club" respectively. All these payments, with the exception, as I have already said, of the "Runners' allowance", were included in schemes prepared by the board in accordance with the provisions of the Act and submitted to, and approved by, the Secretary of State. The excepted item appears to have been treated as part of the board's working expenses in order to test whether inclusion in a scheme was material for tax purposes.

I have very briefly summarised the facts as they appear in the Case Stated, and will only add that the Special Commissioners had before them a quantity of evidence in regard to the relationship between the volume of totalisator betting and the number of horses running in a race and the number of people attending the race meeting, in regard to the influence of racecourse amenities on attendances by the public and to the necessity of public confidence in the proper conduct of racing and the accuracy of the official supervision and decision, in regard to the need for augmenting prize money and the increase in the cost of maintaining racehorses and bringing them to meetings and the need for subventions to Point to Point and Pony Turf Club meetings. On this evidence, the Special Commissioners came to this conclusion:

"We were satisfied on the evidence that all the payments set out in exhibits B, B1 and B2 [being relevant statements of account] were made by the board with the object of increasing the receipts of its totalisators, although such payments might and in all cases did (in the words of s. 3 (6) of the Act of 1928) improve the breed of horses or the sport of horse-racing, and although the increase in such receipts was not in all cases expected to be exactly proportionate to the expenditure."

They accordingly determined that all such payments were wholly and exclusively made for the purpose of the board's trade of operating totalisators. This determination was, as I have said, reversed by UPJOHN, J., who was upheld by the Court of Appeal.

My Lords, a considerable part of the debate in this House turned on the meaning of the conclusion of the Special Commissioners which has been set out verbatim. It was urged that it was a finding of fact which must be accepted by the court and, being accepted, could lead to no other result than that the payments fell within s. 137 of the Income Tax Act, 1952, and were deductible in a computation of profits and gains. It could only mean, it was said, that the only object of the board in making the payments was to increase the receipts of the totalisators. If so, it followed that they were made wholly and exclusively for the purpose of their trade; the concluding part of the paragraph could be disregarded. My Lords, I cannot regard this as a correct interpretation of the conclusion. It is altogether too ingenious to suppose that the board, in making these payments, had not in mind the justification, if not the very purpose, of their creation and had not the object of improving the breed of horses and the sport of horse-racing. It is true that the sentence beginning with the word "although" suggests that the ensuing result was fortuitous and unintended. But, if this is what the commissioners meant, I should not hesitate to regard the finding as irrational and even perverse.

The difficulty in the case no doubt arises out of the somewhat anomalous position of the board, which is not that of an ordinary trading corporation.

- A The same difficulty may well arise in the case of all nationalised industries. In such cases, the distinction is likely to be obscured between expenditure made in order to earn profits of the trade and expenditure out of earned profits. It is often a fine distinction—see, for instance, *Mersey Docks & Harbour Board v. Lucas* (1), *Inland Revenue Comrs. v. Stonehaven Recreation Ground Trustees* (2), and, in particular, the observations of my noble and learned friend, LORD REID,
- B in the recent case of *Inland Revenue Comrs. v. Dowdall, O'Mahoney & Co., Ltd.* (3). But in the present case the line is clearly drawn by the Act itself, and the commissioners have, I think, fallen into error because they have ignored its structure and assumed that the tax position was precisely what it would have been if the board was an ordinary corporation whose object was, under its memorandum of association, to carry on the trade of operating
- C totalisators on racecourses and other objects incidental thereto, and nothing had been prescribed in regard to the distribution of its profits. I do not say—it is unnecessary for me to say—what the result would be if that had been the case, and there had been a similar finding of fact. Here, however, the Act distinguishes between, on the one hand, the trading activities of the board and its attendant expenditure and, on the other, the payments which are to be made
- D out of the balance that remains. The payments or appropriations so made must accord with the directions of the Act and must be approved by the Secretary of State, and it would, as it appears to me, be inconsistent with its scheme and purpose to treat those very payments as expenditure made wholly and exclusively for the purpose of its trade. The same result is reached if the matter is
- E looked at from a slightly different angle. It may be asked what is the trade which the board carries on. The answer is that it is the trade of operating totalisators on racecourses. It is the expenditure for the purpose of that trade which is deductible in computing the amount of its profits or gains. No doubt, as was held in *A.-G. v. Racecourse Betting Control Board* (4), the legitimate activity of the board extends to matters fairly incidental to its express powers
- F but the question in that case was solely one of vires, and it is not to be regarded as an authority for saying that every activity which might indirectly result in an increased patronage of the totalisator was a part of the trade of the board. On the contrary, I would hold that, though the appropriations may benefit the board, it is no part of their trade to assist racecourse executives or to encourage racing in other ways. That is the object to which under the
- G control of the Secretary of State the profits of their trade may be devoted.

It remains to say something about the third item of expenditure. This was the so-called runners' allowance to owners of horses of £1 per runner in every race. The object was beyond doubt to induce owners to enter and run their horses in races and thus, presumably, to increase the amount of betting. The

H only difference that I have been able to detect between this and the other expenditure with which I have been dealing is that, in their accounts, the board have treated this payment as part of their "working expenses" which did not require the approval of the Secretary of State. But this does not determine their character for taxation purposes, and I am clearly of opinion that they are not properly described as "working expenses" of operating the totalisators but were

I payments which might be made out of the balance of the fund under an approved scheme. Without such approval they were ultra vires payments.

In the result, therefore, I am of opinion that UPJOHN, J., and the Court of Appeal came to a correct conclusion, and these appeals must be dismissed with costs.

(1) (1883), 8 App. Cas. 891.

(2) 1930 S.C. 206.

(3) [1952] 1 All E.R. at pp. 539, 540; [1952] A.C. at p. 418.

(4) [1935] Ch. 34.

My noble and learned friend, **LORD RADCLIFFE**, who is unable to be here today, has asked me to say that he has read and concurs in the opinion which I have just expressed. A

LORD REID: My Lords, I entirely agree with the speech which my noble and learned friend, **LORD SIMONDS**, has just delivered and I cannot usefully add anything. B

LORD TUCKER: My Lords, I agree that these appeals should be dismissed, for the reasons stated by my noble and learned friend on the Woolsack.

LORD KEITH OF AVONHOLM: My Lords, the point on which the appellants (hereinafter called "the board") mainly, if not entirely, rely in this appeal is finding 7 of the Case Stated (5) by the Special Commissioners, which has already been recited to your Lordships and which I do not repeat. I am unable to appreciate how the commissioners could have reached this finding without some element of misdirection, and their conclusion that all the items referred to in that finding were paid wholly and exclusively for the purposes of the trade is equally vitiated. All the items, with the exception of the item paid in the year 1954 known as "Runners' allowance", were payments made pursuant to schemes approved by the Secretary of State in accordance with s. 3 (6) of the Racecourse Betting Act, 1928. Under that section, the schemes had to be "for purposes conducive to the improvement of breeds of horses or the sport of horse racing". The Betting and Lotteries Act, 1934, extended the purposes to which the surplus of the totalisator fund might be applied. For the purposes of this case that extension is immaterial. The commissioners, in their finding 7, expressly accept it that the payments "in all cases did (in the words of s. 3 (6) of the Act of 1928) improve the breed of horses or the sport of horse-racing". Looking to this part of the finding and to the fact that the board put forward their scheme for the approval of the Secretary of State in terms of the Act, I fail to see how the conclusion can be reached, as the commissioners have done, that "all the items . . . were paid wholly and exclusively for the purposes of such trade", i.e., with the object of increasing the receipts of their totalisators. It is not possible, in my opinion, to say, in the circumstances of this case, that that was the whole purpose and that the other was merely an accidental, or incidental, consequence. C D E F G

I would be prepared, however, to treat the matter on broader grounds. The board have a statutory duty, under statutory procedure, to make a defined class of payments out of the totalisator fund. In my opinion, these payments and payments that may be called "working expenses" are mutually exclusive. It is not permissible to diminish what would otherwise be the surplus of the totalisator fund by payments of the kind to which the totalisator fund falls to be applied. This, I think, is explicit in the Act. The deductions to be made before striking the balance to be applied to the statutory purposes are expressed to be all taxes, rates, charges and working expenses, such sums as the board think fit to meet contingencies and such sums as they think fit to pay to charitable purposes. It is only as working expenses that the board can put forward their claim here. But I cannot hold that the very payments to which the totalisator fund falls to be applied can be working expenses within the meaning of the statute. The Act has, in my view, drawn a clear distinction between these two things. H I

There remains the point about the runners' allowances. These were introduced in only one of the years in question for the express purpose of testing the claim in a situation unembarrassed by their having been approved as an authorised

(5) See p. 218, letter E, ante; cf. [1958] 1 All E.R. 284.

A payment by the Secretary of State. But this payment is of the same type as the others, and the same result must follow. It should, in my opinion, have been paid, if at all, under an approved scheme, and the fact that it was not cannot improve the position. The commissioners themselves seem to have made no distinction with regard to the runners' allowances.

I would dismiss the appeals.

Appeals dismissed.

B

Solicitors: *Simmons & Simmons* (for the board); *Solicitor of Inland Revenue*.

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

Re HASTINGS (No. 3).

C

[COURT OF APPEAL (Lord Evershed, M.R., Romer and Pearce, L.J.J.), June 15, 1959.]

Habeas Corpus—Appeal—Criminal cause or matter—Second application for habeas corpus to different court rejected on ground that dismissal of first application was a decision for whole High Court—Appeal against second rejection—No jurisdiction—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5 c. 49), s. 31 (1) (a).

D

In July, 1957, the applicant was convicted on all counts of an indictment containing five counts, the first count being in regard to a felony and the other four counts in regard to misdemeanours. He was sentenced to four years' corrective training, but no part of the sentence was stated to be on any particular count. On appeal against conviction on the first three counts, the Court of Criminal Appeal quashed the conviction on the first count. There was no alteration of sentence. On an application to a Divisional Court of the Queen's Bench Division for a writ of habeas corpus, the applicant claimed that the sentence of four years' corrective training related exclusively to the first count of the indictment and that, therefore, he was entitled to be released. The Divisional Court refused the application, holding that the sentence passed on the applicant was a sentence of concurrent terms on each count and that, therefore, the quashing of one count had no effect on the sentence. A Divisional Court of the Chancery Division having refused to entertain a subsequent application made on the same grounds, the applicant appealed to the Court of Appeal.

E

F

G

Held: no appeal lay from the decision of the Divisional Court of the Chancery Division, because this was a criminal cause or matter, within s. 31 (1) (a)* of the Supreme Court of Judicature (Consolidation) Act, 1925, in that, as the essential question was whether the applicant was rightly incarcerated, it challenged the validity of the decision of the Queen's Bench Divisional Court that the sentence of four years' corrective training was concurrent on each count and, therefore, linked the application with the original criminal proceedings.

H

Decision of the DIVISIONAL COURT ([1959] 1 All E.R. 698) affirmed.

[For the Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (1) (a), see 5 HALSBURY'S STATUTES (2nd Edn.) 357.]

Cases referred to:

I

Amand v. Secretary of State for Home Affairs, [1942] 2 All E.R. 381; sub nom. *Amand v. Home Secretary & Minister of Defence of Royal Netherlands Government*, [1943] A.C. 147; sub nom. *R. v. Secretary of State for Home Affairs & Minister of Defence of the Royal Netherlands Government*, *Ex p. Amand*, 111 L.J.K.B. 657; 167 L.T. 177; 2nd Digest Supp. *Auten v. Rayner*, [1958] 3 All E.R. 566; 123 J.P. 124; [1958] 1 W.L.R. 1300; 3rd Digest Supp.

* Section 31 (1) (a) is printed at p. 223, letter A, post.

R. v. Maidstone Prison (Governor), Ex p. Maguire, (1925), 95 L.J.K.B. 55; A Digest Supp.

Woodhall, Ex p., (1888), 20 Q.B.D. 832; 57 L.J.M.C. 71; 59 L.T. 841; 52 J.P. 581; 14 Digest (Repl.) 607, 6019.

Appeal.

The applicant, Edward Thomas Hastings, appealed from a decision of a Divisional Court of the Chancery Division (VAISEY and HARMAN, JJ.), dated Mar. 6, 1959, and reported, [1959] 1 All E.R. 698, dismissing his application for a writ of habeas corpus directed to the Secretary of State for Home Affairs and the Governor of Durham Prison, the applicant being then detained in Durham Prison undergoing a sentence of four years' corrective training. The Divisional Court of the Chancery Division held that it had no jurisdiction to entertain the application, as the matter had already been decided by a Divisional Court of the Queen's Bench Division. Before the Court of Appeal the Solicitor-General, for the respondents, took the preliminary point that no appeal lay as this was a criminal cause or matter within s. 31 (1) (a) of the Supreme Court of Judicature (Consolidation) Act, 1925.

The applicant appeared in person.

The Solicitor-General (Sir Harry Hylton-Foster, Q.C.) and J. R. Cumming-Bruce for the respondents.

LORD EVERSHERD, M.R.: The appellant in this court, Edward Thomas Hastings (referred to hereinafter as "the applicant") was convicted in July, 1957, in the Crown Court at Liverpool on all counts of an indictment containing five counts. The first count was for alleged felony and the second to the fifth counts, inclusive, were for misdemeanours. After he was convicted on all five counts, the sentence imposed on him was: "four years' corrective training". The sentence contained no reference to any particular charge, nor was it expressly stated whether the four years' corrective training was intended to be concurrent on each count. The applicant appealed to the Court of Criminal Appeal by leave and he succeeded in getting the conviction on the first count for felony quashed. He had also appealed on the second and third counts, but in those respects he failed (1).

The next step was that in March, 1958, the applicant applied for an order for a writ of habeas corpus ad subjiciendum to a Divisional Court of the Queen's Bench Division over which LORD GODDARD, C.J., presided. The applicant's point was that the four years' corrective training should be related exclusively to the charge of felony, which had now been quashed, and that, therefore, there was no effective sentence outstanding against him and he was entitled to be released. The Divisional Court (2) rejected that view, holding that in the circumstances the sentence of four years' corrective training must be treated as having been concurrent in respect of all the counts, so that the quashing of the conviction on the first count for felony left the sentence of four years' corrective training outstanding and effective in respect of the second to the fifth counts respectively. From that decision of the Divisional Court the applicant sought to appeal to this court, and I have before me the judgment (3) of this court delivered on July 28, 1958. On that occasion the applicant was represented by leading counsel, and the respondents were represented by the Solicitor-General and two other counsel. A preliminary objection was taken by the Solicitor-General that no appeal lay on this matter to this court, having regard to the language of s. 31 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, which says:

(1) Leave to appeal was given only in respect of conviction, and PEARSON, J., giving the judgment of the Court of Criminal Appeal, said that, in the opinion of the court, the sentence was a reasonable one, and that there would be no alteration of sentence.

(2) The judgment of the Divisional Court is reported in [1958] 1 All E.R. 707.

(3) A summary of the judgment is to be found in a footnote to *Re Hastings (No. 2)* in [1958] 3 All E.R. at p. 627.

- A “No appeal shall lie—(a) except as provided by the Criminal Appeal Act, 1907, or this Act, from any judgment of the High Court in any criminal cause or matter . . .”

B This court pointed out that no question arose out of the exceptions (that is, the references to the Criminal Appeal Act, 1907, or to the Act of 1925 itself), so that the single point for decision was whether the applicant's attempted appeal was, or would (if entertained) be, an appeal in a criminal cause or matter. The members of this court then sitting referred to *Ex p. Woodhall* (4), *R. v. Maidstone Prison (Governor)*, *Ex p. Maguire* (5), and *Amand v. Secretary of State for Home Affairs* (6), a decision of the House of Lords. The court pointed out that the first two decisions which I have mentioned were decisions under s. 47 of the Supreme Court of Judicature Act, 1873 (7), although they observed that the material statutory language did not differ, and also that the two decisions had been approved in cases decided since 1925. *Amand v. Secretary of State for Home Affairs* (6) was, of course, a decision after the Act of 1925 had been passed. I do not propose to refer at length to the judgment of this court in the applicant's earlier appeal or to citations from the three authorities which I have mentioned. It is sufficient to say that this court clearly took the view that an application for

D an order of habeas corpus ad subjiciendum in a case such as this could not be regarded as sufficiently distinct from the original proceeding, namely, his trial and conviction at the Crown Court at Liverpool, to enable him to say that the application was not in a criminal cause or matter; and it followed from that, they held, that no appeal lay to this court.

E Since that judgment two other events have occurred. In the first place the applicant made another original application (8) for an order for a writ of habeas corpus to another Divisional Court of the Queen's Bench Division, in this instance presided over by LORD PARKER, C.J., the other members of the court also being different from those who constituted the court over which LORD GODDARD, C.J., presided in March, 1958. It was suggested on the applicant's behalf that he could go from judge to judge, or from groups of judges to groups of judges, until he had

F exhausted the entire personnel of the Queen's Bench Division. But the Divisional Court rejected that view, holding that, if on a matter of this kind a Divisional Court of the Queen's Bench Division, properly constituted, had dealt with an application for habeas corpus, it must be treated as speaking for all the judges of the Queen's Bench Division. The court did not, however, go on to say anything about the jurisdiction of judges of other Divisional Courts, and,

G encouraged thereby, the applicant then proceeded, in March, 1959, to apply to the Chancery Division for the same order of habeas corpus based on the identical contentions which he had put forward before the original Queen's Bench Divisional Court.

H There was some preliminary difficulty about the constitution in the Chancery Division of a Divisional Court at all, but that difficulty was successfully overcome, so that the matter was heard before VAISEY, J., and HARMAN, J., sitting as a Divisional Court of the Chancery Division. They took the view that, since the Supreme Court of Judicature Act, 1873, the Chancery Court, as it was previously called, was no longer a separate court, and that the judges of the Chancery Division were, no less than the judges of the Queen's Bench Division, or of the Probate, Divorce and Admiralty Division, judges of the High Court; from which

I it followed that, if the Divisional Court, presided over by LORD GODDARD, C.J., on the original application had spoken for the Queen's Bench Division, it must also be taken to have spoken for the personnel of the High Court as a whole and as a single entity. The preliminary objection having been taken by the Solicitor-General, the order made was, in terms, that the motion do stand dismissed out of this court.

(4) (1888), 20 Q.B.D. 832.

(5) (1925), 95 L.J.K.B. 55.

(6) [1942] 2 All E.R. 381; [1943] A.C. 147.

(7) Section 47 has now been repealed.

(8) It is reported in [1958] 3 All E.R. 625.

The applicant now appeals to this court, and the question, therefore, arises once again on the objection taken by the Solicitor-General: Is this appeal, if we entertain it, an appeal in a criminal cause or matter? There is obviously only one matter of distinction between the case as it now comes before us and the case as it came before this court a year ago. The applicant says that the Divisional Court of the Chancery Division wrongly took the view that the judgment of the first Divisional Court of the Queen's Bench Division spoke for the entire High Court, and that, accordingly, he was entitled to have his case reheard by a Divisional Court of the Chancery Division. Even if it is assumed, however, that that argument is well founded, it seems quite plain that, none the less, this present appeal, if entertained, would be an appeal in a criminal cause or matter. The essential subject-matter which is raised by the application (from the judgment on which the applicant now seeks to appeal) is the question whether in the circumstances he is rightly incarcerated in prison; and that challenges the validity of the view of the first Divisional Court, in March, 1958, that the four years' corrective training must be treated as having been concurrent on all the charges, which, in turn, inevitably links the present application with the original proceedings when the conviction was entered. It seems to me that there can be no escape from that conclusion. In *Ex p. Woodhall* (9) it was said that the words "criminal cause or matter" must be given a very wide significance, and in that case the question was put whether it could be said that the question now sought to be raised was in, or with regard to, proceedings the subject-matter of which was criminal. No doubt, that formula should not be carried to extreme lengths.

The applicant referred to *Auten v. Rayner* (10), a decision of this court. The question there was whether the Home Secretary had been entitled to make a determination preventing or refusing the production by police officers, on discovery in a civil action, of certain police records. The applicant said that to some extent those police records were related to quite different criminal proceedings. It seems quite plain that the appeal to this court in *Auten v. Rayner* (10), which was concerned with discovery, could not fairly be said to be in regard to the criminal proceedings to which certain of the records related or might have related. But in the present case the link between the original criminal proceedings and the present application is far closer and is, as I think, incapable of severance. The applicant is seeking to challenge the effect of what transpired in July, 1957, when he was convicted of the charges which I have mentioned and as to four of which he still remains convicted. In my judgment, the further point whether, once a Divisional Court has refused an application, that concludes the matter and prevents him making the identical application to other judges of the High Court, does not suffice to distinguish this case from the conclusion of this court pronounced on July 28, 1958, and I am, therefore, clear that the preliminary objection taken by the Solicitor-General must be sustained. In the terms of s. 31 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, we have no jurisdiction to entertain this appeal.

ROMER, L.J.: I entirely agree with LORD EVERSHERD, M.R., and there is nothing that I wish to add.

PEARCE, L.J.: I also entirely agree with what my Lord has said.

Appeal dismissed.

Solicitor: *Treasury Solicitor* (for the respondents).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

A
WARD v. T. E. HOPKINS & SON, LTD.
BAKER AND ANOTHER v. T. E. HOPKINS & SON, LTD.

[COURT OF APPEAL (MORRIS, ORMEROD AND WILLMER, L.J.J.), June 1, 2, 3, 4, 5,
July 24, 1959.]

B *Negligence—Rescue—Negligence placing workmen in imminent peril from gas on their descending a well—Doctor descending well to rescue them—Whether duty of care owed by master to servant extended to doctor.*

Safe System of Working—Safe place of work—Well—Clearing well of water—Petrol pump used on platform down well—Danger from carbon monoxide—Employees told not to go down well—Danger of death not indicated—Liability of master to servants and to doctor attempting rescue.

D A company, which carried on business as builders and contractors, undertook work on a well which involved clearing it of water. The well was some fifty feet deep and about six feet in diameter. H., a director of the company, and W. and another workman employed by the company, erected a platform twenty-nine feet down the well and some nine feet above the water and lowered on to it a petrol-driven pump. After the engine of this pump had worked for about one and a half hours it stopped and a haze of fumes was visible in the well. The working of the petrol engine created also a dangerous concentration of carbon monoxide, a colourless gas. H. returned to the well after working hours that evening and observed the haze and noticed a smell of fumes. On the following morning at about 7.30 a.m. H. instructed the two workmen to go to the well, but said to W. "Don't go down that bloody well until I come". The workmen arrived at the well at about 8.15 a.m., and, before H. had arrived, one of the workmen went down the well and a few minutes later the other workman also went down it. Both were overcome by fumes. A doctor, who was called to the well, went down the well with a rope tied to his body in order to see if he could rescue the men, though he had been warned not to go. He also was overcome by fumes. Endeavour was made to haul him to the surface by the rope, but the rope caught in a down pipe in the well and he could not be brought to the surface until help arrived some time later. He died shortly afterwards. The court found that H. had acted in good faith but that he lacked experience and did not appreciate the great danger that would be created in the well and did not seek expert advice on the proper method of emptying the well. In actions for damages for negligence resulting in the death of W. and the doctor damages were awarded, but those awarded in the case of W. were apportioned, one-tenth of the responsibility being attributed to W. On appeal,

H **Held:** (i) the defendant company were liable for negligence causing the death of W. because the method adopted to empty the well had created a situation of great danger to anyone descending the well on the morning in question, and the defendant company were negligent in that no clear warning of the deadly danger was given to W. on that morning, H.'s order not to go down the well until he came being insufficient to discharge the defendant company's legal duty to take reasonable care not to expose W. to unnecessary risk, though the apportionment of one-tenth of the responsibility to W. would not be disturbed.

I (ii) the defendant company were liable for negligence causing the death of the doctor because it was a natural and proper consequence of the defendant company's negligence towards the two workmen that someone would attempt to rescue them, and the defendant company should have foreseen that consequence; accordingly the defendant company were in breach of duty towards the doctor.

Dictum of LORD ATKIN in *M'Alister (or Donoghue) v. Stevenson* ([1932] All E.R. Rep. at p. 11) applied.

(iii) no defence to the claim arising out of the death of the doctor was afforded either

(a) by the principle of *novus actus interveniens*, for that did not apply where, as in the present case, the act in question was the very kind of thing that was likely to happen as a result of the negligence.

Dictum of GREER, L.J., in *Haynes v. Harwood* ([1934] All E.R. Rep. at p. 107) applied.

or (b) by the maxim *volenti non fit injuria*, for that could not be successfully invoked as a defence by a person who had negligently placed others in a situation of such peril that it was foreseeable that someone would attempt their rescue.

Dictum of GREER, L.J., in *Haynes v. Harwood* ([1934] All E.R. Rep. at p. 108) applied.

(iv) the doctor had not acted recklessly or negligently and had neither caused nor contributed to his own death.

Per WILLMER, L.J.: bearing in mind that danger invites rescue, the court should not be astute to accept criticism of the rescuer's conduct from the wrongdoer who created the danger (see p. 244, letter B, post).

Decision of BARRY, J. ([1958] 3 All E.R. 147) affirmed.

[As to a master's duty not to expose his servant to unnecessary risk, see 25 HALSBURY'S LAWS (2nd Edn.) pp. 508 et seq.; as to human intervention breaking the chain of causation of damage, see 11 HALSBURY'S LAWS (3rd Edn.) 283, para. 467, and as to imminent danger justifying an unusual course of action, so as not to amount to contributory negligence, see 23 HALSBURY'S LAWS (2nd Edn.) 688, para. 971.]

As to the intervention of a third party and the chain of causation in negligence, see 23 HALSBURY'S LAWS (2nd Edn.) 594, para. 845; and for cases on the subject, see 36 DIGEST (Repl.) 33, 34, 150-157, and 151, 794, 795.]

Cases referred to:

Admiralty Comrs. v. S. S. Volute, [1922] 1 A.C. 129; 91 L.J.P. 38; 126 L.T. 425; 41 Digest 780, 6417.

Brandon v. Osborne, Garrett & Co., [1924] 1 K.B. 548; 93 L.J.K.B. 304; 130 L.T. 670; 36 Digest (Repl.) 191, 1008.

British Fame (Owners) v. Macgregor (Owners). *The Macgregor*, [1943] 1 All E.R. 33; [1943] A.C. 197; 112 L.J.P.C. 6; 168 L.T. 193; 2nd Digest Supp.

Canadian Pacific Ry. Co. v. Kelvin Shipping Co., Ltd. The Metagama, (1927), 138 L.T. 369; 29 Lloyd's Rep. 253; 41 Digest 776, 6352.

Dann v. Hamilton, [1939] 1 All E.R. 59; [1939] 1 K.B. 509; 108 L.J.K.B. 255; 160 L.T. 433; 36 Digest (Repl.) 155, 813.

Davies v. Swan Motor Co. (Swansea), Ltd., [1949] 1 All E.R. 620; [1949] 2 K.B. 291; 36 Digest (Repl.) 171, 921.

Hadley v. Baxendale, (1854), 9 Exch. 341; 23 L.J. Ex. 179; 23 L.T.O.S. 69; 156 E.R. 145; 17 Digest (Repl.) 91, 99.

Hay (or Bourhill) v. Young, [1942] 2 All E.R. 396; [1943] A.C. 92; 111 L.J.P.C. 97; 167 L.T. 261; 36 Digest (Repl.) 16, 66.

Haynes v. Harwood, [1934] All E.R. Rep. 103; [1935] 1 K.B. 146; 104 L.J.K.B. 63; 152 L.T. 121; 36 Digest (Repl.) 151, 795.

Hyett v. Great Western Ry. Co., [1947] 2 All E.R. 264; [1948] 1 K.B. 345; [1947] L.J.R. 1243; 177 L.T. 178; 36 Digest (Repl.) 45, 243.

Letang v. Ottawa Electric Ry. Co., [1926] A.C. 725; 36 Digest (Repl.) 156, 1349.

- A** *Lord v. Pacific Steam Navigation Co., Ltd. The Oropesa*, [1943] 1 All E.R. 211; [1943] P. 32; 112 L.J.P. 91; 168 L.T. 364; 2nd Digest Supp.
- M'Alister (or Donoghue) v. Stevenson*, [1932] All E.R. Rep. 1; [1932] A.C. 562; 1932 S.C. (H.L.) 31; 101 L.J.P.C. 119; 147 L.T. 281; 36 Digest (Repl.) 85, 458.
- B** *National Coal Board v. England*, [1954] 1 All E.R. 546; [1954] A.C. 403; [1954] 2 W.L.R. 400; 3rd Digest Supp.
- Osborne v. London & North Western Ry. Co.*, (1888), 21 Q.B.D. 220; 57 L.J.Q.B. 618; 59 L.T. 227; 52 J.P. 806; 36 Digest (Repl.) 156, 822.
- Stapley v. Gypsum Mines, Ltd.*, [1953] 2 All E.R. 478; [1953] A.C. 663; [1953] 3 W.L.R. 279; 3rd Digest Supp.
- C** *Wagner v. International Ry. Co.*, (1921), 232 N.Y. Rep. 176.

Appeal.

- The first plaintiff, Mrs. Florence Mary Ward, the widow of a Mr. W. Ward, a former employee of the defendant company, and the second plaintiffs, Mrs. Ailsa Battie Baker, widow of Dr. Mark Gregory Baker, and Mr. Geoffrey Murkett, as executors of Dr. Baker, brought actions for damages against the defendant company under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, for negligently causing the deaths of Mr. Ward and Dr. Baker. On July 21, 1958, BARRY, J. (reported, as regards the action brought by the second plaintiffs, [1958] 3 All E.R. 147), gave judgment for the plaintiffs in the two actions holding that the defendant company had been guilty of a breach of duty towards both Mr. Ward and Dr. Baker resulting in their deaths, and that there had been contributory negligence on the part of Mr. Ward whose responsibility for the accident resulting in their deaths he assessed at ten per cent., but no contributory negligence on the part of Dr. Baker. The defendant company appealed to the Court of Appeal. The second plaintiffs served a respondent's notice that it would be contended that the amount of general damages should be increased, and the defendant company gave a supplemental notice that, in the event of their appeal as to liability being unsuccessful in that case, they would contend that the amount of the damages should be reduced. These further claims as to damages were withdrawn at the hearing (see p. 230, letter D, post).
- E**
- F**

The facts appear in the judgment of MORRIS, L.J., *infra* to p. 230, letter C, post.

- G** *Marven Everett, Q.C.*, and *Tudor Evans* for the defendant company.
M. K. Harrison-Hall for the first plaintiff.
F. W. Beney, Q.C., and *D. G. A. Lowe* for the second plaintiffs.

Cur. adv. vult.

July 24. The following judgments were read.

- H** **MORRIS, L.J.:** The tragic events which gave rise to this litigation occurred within a very short space of time on Wednesday, Aug. 17, 1955. The defendant company had been engaged to undertake the task of cleaning out a well at Tadser Farm, Ticknell, in the county of Derby, which had become contaminated. The well was about fifty feet in depth with a diameter of six feet. On Saturday, Aug. 13, Mr. Hopkins, the managing director of the defendant company, together with his employees, Ward and Wileman, went to the farm. They appear first to have attempted to empty the well by using the hand pump which was normally used. It was obviously necessary to empty the well of water before it could be adequately cleaned. The hand pump proved to be ineffective for the purpose of pumping the water from the bottom of the well. An alternative method of pumping had to be devised. Mr. Hopkins decided to use a Pegson pump, operated by a petrol engine. He went away to get the pump in question and returned with it and with other equipment on his lorry. He made a test of the atmosphere in the well.
- I**

He adopted the method of lowering a lighted candle which was placed in a bucket. When the bucket was raised again the candle was still alight. The evidence showed that a candle would remain alight if the percentage of oxygen in the atmosphere was not below seventeen per cent. A

Having made the test, Mr. Hopkins and his two men erected a wooden platform in the well at a position approximately nine feet above the existing water level in the well. The depth of the water in the well was approximately twelve feet. In the well there were certain permanent wooden fixtures, which supported and contained the pipe through which water was pumped from the well. A ladder from the surface was placed on to one of the cross-members of the wooden structure; from that ladder it was possible to step on to a second ladder, which was placed so as to reach down to the platform that was erected. The pump was lowered down to the platform. No sufficiently long delivery hose was then available. B C

On Tuesday, Aug. 16, Mr. Hopkins and the two men went again to the farm. The learned judge accepted the evidence of Mr. Hopkins that he made a test by lowering a candle into the well and that the candle was not extinguished. A length of hose had to be obtained so that the water could be pumped to ground level. After that was obtained the petrol engine of the pump was started up. It was started by Ward, Mr. Hopkins being then half way down the well. After some initial uncertainty the engine ran smoothly. Mr. Hopkins and Ward came up to the surface after the engine had been made to run and the latter made a remark to Mr. Hopkins to this effect: "By gum, you couldn't stay down there long, the fumes would kill you." Mr. Hopkins replied: "That is how they commit suicide in motor cars." The remarks so made were considered by the judge to be by way of casual exchange. The petrol tank of the engine contained enough petrol to enable the motor pump to run for about six hours and Mr. Hopkins considered that such period of time would be sufficient to enable the pump to clear the well. The engine was started just after four o'clock in the afternoon. D E

The evidence establishes that the use of a petrol-driven engine in the well was productive of most serious consequences. The exhaust from the petrol engine would contain carbon monoxide. Carbon monoxide is an odourless gas and is very slightly lighter than air but in the confines of the well, where the air would be undisturbed, it would not be drawn away or rise but would gradually build up a most dangerous concentration of lethal gas. It is not in contest in the litigation that the method employed was improper and was highly dangerous. There were no means of ventilation in the well. The evidence showed that a concentration of half of one per cent. of carbon monoxide is fatal and that a most dangerous quantity of carbon monoxide may be present even though the oxygen content of the air remains at over seventeen per cent. The lighted candle test to which I have referred is therefore quite useless for the effective detection of carbon monoxide. F G

Mr. Hopkins was absolved from conduct that involved callousness or moral turpitude on his part, but it was clearly shown that, by reason of his lack of knowledge and experience and his failure to take advice, he employed a system which inevitably exposed those called on to operate it to unnecessary risks. Mr. Hopkins did not appreciate the grave dangers of the system that he adopted and did not know that the tests of the atmosphere in the well that he made were wholly ineffective as a means of detecting the presence of a highly dangerous concentration of poisonous gas. H I

Though, when Mr. Hopkins first adopted the plan of having a petrol-driven pump some thirty feet down in the well, he had not appreciated the dangers that he was creating, he does appear to have had some sense of alarm after the pump had been working for a short time. When a friend of his, a Mr. Grew, called on him while he was at the farm on that Tuesday afternoon, Mr. Grew and Mr. Hopkins made a test to measure the depth of the water in the well. A test of the air was then made by attaching a lighted candle to a line and lowering it

A down into the well. After being lowered approximately fifteen feet, the candle was extinguished. That took place at about 4.55 p.m. Shortly after that Mr. Hopkins went away from the farm leaving Ward and Wileman there. Before he went away Mr. Hopkins spoke to Ward and it was held by the learned judge that he used words to this effect: "Don't go down the well tomorrow until the fumes have cleared." Ward replied "All right". Ward and Wileman
B remained at the farm until approximately 5.30 p.m., but just before they left the engine stopped of its own accord. It had by then been running for about one and a half hours. It seems very probable that the reason why the engine stopped was that the well had become so devoid of oxygen that combustion in the engine was not possible.

C Mr. Hopkins then became uneasy about the conditions in the well. He decided to go back there and did so at about 7 p.m. Ward and Wileman did not know of this visit and never came to know of it. Mr. Hopkins had expected to find the petrol engine still running but he learned that it had stopped just before his men, Ward and Wileman, left for the day. Looking into the well he saw that it contained a kind of blue haze and there was a smell of fumes.

D Next morning at 7.30, Ward and Wileman, in accordance with the usual practice, went to the yard of the defendant company at Ashby and there met other employees and Mr. Hopkins. Certain orders for the men were given and Ward and Wileman were told that the lorry driver, whose name was Cartlidge, would drive them in the lorry to Tadser Farm. Before the lorry left the yard certain posts had to be unloaded and Ward and Wileman were to assist in their unloading. The lorry was to take certain tiles to a nearby village and was
E then to take the two men on. The learned judge held that Mr. Hopkins said to Ward and Wileman:

"Frank (i.e., Frank Cartlidge) will take you to Tadser Farm and don't go down that bloody well till I get there."

F From the yard Ward and Wileman took with them a partly filled two-gallon can of petrol. Mr. Hopkins thought that the time which would be taken in carrying out the early duties would be about an hour. In fact the two men arrived at Tadser Farm at about a quarter past eight. Mr. Hopkins had an engagement which took him to Ellistown and he planned thereafter to go on to Tadser Farm.

G After Ward and Wileman arrived at Tadser Farm bearing with them the partly filled two-gallon petrol can, they appear first to have made a test of the depth of the water in the well. So Miss Insley, who was staying at the farm, concluded by reason of some sounds that she heard. Then, after the men had been at the farm some seven to ten minutes, Miss Insley heard Wileman call out in a tone of some agitation—"Bill, are you all right." Miss Insley called her brother-in-law, Mr. Taylor. Mr. Taylor went out and saw and spoke to Wileman who said
H that he feared that his mate who had gone down the well must be ill. Mr. Taylor said that he would seek help and requested Wileman not to go down the well. Mr. Taylor went to a near-by farm in order to telephone for, or to cause telephone messages to be sent for, the police and for a doctor and to summon Mr. Hopkins. Miss Insley went outside shortly thereafter. Miss Insley and Mrs. Taylor looked down into the well and listened. They could see that Wileman had gone down.
I He appeared to be on the platform down in the well. Heavy breathing could be heard and a splashing sound that may have been caused by the falling of petrol from the platform to the water below. Mr. Taylor returned and was accompanied by the neighbouring farmer. Being told of the situation Mr. Taylor went away in order to get the police to call a fire brigade that would have breathing apparatus. Then Dr. Baker arrived at the farm. It seems clear that in some manner he must have received a message or request to go there.

The details of the subsequent events are chronicled in the very careful judgment of the learned judge. Miss Insley told Dr. Baker what had happened and

told him about the running of the petrol engine and, saying that the fire brigade had been sent for, suggested that he ought not to go down. Dr. Baker who had by then tied a rope round his waist said:—"There are two men down there. I must see what I can do for them". Miss Insley feared that Dr. Baker would, to use her words, "only make a third" and urged Dr. Baker not to go into the well. But Dr. Baker, prompted by the finest instincts of humanity, proceeded to go down. He did so after arranging for Miss Insley and Mrs. Taylor to hold on to the rope and to pull him up if he called. He went down. He replied to Miss Insley's inquiries and made oral reports of his progress. Thereafter the doctor became overcome and his weight came on to the rope. The two ladies had by then been joined by a Mr. Weaver and the three of them proceeded to pull up the rope. Then by the cruellest mischance the rope became caught and they could raise it no further. In the result Ward and Wileman and Dr. Baker lost their lives.

Actions were brought against Mr. Hopkins' company—the defendant company—in respect of the deaths of Ward and of Dr. Baker. The claims were put forward under Lord Campbell's Act and under the Law Reform (Miscellaneous Provisions) Act, 1934. BARRY, J., held that the claims succeeded and appeals are now brought to this court. In regard to the appeal in the action concerning Dr. Baker's death, there was a notice served by the second plaintiffs under R.S.C., Ord. 58, r. 6, that it would be contended that the amount of the general damages should be increased. By a supplemental notice of appeal the defendant company gave notice that, in the event of their appeal as to liability being unsuccessful, they would contend that the amount of the damages should be reduced. With the approval of the court, the respective claims to increase or to reduce the damages were, however, withdrawn.

It will be convenient to deal first with Dr. Baker's case. The claim which was put forward was that there was negligence, for which the defendant company were responsible and that such negligence resulted in the death of Dr. Baker.

The first stage in the proof of the claim involves proof that the defendant company were negligent towards their employees, the second that such negligence caused such employees to be in peril, the third that this could reasonably have been foreseen, and the fourth that it could also have been reasonably foreseen that someone would be likely to seek to rescue them from their peril and might either suffer injury or lose his life. In the classic words of LORD ATKIN in *M'Alister (or Donoghue) v. Stevenson* (1):

"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour."

Neighbours are those persons (1)

"who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

So in this case it is said that, if the defendant company negligently caused or permitted their servants to be placed in dire peril in a gas-filled well, it ought reasonably to have been contemplated that some brave and stalwart man would attempt to save their lives. In the eloquent words of CARDOZO, J., in *Wagner v. International Ry. Co.* (2):

"Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognises them as normal. It places their effect within the range of the natural and probable. The wrong that imperils life is a wrong to the imperilled victim; it is a wrong also to his rescuer."

The decision of this court in *Haynes v. Harwood* (3) shows: (i) that there may

(1) [1932] All E.R. Rep. at p. 11; [1932] A.C. at p. 580.

(2) (1921), 232 N.Y. Rep. at p. 180.

(3) [1934] All E.R. Rep. 103; [1935] 1 K.B. 146.

A be circumstances in which, if A by negligence places B in peril, A ought reasonably to contemplate or to have contemplated that C might endeavour to rescue B; and (ii) that, if in such circumstances C suffers hurt, he may recover damages from A. It is said that in the present case there was negligence on the part of the defendant company and that as a result Ward and Wileman were placed in peril and that as a further result Dr. Baker tried to rescue them and in the attempt lost his life. But, on behalf of the defendant company, it is submitted that, even if the company were at fault in arranging to have a petrol-driven pump in the well, the predicament of peril of Ward and Wileman was not a result of such fault. It is said that the instruction or admonition of Mr. Hopkins expressed in the words which I have quoted was such that the later presence of Ward and Wileman in the dangerous well must be attributed solely to a disobedience on their part of a direct prohibition and not at all to any negligence which created the elements of danger in the well.

In considering this submission it becomes necessary to examine (a) the duty owed by the defendant company to Ward and Wileman in the circumstances of this case, and (b) the nature of the instruction given and the effect of giving it. Stated in general terms, the duty of the defendant company was to take reasonable care to provide for the well-being and safety of their employees so as to avoid exposing them to any unnecessary risks. When, however, the company set about the task which they had undertaken of cleaning out the well, they proceeded to adopt a method of operation which was extremely dangerous and unsafe. The employment of the petrol-driven pump in the well involved that lethal conditions would be created which might long persist. The pump could only be started if someone went down into the well; such person would soon thereafter be exposed to the risk of inhaling gases which might kill him. Such person, having started the engine of the pump, might come safely to the surface—but it might thereafter be unsafe for anyone to go into the well for many days or weeks. It is manifest that the petrol-driven pump would never have been used if there had been an appreciation of the most serious dangers as well as of the impracticabilities of the system adopted. But, though the defendant company were not indifferent or callous in regard to the welfare of their employees, the unawareness which allowed them to follow a most hazardous and dangerous method of operations cannot in law absolve or excuse them.

Then it is said that Ward and Wileman were told on the Wednesday morning not to go down the well until Mr. Hopkins arrived, and so it is said that, by the giving of that instruction, the defendant company discharged their duty to exercise reasonable care. It is argued that, if Ward and Wileman had obeyed the instruction, there would have been no situation of peril and that, if they had waited for the arrival of Mr. Hopkins, there would then have been a test made by Mr. Hopkins of the air conditions in the well, which would have revealed the dangers and which would have brought it about that no one would have gone down. The question arises therefore whether the defendant company did all that the dictates of reasonable care demanded. Involved in this question is the further question as to the nature of the instruction given.

The situation on the Wednesday morning was that the defendant company, by the system they had adopted had caused the well to be a place entry into which would probably result in death. Ward and Wileman had left their work the previous evening at the normal hour for finishing work and neither then nor on the following morning was there any suggestion to them that operations in the well might have to be abandoned or for a long period suspended. The men were sent to the farm on the Wednesday morning. If there had been a proper realisation on the part of the defendant company that a descent into the well would mean death, I cannot conceive that there would have been a failure so to inform the men. Common humanity and common sense alike would call for a warning in the clearest terms. If an unambiguous order to refrain in any circumstances

from going into the well for a certain time was to be given, and if the reason for the giving of such an order was that disobedience to it would mean death, I cannot imagine that any employer could reasonably refrain from explaining and emphasising the reason for the order. In the case of the most trusted and diligent of employees, it would be but prudence to warn them of the consequences that would befall them if, prompted by zeal and ardour, they set about their work. If non-compliance with an instruction will mean death from a lurking and hidden peril, no reasonable employer, remembering that men may perhaps at times be forgetful or may not clearly understand, would fail to make sure that the nature of the peril was explained and described. I cannot think, therefore, that in the circumstances of this case the defendant company discharged their duty by the mere uttering of the words spoken by Mr. Hopkins. There was ample evidence to support the finding of the learned judge that the words were spoken. But what instruction did the words convey? Unhappily, neither Ward nor Wileman can say what they understood. They are not here to explain. They were conscientious and responsible men. It ought not lightly to be thought or held that they were recalcitrant or disobedient. If they had clearly understood that the direction to them was that they were to enjoy the August morning in peace and idleness, there is no reason why they should not have been well content. If, however, they had known or thought that, if they went into the well, they would be entering a lethal chamber, it is clear that they would never have gone. In my judgment they ought to have been warned of the perils that existed; I feel sure that they would have been warned had the defendant company not been negligently ignorant of the great dangers of the system that they were negligently employing. In the case of dangers so appalling it seems to me that a warning should have been given. Even if it be thought that Ward understood that he had been told not to go down the well in any circumstances until Mr. Hopkins arrived, and that nevertheless he for some reason proceeded to do so, it can with assurance be said that he would not have gone down if he had thought or known that he would be overcome by poisonous fumes. It will never be known why Ward went down. It will never be known whether he thought or realised that he was acting contrary to an order. It may be that his understanding was that he was not to go down the well for the purpose of cleaning it until Mr. Hopkins came or was not to go down and then remain down. It may be that he had not understood or had not thought that he was enjoined from going down in order to set the pump in motion. It may be that when he got to the well he forgot what had been said. It may be that, prompted by zeal, he did disobey an instruction, thinking that at least he ought to make an inspection. The true explanation can never be known. But if the employers had done what in my judgment they ought to have done, Ward would certainly not have gone down the well. Even if some fault is attributed to Ward it seems to me that his presence in the well must, at least in part, be attributable to the breach of duty of the defendant company in the respects which I have described.

It was therefore as a result of the company's negligence (or at least was in part a result of it) that the time came when Ward was in dire peril in the well. The company could and should in my judgment have anticipated that, if as a result of their negligence their men were exposed to great danger in the well, it would be a natural and probable consequence that someone would attempt a rescue. Subject to a consideration of certain further submissions made by the defendant company, it seems to me, therefore, that it is shown that Dr. Baker's death was a result of the company's negligence.

It is submitted, however, that the action of Dr. Baker in descending the well was a *novus actus interveniens*, and it is further submitted that the defendant company could not reasonably have foreseen the possibility of such a disaster as that which occurred. In my judgment these submissions are wholly unsustainable once it is held that the company were negligent in creating a situation of great

A danger and further in failing to warn their servants of it or in failing to ensure that their servants would not be exposed to it. There is happily in all men of good will an urge to save those who are in peril. Those who put men in peril can hardly be heard to say that they never thought that rescue might be attempted or be heard to say that the rescue attempt was not caused by the creation of the peril. As GREER, L.J., said in *Haynes v. Harwood* (4):

B “If what is relied upon as *novus actus interveniens* is the very kind of thing which is likely to happen if the want of care which is alleged takes place, the principle embodied in the maxim is no defence.”

Equally unavailing in my judgment is the plea which is expressed in the words *volenti non fit injuria*. In *Letang v. Ottawa Electric Ry. Co.* (5) it was said:

C “It is quite a mistake to treat *volenti non fit injuria* as if it were the legal equipollent of *scienti non fit injuria*.”

Approval was given of the proposition in the judgment of WILLS, J., in *Osborne v. London & North Western Ry. Co.* (6) that:

D “If the defendants desire to succeed on the ground that the maxim *volenti non fit injuria* is applicable, they must obtain a finding of fact that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it.”

In *Dann v. Hamilton* (7) ASQUITH, J., said:

E “Where a dangerous physical condition has been brought about by the negligence of the defendant, and, after it has arisen, the plaintiff, fully appreciating its dangerous character, elects to assume the risk thereof, the maxim has often been held to apply, and to protect the defendant.”

If, however, A by negligence places B in peril in such circumstances that it is a foreseeable result that someone will try to rescue B and if C does so try—ought C in any appropriate sense to be described as a “volunteer”? In my judgment the answer is No. I confess that it seems to me to be indeed ungracious of A even to suggest it. C would not have agreed to run the risk that A might be negligent, for C would only play his part after A had been negligent. C’s intervention comes at the moment when there is some situation of peril and the cause of or the responsibility for the creation of the peril may be quite unknown to C. If C, actuated by an impulsive desire to save life, acts bravely and promptly and subjugates any timorous over-concern for his own well-being or comfort, I cannot think that it would be either rational or seemly to say that he freely and voluntarily agreed to incur the risks of the situation which had been created by A’s negligence.

H When Dr. Baker arrived at the well, he proceeded to act as the promptings of humanity directed. He tried to save life. He tried to save the defendant company’s servants. He was doubtless trying to do the very thing that the company hoped could be done. But in any event what he did was brought about by and was caused by the negligence of the company. In these circumstances, the company cannot say that he was a volunteer.

I It was further said that Dr. Baker himself acted with negligence and that his death was caused or was partly caused thereby. This contention was not advanced harshly or in the language of any carping criticism: it was said that Dr. Baker had been “unreasonably” brave. If a rescuer acts with a wanton disregard of his own safety it might be that in some circumstances it might be held that any

(4) [1935] 1 K.B. at p. 156; [1934] All E.R. Rep. at p. 107.

(5) [1926] A.C. at p. 730.

(6) (1888), 21 Q.B.D. at pp. 223, 224.

(7) [1939] 1 All E.R. at p. 63; [1939] 1 K.B. at p. 517.

injury to him was not the result of the negligence that caused the situation of danger. Such a contention cannot be here asserted. Dr. Baker tied a strong rope round his body and arranged for the rope to be held by those on the surface and arranged to maintain oral communication with them. It must be remembered also that the chances of success of his attempt would diminish moment by moment if he tarried. He in no way acted recklessly or negligently. In my judgment, the learned judge came to a correct conclusion in regard to the claim made by his widow. A B

The conclusions at which I have arrived make it unnecessary for me to express any view in regard to certain alternative submissions made by counsel for the second plaintiffs. It was said that, even if the defendant company had not been negligent, they would be vicariously responsible for any negligent acts of Ward or Wileman while acting within the scope of their employment: and it was said that, if Ward or Ward and Wileman were wholly to blame and as a result put themselves in a position of peril of a kind which invited rescue, they would be liable directly, and the defendant company vicariously, for any injury caused to someone who, as could have been foreseen, would attempt a rescue. C

I pass now to consider the appeal in the claim concerning the death of Ward. With some hesitation the learned judge came to the conclusion that ten per cent. of the blame should be attributed to Ward himself. The learned judge said (8): D

“I have hesitated for some time before reaching a conclusion that any blame should properly be attributed to Ward, but looking at the evidence as a whole I feel bound to think that a small—indeed a very small—part of the blame must rest on his shoulders.” E

The defendant company submitted in this as in the Baker case that the negligence of the company was not in any way causative of the fatalities that occurred, and that these ought to be solely attributed to disobedience of orders not to go down the well: the submission in effect was that the defendant company had discharged their duty to take reasonable care of their employees by the utterance of the words spoken by Mr. Hopkins. I have already given my reasons for my conclusion that this submission cannot be upheld. In the circumstances of the case, the defendant company were negligent in the first place in creating a situation of acute danger and then were further negligent in failing to give a clear warning of it so as to ensure that their servants would not do anything while remaining in ignorance of the danger and of its nature and extent. F

But then comes the question whether Ward was himself negligent and if so to what extent. It is argued with much force that, if he was told not to go down the well but nevertheless did so, his share of responsibility for what happened, even accepting that his employers were negligent, was a large one. This necessitates forming a conclusion as to the nature of the instruction given and as to the effect of giving it. We know what was said by Mr. Hopkins, but as I have pointed out we will never know Ward's version of the matter. Ward and Wileman were sent to the farm. The expectation undoubtedly was that operations in the well would continue that day. During the previous afternoon Ward had acquired knowledge that the petrol-driven pump caused objectionable deleterious fumes in the well and on that afternoon he had been told by Mr. Hopkins not to go down the well the next day until the fumes had cleared. It may be that on the Wednesday morning Ward thought that the fumes had cleared: it may be that he made a visual inspection and believed that they had and then went down the well to ascertain the state of affairs. It may be that he thought that what was said on the Wednesday morning was not a firm command and was not intended to prohibit either a reconnaissance or a descent in order to restart the pump. It can be assumed that the petrol can was being taken to the farm because it was anticipated that the petrol tank on the engine of the pump might have to be G H I

(8) The report of *Baker v. T. E. Hopkins & Son, Ltd.*, [1958] 3 All E.R. 147, is a report only of the claim by Dr. Baker's executors.

- A refilled so that the pump could be put in operation. It may be that Ward thought that he was to wait for Mr. Hopkins' arrival before doing any work down the well, but that he assumed that it was essential to continue the pumping out and that he assumed that Mr. Hopkins had not meant his words to be taken so literally that even any necessary pumping out of the well was not to proceed. Mr. Hopkins did not tell Ward and Wileman that he had paid a special visit to the farm the previous evening and they may have thought that he would be under the impression that the pump would have gone on working the previous evening and pumped out the water; on this basis, they may well have understood his words to mean that the clearing out of the well was to await his arrival; they would therefore think it appropriate and not contrary to the intention or spirit of his words for them to cause the pump to resume its pumping. Though much is uncertain it can be confidently assumed that, if Ward and Wileman had been told that the well contained a very powerful lethal mixture which would probably kill anyone who went into the well, Ward would not have gone down. There was no sort of gain or advantage for Ward in being deliberately disobedient and on the available evidence I do not think that it is appropriate to infer that he was. The learned judge does not in terms indicate the respect in which he considered Ward to have been blameworthy. It is possible that he thought that Ward ought to have made some test before going into the well, but he would appear to have negatived the view that Ward was deliberately disobedient. The learned judge was very doubtful whether he should ascribe any blame to Ward at all but, after considering the matter with manifest care, he decided that there was a very small degree of blame and that nearly the whole of the blame rested with the defendant company. I see no reason to differ from this conclusion.

ORMEROD, L.J.: In considering the various issues raised in these appeals I find it convenient to consider first the case of Ward. It cannot be disputed that the system attempted to be operated by the defendant company, through Mr. Hopkins, to pump the water from the well was most dangerous. The well was about fifty feet in depth and six feet in diameter. The pump, which was operated by a petrol motor, was placed on a platform a few feet above the level of the water. It should have been obvious to Mr. Hopkins that a fatal concentration of carbon monoxide would rapidly be built up in the atmosphere at the bottom of the well, and that, with no provision for ventilation, it might well be a considerable time before the fumes had cleared sufficiently for the well to be entered with safety.

The evidence shows that Mr. Hopkins was aware at least to some extent of the dangerous nature of carbon monoxide fumes. So much is clear from his conversation with Ward on the Tuesday afternoon, when Ward after starting the engine came up to the surface and made a remark about the fumes in the well, to which Mr. Hopkins replied: "That is how they commit suicide in motor cars". He told Ward and Wileman before he left the farm not to go down the well the following day until the fumes had cleared. It is clear too that he was uneasy on the Tuesday evening about the situation. He went up to the farm about 7 p.m. and found that the engine had stopped and that the well appeared to be filled with a kind of blue haze. But he did not seem to have appreciated that the danger would remain. He seems to have expected the well to be fit for his men to enter on the Wednesday morning, although he took the precaution of saying to them before they left the yard: "Don't go down that bloody well till I get there". According to his evidence he intended to test the atmosphere in the well with a lighted candle before he allowed the men to go down. This test, as the evidence shows, is of no value so far as disclosing the presence of carbon monoxide is concerned, as a candle will continue to burn if there is present seventeen per cent. of oxygen, even though there is at the same time a fatal concentration of carbon monoxide. It is clear therefore that the defendants had embarked on an operation calculated to involve their employees in grave danger. It is not

suggested that in any way Mr. Hopkins was careless of the safety of his employees. A
He was not, however, aware to any real extent of the dangers to which he was
committing them and he took no expert advice on the matter. It would seem,
therefore, that the defendant company were in breach of their duty to Ward to
provide a safe system of work.

But it is argued by counsel for the defendant company that, in the circum- B
stances, the death of Ward was due, not to any breach of duty on the part of the
defendant company, but to Ward's own conduct in going down the well in dis-
obedience to Mr. Hopkins' instructions not to go down until he came. I find
myself unable to accept that submission. It is not known why Ward went down
the well on the Wednesday morning. He appears to have been a conscientious
and responsible workman who would be unlikely to go down in reckless dis- C
obedience to an order, particularly if he knew of the danger of so doing. We know
that the motor had stopped on the Tuesday evening before the men left work
and that neither Ward nor Wileman had reason to know that Mr. Hopkins was
aware of the fact. A possible explanation of Ward's conduct is that he went
down to restart the motor so that the water could be pumped out whilst they
were waiting for Mr. Hopkins to come. But it can only be a matter for specula-
tion. Had Mr. Hopkins told Ward that it might well be fatal if he went down the D
well the position would have been different. He did not do so, however. He told
him on the Tuesday afternoon not to go down on the Wednesday until the fumes
cleared, and on the Wednesday morning he told him not to go down until he,
Mr. Hopkins, came. Neither of these instructions was calculated to convey to
Ward any idea of the deadly nature of the atmosphere in the well. In my
judgment it was the duty of Mr. Hopkins to give Ward a clear warning of the E
danger. He failed to do this and was in consequence in breach of his duty to
Ward.

It was pleaded by the defendant company that, even if there was a breach of
duty on their part, there was also negligence on the part of Ward in going down
the well in disobedience to the instructions given to him. The defendant company
submitted that a large part of the blame should be attributed to him. The F
learned judge found himself in the circumstances unable to acquit Ward of blame
entirely, but considered his share of the blame should not be put higher than
ten per cent. I would not, for my part, seek to disturb the conclusions of the
learned judge on this part of the case.

The first question which falls for consideration in the case of Dr. Baker is
whether in the circumstances the defendant company owed any duty to him. G
If Mr. Hopkins should have foreseen, and in my view he should, that in the
absence of a clear warning of the danger Ward or Wileman might go down the
well and be overcome by the fumes, should he also have foreseen that some person
might attempt to rescue them, and in so doing suffer injury? *Haynes v. Harwood*
(9) establishes that, if one person by his negligence causes another to be in a
position of danger, he should have regard to the probability that a third person H
might attempt a rescue. In my judgment in this case Mr. Hopkins should
have foreseen that a rescue would be attempted, and that efforts would be made
to obtain the help of a doctor. The defendant company did not, I think, dispute
that in these circumstances a doctor endeavouring to assist might well come
within this class of rescuer, but they argued that the conduct of Dr. Baker, who
they agree acted with supreme courage, was such that it was not reasonable to I
expect them to foresee it.

It is true that Dr. Baker was probably fully aware of the dangerous condition
of the atmosphere of the well. Miss Insley had told him that the petrol engine
had been running at the bottom of the well, and tried hard to persuade him not to
go down. He knew that there were two men in the well who had obviously been
overcome by the fumes. But, in accordance with the high tradition of his

A profession, he said: "There are two men down there—I must see what I can do for them", and he went down the ladder, with the tragic consequence that he in turn was overcome. It may be that circumstances can arise of attempted rescue where the risk to the rescuer is so great and the chance of rescue so small that it could not be expected that a rescue would be attempted. That, however, is not this case. Before he went down the well Dr. Baker tied a rope round his waist and arranged for Miss Insley and Mrs. Taylor to pull him up if he called. He then went part of the way down the well. There is some doubt from the evidence how far down he went, but he seems to have gone far enough to make sure that there was nothing he could do to help the men. He then gave Miss Insley the signal to pull him up and it appears probable he would have been brought out of the well but for the tragic circumstance that the rope became jammed. Dr. Baker's conduct was highly courageous, but it was not foolhardy. He took precautions that might well have been effective for his own rescue in case he felt that he was being overcome. This is conduct which, in my judgment, Mr. Hopkins should reasonably have foreseen. I cannot do better than adopt the words of the learned judge (10):

D "It is beyond question that the late Dr. Baker acted as he did in an urgent and passionate desire to do everything that he could, even at great risk to himself, to preserve human life. It would be an insult to the profession to which he belonged if I were to hold that such conduct, on the part of a brave and humane doctor, could not be reasonably anticipated by those whose negligent acts created the peril which he sought to avert. It is clear that Dr. Baker was fully alive to the risks, but I can find no evidence to suggest E that he voluntarily undertook to accept all the consequences of the defendants' negligence; nor do I think that he acted in a foolhardy or unreasonable way. Despite the emergency, he arranged for himself to be roped, and, had it not been for the quite unforeseeable mischance of the rope becoming caught in the down pipe or cross members of the well, he might easily have been hauled to the surface and his life saved. The defendant company, F whose negligence brought about the danger, must, however, accept the risk of mischances of this kind."

The defendants submitted further that they could be under no liability in the case of Dr. Baker, as his conduct in going down the well consisted of a novus actus interveniens. On this submission it is appropriate to adopt the words of

G GREER, L.J., in *Haynes v. Harwood* (11)

"If what is relied upon as novus actus interveniens is the very kind of thing which is likely to happen if the want of care which is alleged takes place, the principle embodied in the maxim is no defence."

H Here the want of care alleged was creating a situation of danger in the well, and failing to warn the two men in terms which would ensure that they would not expose themselves to it. It cannot, in my view, be a case of novus actus interveniens if the conduct of Dr. Baker is the sort of conduct which the defendant company should have foreseen would happen as a result of such want of care.

I The next question for consideration is whether the defendants can avail themselves of the protection of the doctrine *volenti non fit injuria*. In my judgment they cannot so avail themselves. The important word is *volenti* and not *scienti*. Dr. Baker may well have had knowledge of the risk he was running, but that is wholly different from saying that he freely and voluntarily took the risk. He was a member of the medical profession, schooled in the tradition to do all that he could to save life and relieve suffering. In addition, he was a brave man, and in my view he acted under the compulsion of his instincts as a brave man and a doctor. This would, I think, be sufficient to dispose of the

(10) [1958] 3 All E.R. at p. 153.

(11) [1935] 1 K.B. at p. 156; [1934] All E.R. Rep. at p. 107.

defence of *volenti non fit injuria*, but in any event the doctrine would not, in my judgment, apply in a case of an attempted rescue when the act was the natural and foreseeable result of the negligence of the defendants. I think the right view was expressed by GREER, L.J., in *Haynes v. Harwood* (12) where he quoted a passage from an article by PROFESSOR GOODHART which ran as follows:

"The American rule is that the doctrine of the assumption of risk does not apply where the plaintiff has, under an exigency caused by the defendants' wrongful misconduct, consciously and deliberately faced a risk, even of death, to rescue another from imminent danger of personal injury or death, whether the person endangered is one to whom he owes a duty of protection, as a member of his family, or is a mere stranger to whom he owes no such special duty."

GREER, L.J., went on to say (13)

"In my judgment, that passage not only represents the law of the United States but also the law of this country."

The last plea raised by the defendant company was that of contributory negligence. In my view, in this case the plea cannot help the defendants. The facts must be considered as they presented themselves at the time to Dr. Baker. There was an emergency as a result of which two men's lives were in grave danger. If they were to be saved urgent action was required. Dr. Baker attempted to take that action, but not without taking such precautions as he could for his own safety. In the circumstances he did what he felt he must do. He could not be expected to have foreseen that the rope would have become jammed, and his precautions be of no help to him. There is not, on the facts of this case as disclosed by the evidence any ground, in my judgment, for a finding of contributory negligence on the part of Dr. Baker.

For these reasons, I would dismiss both these appeals.

WILLMER, L.J.: I am in no doubt that both these appeals must be dismissed. The conduct of Mr. Hopkins was, in my judgment, blameworthy in the extreme. The gravamen of his fault lay in the fact that he embarked on a most hazardous enterprise without apparently seeking any advice or taking any steps to ascertain or guard against the dangers which he was creating. I need not enlarge on this, for the argument for the defendant company has not been directed to this aspect of the case, and it is sufficient to say that I find myself wholly in agreement with the learned judge's conclusion that Mr. Hopkins "embarked on the whole enterprise with almost complete disregard to its danger."

So far as Ward's case is concerned, what is contended is that, however blameworthy Mr. Hopkins' conduct may have been in creating such a dangerous hazard, he was guilty of no breach of duty towards his two employees because, by ordering them not to go down the well until he arrived, he sufficiently discharged any duty which he owed to them to take care for their safety. Had that order been obeyed, no casualty to the two men could possibly have occurred, and consequently, it is argued, Ward by going down the well in defiance of his orders was the author of his own misfortune. In other words, it is said that Mr. Hopkins' order and Ward's disobedience of it broke the chain of causation arising from Mr. Hopkins' prior fault. The learned judge rejected this argument, and held that the order given by Mr. Hopkins to the two men not to go down the well was not sufficient to absolve the defendant company from responsibility. He held, however, that Ward was guilty of contributory negligence in going down the well in disobedience to the order, and he assessed the proportion of

(12) [1934] All E.R. Rep. at p. 108; [1935] 1 K.B. at p. 157.

(13) [1934] All E.R. Rep. at p. 108; [1935] 1 K.B. at p. 157.

A blame attributable to Ward at ten per cent. There has been no cross-appeal by the plaintiff in Ward's case against this finding of contributory negligence. But it has been contended on behalf of the defendant company that, assuming this to be a case of contributory negligence, the proportion of blame attributed to Ward ought to have been substantially greater.

B I find myself in agreement with the view expressed by the learned judge that the orders given by Mr. Hopkins to the two men were not sufficiently precise and urgent to absolve the defendants from blame. The vital order given on the morning of the accident must be considered in the context of what had occurred on the previous day. It is true that the men were aware of the fumes that had been given off by the working of the engine, and it is not in dispute that there was some conversation between Mr. Hopkins and Ward about the danger of the fumes. But there is nothing to show that, even after his experience at the bottom of the well on the previous day, Ward realised just how deadly the danger was; nor was there any reason why a man in his position should have realised that the danger would remain on the following morning, more than twelve hours after the engine had stopped running. On the contrary, Mr. Hopkins' order of the previous evening that the men were not to go down until the fumes had cleared was calculated to have precisely the opposite effect. It would lead an ordinary man to suppose that the fumes might be expected to clear after the engine had stopped working, and that it would then be safe to go down. On the following morning the two men were sent back to the farm, presumably for the purpose of working at the well. In such circumstances they may well have been puzzled to receive an order not to go down until Mr. Hopkins arrived. What were they expected to do in the meantime? Mr. Hopkins' order no doubt amounted to a prohibition against going down to the platform for the purpose of restarting the engine. But did it prohibit going a few steps down the ladder to have a closer look at the situation below and perhaps test for fumes? For all that we know to the contrary, this may be just what Ward was trying to do when he was overcome. The learned judge was in my judgment well warranted in saying that the order was insufficiently precise.

G But the real vice of the order given by Mr. Hopkins was that it conveyed no, or no sufficient, warning of danger. I agree with the submission of counsel for the second plaintiffs that Mr. Hopkins, having created the dangerous situation inside the well, was under an imperative duty to warn his men of the danger in the clearest possible way. The degree of warning required in any given situation must in my view be conditioned by the degree of the danger. The man who concocts a deadly poison and leaves it in a bottle to which other people have access does not adequately comply with his duty to warn of the danger merely by affixing a label "Not to be taken". A clear warning that the bottle contains poison would in such circumstances be imperatively required. In the present case, the danger was as deadly as it well could be, as Mr. Hopkins ought to have appreciated, and in such circumstances I cannot think that a mere order not to go down the well until he arrived, without a word of warning of the danger of so doing, was a sufficient compliance with the duty which he owed. I think it must be clear that Ward cannot in fact have appreciated the degree of the danger; otherwise it seems inconceivable that he should have acted as he did.

H I Counsel for the defendant company, however, has insisted that the sole operative cause of Ward's death was his failure to obey the order of his employer. Had Ward waited till Mr. Hopkins arrived, the latter would have made a further test with a lighted candle; this would doubtless have gone out, whereupon the danger would have been fully appreciated by all, and nobody would have gone down the well. Mr. Hopkins, it is argued, was entitled to expect obedience from his own employees; if they obeyed his orders, as was their duty, there could be no danger, and therefore there was no further duty to warn. In my judgment this argument places far too much emphasis on the duty of employees to obey

the orders of their employer. We are not dealing here with men subject to military discipline—and even if we were, it would be proper to observe that in modern times it is realised that soldiers can best be expected to obey the orders that they receive if they are made to understand the reason for them. If the argument of counsel for the defendant company were sound, an employee who sustained injury while in disobedience to his employer's orders could never be entitled to recover damages. Yet counsel for the second plaintiffs has been able to bring to our attention numerous cases in which employees who have disobeyed their orders have nevertheless been held entitled to recover damages—diminished, it is true, to the extent of their own degree of fault—against employers who have themselves been in breach of their duty. The fact that most of the cases referred to were cases where the breach was of a statutory duty is not to my mind a matter of any significance. The question whether the employer was in breach of his statutory or of his common law duty cannot make any difference to the effect of disobedience on the part of the employee.

In these circumstances, I am satisfied that Mr. Hopkins, having in breach of his duty to his employees created a situation of the utmost peril, was in further breach of his duty in failing to give them any adequate warning of the danger. I am satisfied that this failure on the part of Mr. Hopkins, for which the defendant company are liable, continued in operation throughout, and was of "causative potency" in relation to the death of Ward—to borrow the phrase used by DENNING, L.J., in *Davies v. Swan Motor Co. (Swansea), Ltd.* (14). That Ward was also guilty of negligence in disobeying the order he received is not now in issue, but I find it difficult to imagine a case in which it could more truly be said that the second act of negligence (Ward's) was "so much mixed up with the state of things brought about by the first act" (Mr. Hopkins') as to make it a cause of contribution, to use the test laid down by VISCOUNT BIRKENHEAD, L.C. in *Admiralty Comrs. v. S.S. Volute* (15).

This being so, the only remaining question in relation to Ward's case is with regard to the apportionment of blame at which the learned judge arrived. In Admiralty proceedings, the apportionment of blame has for many years been a familiar problem, and it was finally laid down by the House of Lords in *British Fame (Owners) v. Macgregor (Owners), The Macgregor* (16), following a long line of previous authorities, that in case of collision between ships an appellate tribunal which accepts the findings of fact of the court below should, in the absence of error in law, only revise the distribution of blame in very exceptional cases, as where, for instance, a number of different reasons have been given why one ship is to blame, but the appellate court find some of those reasons not to be valid, or where the judge in distributing the blame is shown to have misapprehended a vital fact bearing on the matter. It was suggested by counsel for the defendant company that, in relation to apportionment of blame under the Law Reform (Contributory Negligence) Act, 1945, the same strict rule has not been applied, and that an appellate tribunal has a greater measure of freedom to interfere, and he cited as illustration the cases of *Stapley v. Gypsum Mines, Ltd.* (17), and *National Coal Board v. England* (18). On examination of the speeches of the majority in these two cases, I am not satisfied that the submission of counsel for the defendant company is well founded. Be that as it may, I certainly do not think that this is a case in which this court would be justified in interfering with the learned judge's apportionment. If, as I think must be the case, he took the view that, in the absence of any warning by Mr. Hopkins of the danger involved, Ward's failure to comply with the order not to go down the well was little more

(14) [1949] 1 All E.R. at p. 632 letters CD; [1949] 2 K.B. at p. 326.

(15) [1922] 1 A.C. at p. 144.

(16) [1943] 1 All E.R. 33; [1943] A.C. 197.

(17) [1953] 2 All E.R. 478; [1953] A.C. 663.

(18) [1954] 1 All E.R. 546; [1954] A.C. 403.

A than a technical act of disobedience, he was in my view amply justified in reaching that conclusion in all the circumstances of this case. In my judgment, having regard to the evidence before him, the learned judge arrived at a proper and just determination of the relative degrees of fault as between Ward and Mr. Hopkins. In these circumstances, I see no reason to interfere with the learned judge's decision, so far as concerns Ward's case.

B The conclusion that the negligence of Mr. Hopkins was a substantial contributory cause of Ward's death is a matter of vital importance in connexion with Dr. Baker's case. It becomes unnecessary to consider what would have been the position had Ward's predicament been brought about entirely by his own fault, which would in turn have involved consideration of the difficult question whether Ward was acting within the scope of his employment, so as to affect the defendant company, his employers, with responsibility. Dr. Baker's case falls to be determined on the basis that Mr. Hopkins' own negligence was at least a substantial cause of the peril in which the two men, Ward and Wileman, found themselves, and which led to their death. The case, therefore, raises once more the not unfamiliar problems, much discussed in the so-called "Rescue cases", which arise where A's wrongful act puts B in a situation of peril, and C, a stranger, suffers injury in the course of attempting to rescue B.

D It seems to me that in this case, as in any case where a plaintiff is injured in going to the rescue of a third party put in peril by the defendants' wrongdoing, the questions which have to be answered are fourfold. (1) Did the wrongdoer owe any duty to the rescuer in the circumstances of the particular case? (2) If so, did the rescuer's injury result from a breach of that duty, or did his act in going to the rescue amount to a *novus actus*? (3) Did the rescuer, knowing the danger, voluntarily accept the risk of injury, so as to be defeated by the maxim *volenti non fit injuria*? (4) Was the rescuer's injury caused or contributed to by his own failure to take reasonable care for his own safety? All these questions are raised by the circumstances of this case, and have been much canvassed in argument before us. I will endeavour to deal with each in turn.

F (1) The question whether the wrongdoer owed any duty to the rescuer must be determined, in my judgment, by reference to LORD ATKIN's familiar statement of the law in *M'Alister (or Donoghue) v. Stevenson* (19) when he said:

"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour."

G In the circumstances of the particular case, is the rescuer in law the "neighbour" of the wrongdoer, in the sense that he is so closely and directly affected by the wrongdoer's act that the latter ought reasonably to have him in contemplation as being so affected? Where the act of the wrongdoer has been such as to be likely to put someone in peril, reasonable foresight will normally contemplate the probability of an attempted rescue, in the course of which the rescuer may receive injury. In the American case of *Wagner v. International Ry. Co.* (20), CARDOZO, J., as it seems to me, foreshadowed in a remarkable way LORD ATKIN's statement of principle, and applied it to a typical rescue case. He said (21):

"Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognises them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperilled victim; it is a wrong also to his rescuer."

I Then a little later he went on (21):

"The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had."

(19) [1932] All E.R. Rep. at p. 11; [1932] A.C. at p. 580.

(20) (1921), 232 N.Y. Rep. 176.

(21) (1921), 232 N.Y. Rep. at p. 180.

The judgment of CARDOZO, J., was referred to with approval by LORD WRIGHT in *Hay (or Bourhill) v. Young* (22) and LORD WRIGHT went on to say: A

"This again shows how the ambit of the persons affected by negligence or misconduct may extend beyond persons who are actually subject to physical impact. There, indeed, may be no one injured in a particular case by actual impact; but still a wrong may be committed to anyone who suffers nervous shock or is injured in an act of rescue." B

I should also refer to *Lord v. Pacific Steam Navigation Co. Ltd. The Oropesa* (23) where LORD WRIGHT said, quoting from the speech of LORD HALDANE in *Canadian Pacific Ry. Co. v. Kelvin Shipping Co., Ltd. The Metagama* (24):

"Reasonable human conduct is part of the ordinary course of things . . ."

Assuming the rescuer not to have acted unreasonably, therefore, it seems to me that he must normally belong to the class of persons who ought to be within the contemplation of the wrongdoer as being closely and directly affected by the latter's act. In the present case the fact that Dr. Baker was a doctor is of itself significant. Having regard to the nature of the peril created by the wrongful act of Mr. Hopkins, it was only too likely that a doctor would be summoned—as Dr. Baker in fact was—and, if summoned, would attempt to do all he could for the victim, even at the risk of his own safety. In such circumstances I am satisfied that Dr. Baker was one of the class who ought to have been within the contemplation of Mr. Hopkins when he brought about the dangerous situation in this well. I do not think, therefore, that it is open to the defendant company to contend that no duty was owed by Mr. Hopkins to Dr. Baker. C

(2) The question whether the act of the rescuer amounts to a novus actus answers itself, in my judgment, as soon as it is determined that it is the kind of act which ought to have been within the contemplation of the wrongdoer, so as to bring the rescuer within the class of persons to whom a duty was owed. I cannot do better than quote the words used by GREER, L.J., in *Haynes v. Harwood* (25)—a case in which a police officer was injured while attempting to stop two runaway horses drawing a van, which had been left unattended through the negligence of the defendants' servant. Dealing with the contention that the plaintiff's act amounted to a novus actus, GREER, L.J., said (26) D

"If what is relied upon as novus actus interveniens is the very kind of thing which is likely to happen if the want of care which is alleged takes place, the principle embodied in the maxim is no defence. The whole question is whether or not, to use the words of the leading case, *Hadley v. Baxendale* (27), the accident can be said to be 'the natural and probable result' of the breach of duty. If it is the very thing which ought to be anticipated by a man leaving his horses, or one of the things likely to arise as a consequence of his wrongful act, it is no defence; it is only a step in the way of proving that the damage is the result of the wrongful act." E

In *Hyett v. Great Western Ry. Co.* (28), these words of GREER, L.J., were expressly approved and followed by TUCKER, L.J., with whose judgment the other two members of the court concurred. They must, therefore, be regarded as authoritative so far as this court is concerned. In my judgment, it was a natural and probable result of the wrongdoing of Mr. Hopkins that, in the likely event of someone being overcome by the carbon monoxide poisoning, a doctor would be called in, and that such doctor, having regard to the traditions of his profession, would, even at the risk of his own safety, descend the well for the purpose of F

(22) [1942] 2 All E.R. at p. 405; [1943] A.C. at pp. 108, 109.

(23) [1943] 1 All E.R. at p. 216; [1943] P. at p. 39.

(24) (1927), 138 L.T. 369 at p. 370.

(25) [1934] All E.R. Rep. 103; [1935] 1 K.B. 146.

(26) [1935] 1 K.B. at p. 156; [1934] All E.R. Rep. at p. 107.

(27) (1854), 9 Exch. 341.

(28) [1947] 2 All E.R. 264; [1948] 1 K.B. 345. I

A attempting a rescue. Unless it can be shown, therefore, that Dr. Baker displayed such an unreasonable disregard for his own safety as to amount to negligence on his own part—with which suggestion I will presently deal—I do not think that it can be said that his act constituted a *novus actus interveniens*.

B (3) The next question is whether the plaintiffs in Dr. Baker's case are defeated by the maxim *volenti non fit injuria*. Our attention was directed to a passage in the judgment of ASQUITH, J., in *Dann v. Hamilton* (29), where he said:

“Where a dangerous physical condition has been brought about by the negligence of the defendant, and, after it has arisen, the plaintiff, fully appreciating its dangerous character, elects to assume the risk thereof, the maxim has often been held to apply, and to protect the defendant.”

C These words were clearly obiter, for the actual question in issue in that case was whether the plaintiff took the risk of future negligence on the part of the defendant by accepting a lift in his motor car when she knew that he was the worse for drink. If the learned judge meant that, in all cases where the dangerous physical condition has already come into existence before the plaintiff's intervention, the plaintiff is liable to be defeated by a plea of *volenti*, I think that he went too far. So applied the maxim would defeat the plaintiff's claim in any rescue case, save possibly a case in which the rescuer had acted so instinctively, or so much on the impulse of the moment, that his conduct cannot be regarded as a conscious act of volition. But, as was said by GREER, L.J., in *Haynes v. Harwood* (30),

E “It would be absurd to say that if a man deliberately incurs a risk he is entitled to less protection than if he acts on a sudden impulse without thinking whether he should do so or not.”

It seems to me that, when once it is determined that the act of the rescuer was the natural and probable consequence of the defendant's wrongdoing, there is no longer any room for the application of the maxim *volenti non fit injuria*. It would certainly be a strange result if the law were held to penalise the courage of the rescuer by depriving him of any remedy. GREER, L.J., in *Haynes v. Harwood* (30) was clearly of the view that the maxim cannot be applied to defeat the plaintiff's claim in a rescue case. He quotes from an article by PROFESSOR GOODHART in the CAMBRIDGE LAW JOURNAL (Vol. V., at p. 196) as follows (31):

G “The American rule is that the doctrine of the assumption of risk does not apply where the plaintiff has, under an exigency caused by the defendants' wrongful misconduct, consciously and deliberately faced a risk, even of death, to rescue another from imminent danger of personal injury or death, whether the person endangered is one to whom he owes a duty of protection, as a member of his family, or is a mere stranger to whom he owes no such special duty.”

H GREER, L.J., goes on (31):

“In my judgment, that passage not only represents the law of the United States but also the law of this country.”

I It is by no means clear that the other two members of the court were prepared to go so far as GREER, L.J., in stating the principle, and they appear to have based their judgments to a great extent on the fact that in the particular case the plaintiff was a police officer. But for my part I am content to accept GREER, L.J.'s statement of the law, and to hold that the maxim *volenti non fit injuria* cannot be invoked in this case to defeat the second plaintiffs' claim. In my judgment, the real question to be determined in a case such as the present is, not whether the rescuer voluntarily accepted the risk of injury, but whether

(29) [1939] 1 All E.R. at p. 63; [1939] 1 K.B. at p. 517.

(30) [1934] All E.R. Rep. at p. 109; [1935] 1 K.B. at p. 159.

(31) [1934] All E.R. Rep. at p. 108; [1935] 1 K.B. at p. 157.

his injury was caused or contributed to by any failure on his part to take reasonable care for his own safety. This was the view expressed by SWIFT, J., in *Brandon v. Osborne, Garrett & Co.* (32) and I think that it is the right view. A

(4) I pass, therefore, to the fourth and last question, which is raised by the defendant company's plea that the death of Dr. Baker was caused or contributed to by his own negligence. The burden of proof with regard to this allegation is on the defendant company, and in order to succeed I think they would have to show that the conduct of Dr. Baker was so foolhardy as to amount to a wholly unreasonable disregard for his own safety. Bearing in mind that danger invites rescue, the court should not be astute to accept criticism of the rescuer's conduct from the wrongdoer who created the danger. Moreover, I think it should be remembered that it is fatally easy to be wise after the event. It is not enough that, when all the evidence has been sifted and all the facts ascertained in the calm and deliberate atmosphere of a court of law, the rescuer's conduct can be shown ex post facto to have been misguided or foolhardy. He is entitled to be judged in the light of the situation as it appeared to him at the time, i.e., in a context of immediate and pressing emergency. Here Dr. Baker was faced with a situation in which two men were in danger of speedy death in the well, unless something were done very quickly. He was a doctor, and he had been specially summoned to help. Any man of courage in his position would have felt impelled to act, even at the risk of his own safety. Time was pressing; immediate action was necessary if the men in danger were to be helped; there was virtually no opportunity for reflection, or for estimating the risks involved in an act of rescue. If Dr. Baker in such circumstances had instinctively gone straight down the well, without stopping to take any precautions at all, it would, I think, have been difficult enough to criticise him; but in point of fact he did take the very wise precaution of securing himself with a rope, whereby those on the surface could pull him up if he himself were overcome. The immediate cause of his death was the sheer mischance of the rope becoming caught on some obstruction, so as to make it impossible for those on the surface to pull him to safety. I do not think that, having regard to the emergency in which he was acting, he is to be blamed for not foreseeing and guarding against the possibility of such a mischance. On the contrary, I entirely agree with the view expressed by the learned judge that the defendant company, whose negligence brought about the danger, must accept the risk of mischances of this kind. In all the circumstances, I find it impossible to accept the contention that Dr. Baker was guilty of any negligence either causing or contributing to his death. B C D E F G

For these reasons, I am of opinion that the appeal in Dr. Baker's case must also be dismissed.

Appeals dismissed.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Fishers*, Ashby-de-la-Zouch (for the defendant company); *George Thatcher & Son*, agents for *A. H. & H. W. Timms*, Burton-on-Trent (for the first plaintiff); *Hempsons* (for the second plaintiffs).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

A OSTIME (INSPECTOR OF TAXES) v. AUSTRALIAN MUTUAL PROVIDENT SOCIETY.

[HOUSE OF LORDS (Lord Radcliffe, Lord Tucker, Lord Somervell of Harrow, Lord Denning and Lord Birkett), June 4, 8, 9, July 16, 1959.]

B *Income Tax—Double taxation—Mutual life assurance society—Resident abroad—Australian company with branch office in United Kingdom—Assessments to income tax on income of society's life assurance fund—Whether assessments competent—Income Tax Act, 1918 (8 & 9 Geo. 5 c. 40), Sch. 1, Sch. D, Rules applicable to Case III, r. 3—Finance (No. 2) Act, 1945 (9 & 10 Geo. 6 c. 13), s. 51 (1)—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), s. 347 (1), s. 430—Double Taxation Relief (Taxes on Income) (Australia) Order, 1947 (S.R. & O. 1947 No. 806), Schedule, art. II (1) (i), (3), art. III (2), (3).*

C An Australian mutual insurance company, resident in Australia carried on business in Australia and, through a branch office in London, in the United Kingdom. It was assessed to United Kingdom income tax for the years of assessment 1947-48 to 1953-54 inclusive on the notional amount of its profits in the United Kingdom computed by reference to the appropriate part of the investment income of its life assurance fund under r. 3* of Case III of Sch. D to the Income Tax Act, 1918, or (in the later years) s. 430 of the Income Tax Act, 1952. The company contended that it was assessable only under the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947, which gave effect to the Australian double taxation relief agreement that was set out in the schedule to the order.

D **Held** (LORD DENNING dissenting): the company should not be taxed under r. 3 of Case III of Sch. D to the Income Tax Act, 1918 (or s. 430 of the Income Tax Act, 1952), because the hypothesis on which such an assessment was based (namely, that the world income from the investments of the life fund formed the first stage in the r. 3 calculation of profits) was inconsistent with the basis of taxation under art. III (3) of the double taxation relief agreement† (which proceeded on the hypothesis that the branch in England was an independent enterprise) and the latter prevailed.

* The terms of r. 3 are printed at pp. 248, 249, post.

E † Paragraph (2) and para. (3) of art. III of the Agreement for Avoidance of Double Taxation set out in the schedule to the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947, are as follows:—“(2) The industrial or commercial profits of an Australian enterprise shall not be subject to United Kingdom tax unless the enterprise is engaged in trade or business in the United Kingdom through a permanent establishment situated therein. If it is so engaged, tax may be imposed on those profits by the United Kingdom, but only on so much of them as is attributable to that permanent establishment: Provided that nothing in this paragraph shall affect any provisions of the law of the United Kingdom regarding the imposition of excess profits tax and national defence contribution in the case of inter-connected companies.

F “(3) Where an enterprise of one of the territories is engaged in trade or business in the other territory through a permanent establishment situated therein, there shall be attributed to that permanent establishment the industrial or commercial profits which it might be expected to derive in that other territory if it were an independent enterprise engaged in the same or similar activities and its dealings with the enterprise of which it is a permanent establishment were dealings at arm's length with that enterprise or an independent enterprise; and the profits so attributed shall be deemed to be income derived from sources in that other territory.

G “If the information available to the taxation authority concerned is inadequate to determine the profits to be attributed to the permanent establishment, nothing in this paragraph shall affect the application of the law of either territory in relation to the liability of the permanent establishment to pay tax on an amount determined by the exercise of a discretion or the making of an estimate by the taxation authority of that territory: Provided that such discretion shall be exercised or such estimate shall be made, so far as the information available to the taxation authority permits, in accordance with the principle stated in this paragraph.”

Inland Revenue Comrs. v. Australian Mutual Provident Society ([1947] 1 All E.R. 600) considered. A

Decision of the COURT OF APPEAL ([1958] 2 All E.R. 665) affirmed.

[Editorial Note.] The Double Taxation Relief (Taxes on Income) (Australia) Order, 1947, was made under the repealed Finance (No. 2) Act, 1945, s. 51 (1), and is continued in force by virtue of s. 528 (2) of the Income Tax Act, 1952, as if made under s. 347 of that Act; see generally, 20 HALSBURY'S LAWS (3rd Edn.) 455, 741. B

The Income Tax Act, 1918, Sch. 1, Sch. D, Rules applicable to Case III, r. 3, has been replaced by the Income Tax Act, 1952, s. 430. The Finance (No. 2) Act, 1945, s. 51 (1), has been replaced by the Income Tax Act, 1952, s. 347 (1). C

As to investment income of foreign and colonial life assurance companies, see 20 HALSBURY'S LAWS (3rd Edn.) 258, para. 473; and as to mutual insurance companies not being taxable on their surplus or profit, see *ibid.*, 211, para. 376.

For the Income Tax Act, 1918, Sch. 1, Sch. D, Rules applicable to Case III, r. 3, see 12 HALSBURY'S STATUTES (2nd Edn.) 169, and for the Income Tax Act, 1952, s. 430, see 31 HALSBURY'S STATUTES (2nd Edn.) 412. D

For the Finance (No. 2) Act, 1945, s. 51, see 12 HALSBURY'S STATUTES (2nd Edn.) 703; and for the Income Tax Act, 1952, s. 347, see 31 HALSBURY'S STATUTES (2nd Edn.) 333.

For a summary of the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947, see 11 HALSBURY'S STATUTORY INSTRUMENTS 104.]

Cases referred to: E

Equitable Life Assurance Society of United States v. Hills, (1924), 131 L.T. 480; 8 Tax Cas. 657; 28 Digest 61, 307.

Hughes v. Bank of New Zealand, [1938] 1 All E.R. 778; [1938] A.C. 366; 107 L.J.K.B. 306; 158 L.T. 463; 21 Tax Cas. 472; Digest Supp.

Inland Revenue Comrs. v. Australian Mutual Provident Society, [1947] 1 All E.R. 600; [1947] A.C. 605; [1947] L.J.R. 690; 177 L.T. 9; 28 Tax Cas. 388; 2nd Digest Supp. F

Inland Revenue Comrs. v. Ayrshire Employers Mutual Insurance Assocn., Ltd., [1946] 1 All E.R. 637; 175 L.T. 22; 27 Tax Cas. 331; 2nd Digest Supp.

Mutual Life and Citizens Assocn. v. Federal Commission of Taxation, (1959), 33 A.L.J. 54.

New York Life Insurance Co. v. Styles, (1889), 14 App. Cas. 381; 59 L.J.Q.B. 291; 61 L.T. 201; sub nom. *Styles v. New York Life Insurance Co.*, 2 Tax Cas. 460; 28 Digest 59, 300. G

Appeal.

Appeal by the Crown from an order of the Court of Appeal (JENKINS, PARKER and PEARCE, L.JJ.), dated June 4, 1958, and reported [1958] 2 All E.R. 665, affirming an order of UPJOHN, J., dated Dec. 20, 1957, and reported [1958] 1 All E.R. 305, dismissing an appeal by the Crown by way of Case Stated under the Income Tax Act, 1952, s. 64, from a decision of the Special Commissioners of Income Tax. The respondent, Australian Mutual Provident Society, was established in New South Wales, Australia, in 1849, was incorporated in 1857, and was governed by the Australian Mutual Provident Society's Acts, 1910-1941. It carried on a life assurance business, including the granting of annuities, and was a company to which the Assurance Companies Act, 1909, applied. It was resident in Australia, its head office was in Sydney, and it carried on business in the United Kingdom through a branch office in London. Both parties agreed that the respondent was not resident in the United Kingdom for income tax purposes. For the years of assessment before 1946-47, the respondent was assessed to income tax in the United Kingdom under r. 3 of Case III of Sch. D, i.e., on a proportion of its income from the investments of its life assurance fund H I

- A** (excluding the annuity fund) which, by virtue of r. 3, was deemed to be profits comprised in Sch. D, and chargeable under Case III. It was granted dominion income tax relief under s. 27 of the Finance Act, 1920. For the years of assessment 1946-47, and subsequent years, this relief was not allowed by reason of the Finance (No. 2) Act, 1945, s. 51 (2), and the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947. The respondent appealed to the Commissioners for the Special Purposes of the Income Tax Acts against assessments to income tax in the sum of £100,000 for each of the years 1947-48 to 1952-53 inclusive, and in the sum of £50,000 for the year 1953-54. The assessments were made in respect of "life fund interest" under r. 3 of the Rules applicable to Case III of Sch. D to the Income Tax Act, 1918, Sch. 1, so far as they related to the years 1947-48 to 1951-52 inclusive, and under the Income Tax Act, 1952, s. 430, so far as they related to the years 1952-53 and 1953-54. The grounds of appeal were that the assessments were not competent in law, having regard to the provisions of the Order of 1947.

John Pennycuik, Q.C., and A. S. Orr for the Crown.

Heyworth Talbot, Q.C., and G. B. Graham for the respondent.

- D** Their Lordships took time for consideration.
July 16. The following opinions were read.

LORD RADCLIFFE: My Lords, the sole question raised by this appeal is whether the respondent, an Australian life assurance company, can be lawfully assessed to income tax in this country under r. 3 of Case III of Sch. D to the Income Tax Act, 1918 (or, as the rule has become, s. 430 of the Income Tax Act, 1952), having regard to the obligations undertaken by the government of the United Kingdom in the Double Taxation Relief Agreement (1) entered into with the government of the Commonwealth of Australia on Oct. 29, 1946. The question itself is said to be a short one, as in one sense it is; but it is not so easy to state it shortly, and, since its solution requires a certain amount of introductory matter, I must ask leave to take a rather longer time than I should have wished in setting my opinion before your Lordships.

The relevant facts are these. The respondent is a mutual insurance society incorporated in the State of New South Wales. It has its head office in Sydney and a branch office in London; from these offices it carries on a business of life assurance. It is not in dispute that, for the purposes of taxation in this country, its life assurance business is to be treated as a business separate from any other class of business carried on by it and the assessments which are the subject of appeal are confined to the income or profits of that business. These assessments relate to a number of years, beginning with the revenue year 1947-48 and ending with the year 1953-54. Those for the first five years were made under r. 3 of Case III of Sch. D to the Income Tax Act, 1918, those for the last two under s. 430 of the Income Tax Act, 1952, which Act replaced the earlier Act in the process of consolidation. As the provisions of the two Acts do not differ in any relevant particular, I shall speak throughout of r. 3 as the governing statutory provision. The course that the case has taken in the courts below is that the assessments raised by the Crown were discharged by the Special Commissioners on the respondent's appeal and the order of the Special Commissioners has been upheld in the High Court (UPJOHN, J.) and in the Court of Appeal (JENKINS, PARKER and PEARCE, L.JJ.). In all courts hitherto the same view has prevailed, that there is a conflict between the provisions of r. 3 and those provisions of the Double Taxation Relief Agreement which deal with the taxation of industrial or commercial profits and that this conflict precludes for the future an effective assessment under the rule. I should add at this point that the agreement became municipal law of this country by virtue of an Order in Council made on Apr. 23, 1947, under the authority given by s. 51 (1) of the Finance (No. 2) Act, 1945,

(1) The Double Taxation Relief (Taxes on Income) (Australia) Order, 1947.

which allows the enactment by such orders of the arrangements contained in double taxation relief agreements and prescribes further that the arrangements covered by an order shall have effect in relation to income tax notwithstanding anything in any enactment A

"... so far as they provide for relief from tax, or for charging the income arising from sources in the United Kingdom to persons not resident in the United Kingdom, determining the income to be attributed to such persons and their agencies, branches or establishments in the United Kingdom..." B

It is plain, therefore, that, if there is a conflict, the unilateral legislation of the United Kingdom must give way.

The decisions in the High Court and the Court of Appeal were dominated by the view taken in those courts as to the effect of the opinions delivered in this House in an earlier case involving the present respondent, which is reported as *Inland Revenue Comrs. v. Australian Mutual Provident Society* (2). Both courts treated that case as deciding that the r. 3 assessment was an assessment and, therefore, a tax on the profits of the business of life assurance and, as such, was a tax on commercial profits within the meaning of the Double Taxation Relief Agreement. I do not think that the first part of this proposition has been denied at any stage by the argument for the Crown, though it challenges the deduction to be drawn from it as to the interpretation of the agreement. However that may be, I am reluctant that the issue of this appeal should be determined by any exclusive reliance on what was said by members of this House in the earlier case, since the point that had then to be decided, relating as it did to the applicability of certain provisions about tax-free interest to a r. 3 assessment, has no direct bearing on the present dispute and, in any event, nothing said by the House in 1947 could amount to an interpretation of the words "commercial or industrial profits" in the agreement, which was not then before them. I, therefore, defer until later any further reference to this case. C D E

My Lords, I think that what has to be done is first to ascertain what was the nature of the taxation imposed by r. 3, so far as that very special enactment admits of any clear categorisation, and then to ask whether or not taxation on that basis can still be imposed consistently with the obligations undertaken by the United Kingdom under the Double Taxation Relief Agreement. I will set out r. 3 in the form in which it appears in the Income Tax Act, 1918, but before I do so I must make one cautionary remark. The framers of the rule were concerned to extract what seemed to them a fair quantum of tax from what had hitherto been an unsatisfactory situation. They were not concerned with precise distinctions between commercial and investment income, which, in any event, do not always admit of such distinction; nor could they be expected to foresee either the contents or the wording of the Double Taxation Relief Agreements which have become a feature of post-1946 tax administration. F G H

"3.—(1) Where an assurance company not having its head office in the United Kingdom carries on life assurance business through any branch or agency in the United Kingdom, any income of the company from the investments of its life assurance fund (excluding the annuity fund, if any), wherever received, shall, to the extent provided in this rule, be deemed to be profits comprised in this Schedule and shall be charged under this Case. I

"(2) Such portion only of the income from the investments of the life assurance fund for the year preceding the year of assessment shall be so charged as bears the same proportion to the total income from those investments as the amount of premiums received in that year from policy holders resident in the United Kingdom and from policy holders resident abroad whose proposals were made to the company at or through its office or agency

- A in the United Kingdom bears to the total amount of the premiums received by the company: Provided that in the case of an assurance company having its head office in any British possession, the Commissioners of Inland Revenue may, by regulation, substitute some basis other than that herein prescribed for the purpose of ascertaining the portion of the income from investments to be so charged as being income derived from business carried on in the
- B United Kingdom.

“(3) Every such charge shall be made by the Special Commissioners as though the company under the provisions of this Act had required the proceedings relating to the charge to be had and taken before those commissioners.

- C “(4) Where a company has already been charged to tax, by deduction or otherwise, in respect of its life assurance business, to an amount equal to or exceeding the charge under this rule, no further charge shall be made under this rule, and where a company has already been so charged, but to a less amount, the charge shall be proportionately reduced.”

Rule 3 first became law in 1915, being introduced by s. 15 of the Finance Act of that year. The situation that it was framed to deal with needs to be shortly stated; it arose from a combination of the special difficulties of establishing the true annual profit of life assurance business with the special difficulties of determining the true United Kingdom income of a non-resident life assurance company doing branch business here. If that assurance company was organised on the mutual principle a further difficulty was superimposed; but this particular

D difficulty was due to the quirk of English judicial reasoning which absolved a mutual company from the possibility of making a taxable profit, and could have been corrected at any time by appropriate legislation.

It had never been easy or convenient to raise an assessment under Case I of Sch. D on a life assurance society in respect of its trading income. To do so involved valuations of liabilities and assets which were not likely to be annually available. On the other hand, life assurance business by its own nature generates the life fund consisting of investments made out of the premium receipts and accumulated income, and the produce of those investments is at least an important part of the annual income of the business. So long, therefore, as the investments were such as to yield interest or dividends from a source in the United Kingdom, the interest and dividends themselves fell under charge to tax and, given the allowance to the company of its management expenses, an adequate, though never an accurate, measure of the annual profit accruing to the business could be regarded as obtained. Moreover, since 1914 a company with its head office here had been liable on the income of foreign investments, even if not remitted to this country. A foreign assurance company was, however, in a different position. If it did business in the United Kingdom through a branch it was not itself a resident and, as a non-resident, could not fairly be regarded as taxable in this country in respect either of its world income from investments or, more generally, its world income from life assurance business. So far as its life fund was represented by United Kingdom securities and no special tax exemption attached to them, it was liable to bear tax on the income from the securities. Theoretically, too, it was liable to an assessment under Case I of Sch. D in respect of the profits from its business carried on in the United Kingdom. But then a foreign assurance company might well not keep its life fund, or at any rate any substantial part of it, invested in United Kingdom securities, so the tax yield on that ground was only a speculative amount; while the problem of raising a valid Case I assessment on the profits of the United Kingdom trade carried on by a branch office which was not even under the obligation of maintaining an independent accounting system was evidently regarded as too vexing for solution.

If it is seen against this background, it is fairly clear what r. 3 was designed

to effect. Its purpose was to attribute to a foreign assurance company doing life business here a reasonable sum of income or profits in respect of that business and so to tax that sum as income arising in the United Kingdom. In one sense it charged the income of all the investments of the life fund wherever received, and in that sense was a tax on investment income; but the language of the taxing provision and, indeed, the whole scheme of it is so exceptional that I do not think it right to give any determining weight to that consideration. As I have indicated, it was not unusual to regard the income of the life fund as an acceptable alternative to the trading income of the business. In the end it is not the investment income itself that is the subject of tax but the product of a mathematical calculation represented by the income of the whole life fund multiplied by premiums obtained through United Kingdom business over the company's total premium income. It is the sum produced by this calculation that is "deemed to be profits comprised in" Sch. D and charged under Case III. This sum, representing an unidentifiable portion of the income from investments, is "charged as being income derived from business carried on in the United Kingdom" (see the proviso to r. 3 (2)). I regard these last words as very important, for to my mind they indicate conclusively the nature of the taxing provision as being designed to attribute to the foreign taxpayer a measure of income to represent the income of his United Kingdom business. It follows that the effect of the charge is not to charge investments "as such" or any specific investments. Finally, the fact that, under r. 3 (4), the tax charge turns out to be only a supplementary or covering charge which abates or disappears to the extent that tax is otherwise obtained by deduction from investment income or direct assessment seems to me to make it very difficult to regard the nature of the taxing provision as being other than that which I have described.

The question we have to determine is how this method of attributing a profit to a life assurance company whose head office is outside the United Kingdom stands up against the provisions of the Double Taxation Relief Agreement. I should find nothing surprising in the conclusion that it had been superseded. Rule 3 was an attempt at a unilateral solution of this particular aspect of double taxation in which the Australian taxing authorities were certainly no less interested than the authorities of the United Kingdom. Bilateral agreements for regulating some of the problems of double taxation began, at any rate so far as the United Kingdom was concerned, in 1946. The form employed which, for obvious reasons, employs similar forms and similar language in all agreements, is derived, I believe, from a set of model clauses proposed by the financial commission of the League of Nations. The aim is to provide by treaty for the tax claims of two governments both legitimately interested in taxing a particular source of income either by resigning to one of the two the whole claim or else by prescribing the basis on which the tax claim is to be shared between them. For our purpose, it is convenient to note that the language employed in this agreement is what may be called international tax language, and that such categories as "enterprise", "commercial or industrial profits" and "permanent establishment" have no exact counterpart in the taxing code of the United Kingdom.

Turning then to the agreement, there is no doubt that the respondent is an Australian enterprise and, therefore, comes within the regulation of art. III (2) that its commercial profits are not to be subject to United Kingdom tax at all unless it is engaged in business here through a permanent establishment here. It is conceded that its branch office is such an establishment and, therefore, the second part of the regulation applies and tax may be imposed on the respondent's commercial profits by the United Kingdom, but only on so much of them as is attributable to that establishment. It is not left wholly to the will of the United Kingdom taxing authorities to decide the basis on which that attribution of commercial profits is to be made. Article III (3) provides by its

- A terms for a basis which, in effect, requires the hypothesis that the branch is an independent enterprise dealing as an independent entity at arm's length with the head office. The profits which emerge from a calculation based on this hypothesis are to be "deemed to be income derived from sources in the United Kingdom". I do not think that it is open to us to decide what would be the consequences of taxing the respondent's commercial profits according to this new formula. It is by
- B no means easy to see what other hypotheses are required or excluded by the central hypothesis. The sole issue under appeal is whether the respondent can be taxed at all on the r. 3 basis. In my opinion, it cannot be, because the world income from the investments of the life fund, which forms the first stage in the r. 3 calculation of profits, cannot be attributed to the hypothetical independent enterprise without violating the very hypothesis which art. III (3) is designed to
- C lay down as the basis of taxability.

- I did not understand the argument for the Crown to maintain that r. 3 could be applied consistently with an assessment according to art. III (3). What was said was that, having regard to the definition of "industrial or commercial profits" in art. II (1) (i), assessments under r. 3 were not affected by art. III (3), since the profits that they charged were not commercial or industrial profits
- D within the meaning of the agreement. With all respect to that argument, it seems to me simply a claim to retain the United Kingdom's unilateral basis of attributing United Kingdom business profits to an overseas life assurance company in spite of the new agreed basis of attribution laid down in art. III (3). It is quite true that the definition of "industrial or commercial profits" declares that it "includes profits from such activities or business but does not include
- E income in the form of dividends, interest, rents, royalties . . ." Accordingly, except so far as art. VI makes certain special stipulations about double taxation of dividends, the respective claims of the taxing authorities on items of income such as dividends or interest are not regulated on the "permanent establishment principle" of art. III, and are left to be taxed according to the local legislation. It would be in accordance with United Kingdom principles to tax all dividends
- F and interest arising from sources in the United Kingdom to whomsoever accruing, unless specially excepted, but not to tax the foreign income of non-residents. So, in this case, the respondent has regularly borne tax on its United Kingdom interest and dividends; and, for instance, of a total tax claim of £97,961 in respect of the r. 3 assessment for 1953-54, as much as £86,796 is set off by taxes
- G paid by deduction or otherwise under various schedules. The tax-deducted portion of that is £79,360. Such income is, no doubt, income "in the form of" dividends or interest for the purposes of art. II (1) (i); but when I look round for any other comparable income received in the basis year which could be excluded from the provisions of art. III I find none. Certainly I do not find it in the notional sum of profits attributed under r. 3 to the United Kingdom business, for that sum is not received in the form of dividends or interest, and only exists
- H as a measure of profits established by the legislature for the purpose of the attribution, whereas it is just that question whether such a measure is any longer sustainable in face of the Double Taxation Relief Agreement that is the subject of the present dispute. In other words, as I see it, the Crown's argument can only succeed by assuming in its favour the very hypothesis that the agreement displaces by a different standard of calculation.

- I I have left to the end any detailed reference to the opinions of this House in *Inland Revenue Comrs. v. Australian Mutual Provident Society* (3). The issue in that case was different from this one. It turned on the question how, if at all, a r. 3 assessment should take account of the circumstance that some of the life fund investments were by statute free of tax to holders non-resident or not ordinarily resident. When the case began its progress through the courts the general construction of the nature of the r. 3 charge seems to have been governed

by ROWLATT, J.'s decision in *Equitable Life Assurance Society of United States v. Hills* (4). In that case he had spoken of the charge as a charge on the investment income simpliciter: "They are taxed on their investments as such, upon a proportion of those investments". Putting that construction side by side with the later decision of the House of Lords in *Hughes v. Bank of New Zealand* (5), the Court of Appeal had held that the r. 3 assessment must be adjusted in favour of the taxpayer to reflect the relief on the exempted income. This House was not prepared to accept that conclusion. I think that it is obvious from the opinions of VISCOUNT SIMON, LORD WRIGHT and LORD PORTER that they did not accept ROWLATT, J.'s construction of the r. 3 charge. For instance, VISCOUNT SIMON is found describing the rule at one point in his speech (6) as one which is made "... in respect of the annual profit of [the company's] life assurance business ..." and at another (7) as "... not one which taxes income from investments ...". LORD PORTER in his speech rejects the argument that the charge is imposed on the income from investments and not on profits. The sum charged, he says (8), does not represent any real income or profit, but is merely arrived at by a conventional calculation adopted for the purpose of estimating an otherwise almost incalculable sum. In the view of LORD WRIGHT (9):

"No specific investments were taxed ... The charge was a tax on the investment income only as a machinery to tax the general profits of the British business ..."

My Lords, I have quoted these extracts at some length, because it is in reliance on their tenor that the courts below have decided against the Crown in the present case. It is true, I think, that it would have been sufficient for the decision of the earlier case if the House had merely confined itself to pointing out, as LORD WRIGHT did, that the r. 3 charge is not in any case a charge on any specific investments; for, if that is so, it is very hard to see how to carry the relief on particular items of income into the unappropriated proportion. It is true, too, that there is nothing in the earlier case that could amount to an interpretation of the words "industrial or commercial profits" as defined by the Double Taxation Relief Agreement; the point with which we are most immediately concerned. But, at the same time, I cannot help recognising that the decision was a unanimous decision of the House which was directed to analysing and explaining the true nature of the r. 3 charge and of what it was that by it was brought under charge, in order to determine the validity of the claim for relief that was under appeal; and I should not think it right to propound in this case any analysis of r. 3 that was materially different from the explanation then given, unless I was convinced that it was unmaintainable. As it is, I am not faced with this difficulty, since I agree with the observations of the noble Lords that I have quoted, and my own reading of the statute leads me to the same conclusion.

I notice, only to reject, an argument that was presented to, but not pressed on, us by the Crown to the effect that, as the date of the making of the Double Taxation Relief Agreement preceded by some months the House of Lords decision in the former case, that agreement ought to be interpreted in the light of the view of the effect of r. 3 that had hitherto prevailed and not in the light of the law as laid down by this House. I do not accept that it would make any ultimate difference even if the earlier view were treated as the only relevant one; but perhaps it is sufficient to say that I do not think that such a method of construction as is proposed ought to be applied to a bipartite taxation treaty

(4) [1924], 8 Tax Cas. 657 at p. 661.

(5) [1938] 1 All E.R. 778; 21 Tax Cas. 472.

(6) [1947] 1 All E.R. at p. 602; 28 Tax Cas. at p. 401.

(7) [1947] 1 All E.R. at p. 603; 28 Tax Cas. at p. 403.

(8) [1947] 1 All E.R. at p. 607; 28 Tax Cas. at p. 409.

(9) [1947] 1 All E.R. at pp. 604, 605; 28 Tax Cas. at pp. 404, 405.

A of this nature. All that can be said in such an agreement is said by art. II (3); and that is not sufficient to assist the Crown's case.

I would dismiss the appeal.

My Lords, my noble and learned friends, **LORD SOMERVELL OF HARROW** and **LORD BIRKETT**, who are not able to be present today, have asked me to say that they agree with the opinion that I have just delivered.

LORD TUCKER: My Lords, I agree.

LORD DENNING: My Lords, your Lordships have to consider today the effect of certain arrangements about taxation which have been made between the governments of the United Kingdom and of Australia. These arrangements have been made so as to ensure that persons are not taxed twice over, once by the United Kingdom and once by Australia, on the same income. They have been embodied in an agreement (10) (which I will call the Double Taxation Agreement) and given statutory force in each country. They override any other enactment. Similar agreements in like terms have been made by this country with other countries and by other countries between themselves. The interpretation which your Lordships put on this Double Taxation Agreement is of more than usual consequence because, if a mistake should be made, it may be well-nigh impossible to put it right; for your Lordships' interpretation will govern this country without any likelihood of change by Parliament. At any rate Parliament itself cannot alter the wording of this Double Taxation Agreement without the consent of both parties to it.

The important thing to notice about the Double Taxation Agreement is that, in defining "industrial or commercial profits", it draws a sharp distinction between profits from a business on the one hand (which I will call "business profits") and income in the form of dividends, interest, rents and so forth on the other hand (which I will call "investment income"). It deals with these quite separately. So far as "business profits" are concerned, the Double Taxation Agreement says that henceforward when an Australian company has a permanent establishment in this country, it may be taxed by the United Kingdom on the profits it makes, but only on so much of them as is attributable to its establishment here. The agreement goes on to say how this amount is to be ascertained. It is by means of a given hypothesis. You are to treat the establishment here as if it were completely independent of the Australian head office and were dealing at arm's length with it; and you are to estimate the profits which such an independent enterprise might be expected to derive on its own; and then tax it on the amount so ascertained. So far as "investment income" is concerned, the tax payable in this country is left untouched by the Double Taxation Agreement. For instance, where an Australian company has investments in this country from which it derives dividends, interest, rents and so forth, it has, of course, to pay tax on that income here by deduction or otherwise. But over in Australia, the Australian company, inasmuch as it is an Australian resident, will have to pay Australian tax on all its investment income, wherever derived, including its income from investments in the United Kingdom. The Double Taxation Agreement provides that, when paying this Australian tax in Australia, the Australian company will receive credit for the tax it has paid in the United Kingdom.

Such being the general effect of the Double Taxation Agreement, your Lordships are today concerned with its effect on a very special kind of tax which is imposed here under r. 3 of Case III of Sch. D to the Income Tax Act, 1918. It is a tax charged on life assurance companies which have their head office overseas and a branch or agency in the United Kingdom. The critical question is whether it is a tax on profits of the business so as to come within the provisions of the Double Taxation Agreement about "business profits", or whether it is

(10) The Double Taxation Relief (Taxes on Income) (Australia) Order, 1947.

rather a tax on investment income so as to come within the relevant provisions about "investment income". A

My Lords, in order to explain the nature of this special tax, I would first say a little about the business of life insurance itself. First, take a mutual society. It carries on business on a mutual basis, and it is settled law that it makes no trading profits but only a surplus and is not liable to tax on that surplus: see *Styles v. New York Life Insurance Co.* (11), *Inland Revenue Comrs. v. Ayrshire Employers Mutual Insurance Assn., Ltd.* (12). But it is, of course, liable to tax on its investment income. Secondly, take a proprietary society. It carries on business on a proprietary basis and may in theory make a trading profit, but there is much difficulty in calculating it. It is difficult to say what profit there is when you receive premiums and may have to pay out big sums at some unknown future time. In any case, the actuaries seek to calculate the premiums so that they just cover the risk and there is no profit as such. But a proprietary society, of course, invests its income and receives dividends from it. That is how it makes its money. The result is that, in practice, a proprietary company is not charged with tax on any trading profit but only on its investment income. When you are dealing with life insurance companies resident in the United Kingdom, there is no difficulty about applying the Double Taxation Agreement to them. They are resident here and are taxed on their total investment income from the life fund, wheresoever this income is derived; and they are given credit for the tax paid by them in Australia on their Australian investments. But with an Australian society (or any company resident overseas) the position is different. Apart from the special tax which we have to consider, the only tax payable by it in the United Kingdom would be the tax on its investments *here*; and it could avoid paying tax in England by reducing its English investments to a minimum. It could make nearly all its investments elsewhere. It was in order to avoid such a situation, so obviously unjust to English taxpayers, that a special tax was introduced. In 1915 it was enacted (13) that life insurance companies, with head offices overseas, should pay tax on a figure calculated according to a prescribed formula. The formula was this: Take the total income which the company receives from its investments all over the world. Then divide this income up. Divide it into proportions according to the volume of business done in life insurance in this country compared with the business done overseas. (This proportion was usually to be ascertained by comparing the premiums received in this country with those received overseas.) By dividing the world investment income in those proportions, you arrive at a fair figure to represent the proportion applicable to the United Kingdom. The company was to be taxed on the figure so ascertained. These 1915 provisions were afterwards embodied in r. 3 of Case III of Sch. D, and I will refer to them as "the r. 3 provisions". B C D E F G H

The critical question, as I have said, is: What is the nature of this r. 3 tax? Is it a tax on the investment income of the company? Or is it a tax on the profits of the business? For it needs must, I think, be put in one category or the other if this Double Taxation Agreement is to work on it. And it is to be remembered that the term "profits" must be given the meaning it has under English law, unless the context otherwise requires. Apart from authority, I should have thought this r. 3 tax was a tax on investment income. It is not, of course, a tax on specific investments, but it is a tax on a proportion of the world investment income; and that is surely a tax on investment income and not on business profits. In so holding, I should be in good company; for I

(11) (1889), 2 Tax Cas. 460.

(12) [1946] 1 All E.R. 637; 27 Tax Cas. 331.

(13) By s. 15 of the Finance Act, 1915.

A ROWLATT, J., so regarded it in *Equitable Life Assurance Society of United States v. Hills* (14). So did DIXON, C.J., FULLAGAR and MENZIES, J.J., in *Mutual Life and Citizens Assocn. v. Federal Commission of Taxation* (15), who all took the view that

B “If you impose a tax on ten per cent. of an amount which includes several items, you are imposing a tax on every item which is included in that amount.”

But it is said that there is a decision of this House to the effect that it is not a tax on investment income but is a tax on the profits of the business. That decision is *Inland Revenue Comrs. v. Australian Mutual Provident Society* (16). I would draw the attention of your Lordships to the most unusual course which
C that case took. The question was how the tax under r. 3 was to be calculated when some of the investments of the society were in United Kingdom War Loan Stock which was exempted from any tax at all. Both parties—both the Crown and the society—proceeded on the footing that the tax under r. 3 was a tax on investment income and that the society must be given the benefit of this exemption. The parties differed only as to the way in which the benefit should
D be calculated. The method adopted by the Crown commended itself to the court of first instance. The method adopted by the society commended itself to the Court of Appeal. But when the case reached this House, a new point was raised for the first time by the House itself. It was suggested that the tax under r. 3 was not a tax on investment income at all but a tax on profits; and, accordingly, that the society was not entitled to any benefit at all from the
E exempted investments and could make no deduction at all on that account. Neither party liked the point at all. The Crown (in whose favour it appeared to be) refused to take it. The Solicitor-General said:

F “It is not proposed to address the House on the question whether the wording of r. 3 is such as not to permit any deduction at all. The Crown does not, in any event, seek an order putting the respondents in a worse position than the order of the court of first instance.”

In spite of the Crown's reluctance, the House was so convinced of the correctness of the point, which it had itself raised, that it decided that the society was not entitled to any exemption at all. The House did not, however, carry its point of view so far as to compel the Crown to accept an order it did not ask for.
G The House simply reversed the decision of the Court of Appeal, and restored the judgment of the court of first instance. Looking back on it now, with all the knowledge since acquired, it does seem a pity that the House insisted on its own point so strongly; for it has been turned to great advantage by the mutual societies as against the Crown. It recently compelled the High Court of Australia to decide a case contrary to its own better judgment: see *Mutual Life and
H Citizens Assocn. v. Federal Commission of Taxation* (17). It compelled the judges below in the present case to decide it as they did; and PARKER, L.J., went so far as to say (18) that he was unable “fully to understand” the decision of the House. And, as it happened, no doubt owing to the unusual course which was adopted, the House in 1947 was never referred to a very relevant decision of its own. It was never referred to the decision in *Styles v. New
I York Life Insurance Co.* (19), which holds that a mutual life assurance society does not make profits. That case is quite inconsistent with the notion that the tax under r. 3 is truly a tax on “profits” as that word is used in English law.

(14) (1924), 8 Tax Cas. 657.

(15) (1959), 33 A.L.J. 54 at p. 56.

(16) [1947] 1 All E.R. 600; 28 Tax Cas. 388.

(17) (1959), 33 A.L.J. 54.

(18) [1958] 2 All E.R. at p. 673; [1959] Ch. at p. 441.

(19) (1889), 2 Tax Cas. 460.

At most it is a tax on a calculated figure that is "deemed to be profits" though not so in fact. It is to be treated "as being income", that is, as if it were income derived from the business, though not so in fact. A

My Lords, I ask myself: What authority is to be given in these circumstances to the decision of this House in 1947? Is it to be followed from step to step regardless of consequences? Are we to hold that the tax under r. 3 is a tax on the profits of the business for all purposes, including the purposes of the Double Taxation Agreement, which this House never had in mind at all? I think not. B
The doctrine of precedent does not compel your Lordships to follow the wrong path until you fall over the edge of the cliff. As soon as you find that you are going in the wrong direction, you must at least be permitted to strike off in the right direction, even if you are not allowed to retrace your steps. And that is what I would ask your Lordships to do. I would invite your Lordships to C
say that the decision of this House in 1947 has no application to the meaning of the word "profits" in the Double Taxation Agreement. The tax under r. 3 is not a tax on the profits of the business within the meaning of that agreement, but is rather a tax on income in the form of dividends and interest. Just consider what would be the result of applying the 1947 decision here. If the respondent does make "profits" from its business, the Double Taxation Agreement says D
that it is to be taxed here, as if it were completely independent of the Australian head office and were dealing at arm's length with it. But, on this hypothesis, what is the result? If this respondent were here completely independent, then, being a mutual society, it would not make any profits so as to be chargeable under Case I; and, furthermore, being established in this country, it would not be liable to tax under r. 3 at all, because that tax does not apply to independent E
establishments here. So the establishment here would not be liable to tax on profits at all. This cannot have been intended. It is quite contrary to the tenor of the Double Taxation Agreement which assumes that, if the respondent does make profits, some of those profits would be attributable to its establishment in the United Kingdom.

The true answer, to my mind, is that the respondent does not make any "profits" from its business within the meaning of the Double Taxation Agreement. F
But it has a world "investment income"; and it can be taxed here under r. 3 on a proportion of that income. And when it comes to pay Australian tax in Australia (on its world investment income) it will receive credit for the amount paid here under r. 3. If I am wrong, it means that the Australian G
society will no longer have to pay the tax it has paid under r. 3 for thirty years or more. It will have to pay no tax at all in return for the benefit of carrying on the business of life assurance in this country—but only tax on such investments as it may choose at its will to retain in this country. I do not think that this was the intention of the Double Taxation Relief Agreement between the United Kingdom and Australia.

I would, therefore, allow the appeal. H

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Bell, Brodrick & Gray* (for the respondent).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

Re WATER-TUBE BOILERMAKERS' ASSOCIATION'S AGREEMENT.

[RESTRICTIVE PRACTICES COURT (Upjohn, J., Sir Stanford Cooper, Mr. W. L. Heywood and Mr. W. G. Campbell), June 22, 23, 24, 25, 26, 29, 30, 31, July 1, 2, 3, 6, 7, 31, 1959.]

Restrictive Trade Practices—Reference—Water-Tube Boilermakers' Association—Scheme for allotting contracts among members—Whether removal of restriction would deny public substantial benefit—Whether restriction reasonably necessary to enable members to negotiate fair terms for supply of goods to preponderant buyer—Whether removal of restriction would be likely to cause substantial reduction in the volume or earnings of the export business—Restrictive Trade Practices Act, 1956 (4 & 5 Eliz. 2 c. 68), s. 21 (1) (b), (d), (f).

The Water-Tube Boilermakers' Association, which was concerned solely with the industry of making land water-tube boilers, was formed with the objects, inter alia, of promoting and advancing the status of the water-tube steam boiler industry and, in particular, of United Kingdom contractors for water-tube steam boilers and of raising funds for this purpose; of providing a means for the exchange of views and information between contractors; of carrying out, either alone or in conjunction with others, research and development work and of raising funds for the purpose; of assisting in the equitable distribution between members of the work available and thereby, and consistent with meeting requirements of the purchasers, to seek to ensure the most efficient use of the members' resources; of consulting together with the object of combating foreign competition and devising means for expanding export trade. The industry was concentrated in the hands of a few large companies and there were not more than eight or nine companies in the United Kingdom capable of carrying out contracts for the largest boilers; of these companies, six were members of the Association. The activities of boiler manufacturers were of two classes:—(i) designing and manufacturing the giant boilers for central power stations both at home and abroad (the only customer in England and Wales at the present time for these boilers was the Central Electricity Generating Board); (ii) manufacturing boilers required by manufacturing concerns for running their own steam plant and electrical generators, for manufacturing processes, for heating their premises, or for all these purposes. These boilers were generally much smaller than those required by the central power stations. About forty per cent. of the activities of the members of the Association were concerned with the export of both types of boilers to countries overseas. In consequence of the post-war demand for electricity, members of the Association and others were encouraged to expand their manufacturing capacity, but, as a result of recent advances in scientific theory and the design of boilers, the number of orders for boilers was greatly reduced, though the size and the value of individual boilers were greatly increasing. It was found by the court that the industry was now, and probably for one or two years had been, in a state of recession. This recession might be expected to last for something in the region of five years until the middle of the 1960's. Thereafter a gradual and well ordered increase in demand should arise. The position of the industry was a very special one, requiring highly scientific and technical knowledge,

rapid advances in which were constantly being made. Research was very important and large staffs for this purpose were maintained by the larger members and at considerable cost. In addition, the Association maintained a research department. The court was satisfied that it would not be in the national interest that any of the members should be forced by economic pressure to give up boiler production.

Under r. 5 of the Association's rules*, the following procedure was followed when a member of the Association who had received an inquiry for a boiler, had reported it (as he was bound to do) to the Director of the Association. When the director received notification of the same inquiry or intention to tender from more than one member, a meeting was called for those members who had received the inquiry or who had notified their intention to tender, to which a representative of the member brought full details of his proposals in regard to technical performances and prices. The objects of the meeting were to exchange technical information on the manner in which members intended to meet the requirements of the inquiry, to compare the prices of members of the schemes which they proposed to put forward, and to decide whether or not any one member should be entitled to reduce his proposed evaluated price to the lowest evaluated price (the offers put forward, having been compared on a material for material and performance for performance basis). The first thing decided at the meeting was which member, referred to as the "selected member", should be given the right to reduce his tabled price to the lowest evaluated price, unless his price happened to be the lowest price, the purpose of this being to encourage as far as possible the distribution of the available work in such a manner as might provide the most efficient and economical use of the technical and manufacturing resources of the industry including, in the case of overseas inquiries, works and organisations built up by members in overseas territories. When the selected member had been determined, the director tabled the prices already received by him from the members present. Any member might send in his quotation before coming to the meeting or at any time thereafter, and might at any time before the meeting vary the prices quoted. But after the schemes had been tabled, no member, other than the selected member, was entitled to quote to the customer prices other than those prices which he tabled at the meeting. Variation in the details of the quotation and consequential variation of prices after the date of the meeting might, however, be permitted with the consent of all members who had attended the original meeting provided that the quotation for similar extent of supplies was not thereby made more expensive for the purchaser. If a member was asked by the purchaser to revise his quotation because of a major change in conditions or requirements, then such revision was treated as a new inquiry and the whole of r. 5 operated again. The court was satisfied that r. 5 was of great benefit to the members and was so operated that, on the one hand, it did not result in inflated prices being quoted but competitive prices which only included a low but reasonable margin of profit, and, on the other hand, did not result in uneconomic prices being tabled. Some of the members of the Association maintained overseas offices and staff through whom there was valuable contact with overseas buyers. On a reference by the Registrar of Restrictive Trading Agreements under s. 20 (1) and s. 20 (2) (a) of the Restrictive

* The terms of r. 5 are set out at p. 260, letter H, to p. 261, letter I, post.

A Trade Practices Act, 1956*, the Association sought to support the operation of the restriction (r. 5) under s. 21 (1) (b), (d) and (f)†.

Held: (i) the restriction was not deemed by s. 21 (1) of the Restrictive Trade Practices Act, 1956, to be contrary to the public interest (and accordingly was not rendered void by s. 20 (3)) for the following reasons—

B (a) on the true construction of s. 21 (1) (f) the relevant criterion was probability of causing a reduction in export business that would be a substantial reduction, comparing for this purpose the expected reduction with the total business (including export business) of the industry (see p. 275, letter I, to p. 276, letter B, post).

C (b) the removal of the restriction would be likely to cause such a reduction in export business, since the loss in any year of even one overseas contract might produce a substantial reduction, and since the restriction operated to maintain export orders by procuring consultation and exchange of knowledge between interested members before tender and by reducing the likelihood of members' overseas offices being closed; the Association had, therefore, satisfied the court of the circumstances stated in s. 21 (1) (f) (see p. 276, letter G, post).

D (c) the Association had also satisfied the court that (within the final provision of s. 21 (1)) the restriction was not unreasonable, since the detriment to the public by purchasers having to pay rather more for boilers did not outweigh the national benefit that should result from the expected maintenance of exports (see p. 277, letter E, post).

E (ii) the restriction was not maintainable, however, under para. (b) of s. 21 (1) because, though the Association had proved that the restriction contained many advantages for the members, yet it had not been proved that

* Section 20, so far as relevant, provides: “(1) The court shall have jurisdiction, on application made in accordance with this section in respect of any agreement of which particulars are for the time being registered under this Part of this Act, to declare whether or not any restrictions by virtue of which this Part of this Act applies to the agreement (other than restrictions in respect of matters described in paras. (b) to (d) of s. 8 (8) of this Act) are contrary to the public interest.

F “(2) An application to the court under the foregoing subsection may be made—(a) in any case, by the registrar . . .

G “(3) Where any such restrictions are found by the court to be contrary to the public interest, the agreement shall be void in respect of those restrictions; and . . . the court may . . . make such order as appears to the court to be proper for restraining all or any of the persons party to the agreement . . . (a) from giving effect to . . . the agreement in respect of those restrictions; . . .”

H † Section 21 (1), so far as relevant, provides:—“For the purposes of any proceedings before the court under the last foregoing section, a restriction accepted in pursuance of any agreement shall be deemed to be contrary to the public interest unless the court is satisfied of any one or more of the following circumstances, that is to say . . . (b) that the removal of the restriction would deny to the public as purchasers, consumers or users of any goods other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such, whether by virtue of the restriction itself or of any arrangements or operations resulting therefrom . . . (d) that the restriction is reasonably necessary to enable the persons party to the agreement to negotiate fair terms for the supply of goods to, or the acquisition of goods from, any one person not party thereto who controls a preponderant part of the trade or business of acquiring or supplying such goods, or for the supply of goods to any person not party to the agreement and not carrying on such trade or business who, either alone or in combination with any other such person, controls a preponderant part of the market for such goods . . . (f) that, having regard to the conditions actually obtaining or reasonably foreseen at the time of the application, the removal of the restriction would be likely to cause a reduction in the volume or earnings of the export business which is substantial either in relation to the whole export business of the United Kingdom or in relation to the whole business (including export business) of the said trade or industry . . . and is further satisfied (in any such case) that the restriction is not unreasonable having regard to the balance between those circumstances and any detriment to the public or to persons not parties to the agreement . . . resulting or likely to result from the operation of the restriction.”

abrogation of the restriction would deny to the public any benefits (see p. 272, letter F, post).

(iii) neither was the restriction maintainable under para. (d) of s. 21 (1) because, though the Electricity Board controlled a preponderant part of the market and though it was unnecessary in order to bring the case within para. (d) to show that the preponderant buyer was likely to try to enforce unfair terms (see p. 273, letter I, post), yet the restriction was not reasonably necessary to enable the members of the Association to negotiate fair terms with the board, since the restriction was too wide, as it applied not only to contracts with the board but also to all other contracts for home industrial boilers and all contracts in a number of overseas territories (see p. 274, letter D, post).

[For the Restrictive Trade Practices Act, 1956, s. 21, see 36 HALSBURY'S STATUTES (2nd Edn.) 954.]

Reference.

Pursuant to the Restrictive Trade Practices Act, 1956, s. 20 (2) (a), the Registrar of Restrictive Trading Agreements referred to the Restrictive Practices Court an agreement made between the members of the Water-Tube Boilermakers' Association (hereinafter called "the Association") and contained in the Association's constitution, general rules, list of members and model form of general conditions of contract. By cl. 2 of the constitution the objects of the Association were

"(a) To promote and advance the status of the water-tube steam boiler industry and in particular of United Kingdom contractors for water-tube steam boilers and to raise funds for this purpose. To encourage the members of the Association to maintain a high standard for their products in the home market which in turn will help to foster, maintain and develop the export business of the industry. (b) To provide a means for the exchange of views and information between contractors. (c) To carry out, either alone or in conjunction with others, research and development work and to raise funds for the purpose. (d) To act on behalf of the industry in discussion and negotiations with the United Kingdom or other governments, with nationalised industries and with other organisations and users of water-tube steam boiler plant. (e) To assist in the equitable distribution between members of the work available and thereby, and consistent with meeting the requirements of the purchasers, to seek to ensure the most efficient use of the resources of the members of the Association. (f) To consult together with the object of combating foreign competition and devising means for expanding export trade. (g) To collaborate with other associations and bodies."

By r. 5 of the Association's general rules it was provided:

"(5) (a) As and when the director shall have received notification of the same inquiry or intention to tender from more than one member he shall inform all the notifying members that the procedure outlined below will be followed.

"(b) Whenever the director shall notify members that more than one member has received the inquiry a meeting shall be called, for a date and time convenient to all interested members. The objects of the meeting shall be: 1. To exchange technical information on the manner in which members intend to meet the requirements of the inquiry. 2. To compare the prices of members of the schemes which they propose to put forward. 3. To decide whether or not any one member shall be entitled to reduce his proposed evaluated price to that of the lowest evaluated price.

"(c) Only those members who have received the inquiry or who have notified their intention to tender and are in a position to table prices shall be

A entitled to attend the meeting. Any member who intends to tender shall send a representative to such meeting with full details of their proposals in regard to technical performance and prices so that these can be discussed and their prices properly evaluated.

B “(d) A member may submit prices for any number of schemes but one of these schemes shall, if possible, be in accordance with any specification called for by the inquiry. Particulars of such alternatives must be lodged with the director together with the particulars of the main proposal.

C “(e) It is an essential part of this arrangement that the various offers put forward by the members shall be sensibly compared, and prices established which material for material and performance for performance may be determined as being comparable. The lowest of such offers so determined is referred to herein as the ‘lowest evaluated price’.

“ (f) Prior to prices being evaluated, the meeting will decide whether any member, and if so which member, shall be given the right to reduce his tabled price to the lowest evaluated price tabled by members, unless his price happens already to be the lowest price. Such member will be referred to thereafter as the ‘selected member’.

D “(g) The purpose shall be to encourage, as far as possible, consistent with the preference of purchasers for plant provided by certain members, the distribution of the available work in such a manner as may provide the most efficient and economical use of the technical and manufacturing resources of the industry including, in the case of overseas inquiries, works and organisations which have been built up in overseas territories by certain members.

E “(h) When the selected member has been determined, the director will table the prices already received by him from the members present together with all technical details of their proposals. Any member may send in his quotation before coming to the meeting or at any time thereafter, and may at any time before the meeting vary the prices so quoted but, after the schemes have been tabled, no member, other than the member permitted to reduce his price to the lowest evaluated price as aforesaid, shall be entitled to quote to the customer prices other than those prices which he tabled at the meeting but any member shall be entitled to refrain from submitting a quotation. Variation in the details of the quotation and consequential variation of prices after the date of the meeting, may, however, be permitted with the consent of all members (which consent shall not be unreasonably withheld) who had attended the original meeting provided that the quotation for similar extent of supplies is not thereby made more expensive for the purchaser.

F “(i) If any member who was not present at the meeting notifies the director that he intends to tender the director shall call for such member to submit the details of his proposed tender and shall have a discretion if he so desires to call a further meeting.

G “(j) No member may quote for any alternatives unless particulars of such have been submitted to the director as prescribed above.

H “(k) If a member is asked by the purchaser to revise his quotation because of a major change in conditions or requirements, then such revision shall be treated as a new inquiry and be subject to the foregoing procedure.”

I Rule 5 contained the main restriction operated by the Association, and it was the only restriction considered, at the request of the parties, by the court. Certain subsidiary restrictions were, by agreement, stood over generally. The facts are stated in the judgment of the court.

B. J. M. MacKenna, Q.C., and *D. A. Grant* for the Water-Tube Boilermakers' Association.

John Megaw, Q.C., and *Arthur Bagnall* for the registrar.

July 31. UPJOHN, J., read the following judgment of the court: The respondents are the Water-Tube Boilermakers' Association (which we shall call "the Association") and the six companies who are members thereof. The Association was formed in the year 1933 as the result of a price war which had seriously damaged the industry in the late 1920's and the early 1930's when, we were told, boilers were sold at wholly uneconomic prices. The objects of the Association (as altered in February, 1957) are (inter alia) to promote and advance the status of the water-tube steam boiler industry and, in particular, of United Kingdom contractors for water-tube steam boilers and to raise funds for this purpose; to provide a means for the exchange of views and information between contractors; to carry out, either alone or in conjunction with others, research and development work and to raise funds for the purpose; to assist in the equitable distribution between members of the work available and thereby and consistent with meeting requirements for the purchasers to seek to ensure the most efficient use of the resources of the members of the Association; to consult together with the object of combating foreign competition and devising means for expanding export trade. B C

The Association is, in fact, concerned solely with the industry of making land water-tube boilers, which (for brevity) we will call "boilers". This industry is concentrated in the hands of a few large companies, and today there are not more than eight or nine companies in the United Kingdom capable of carrying out contracts for the largest boilers. Of these companies, six are members of the Association. Formerly there was a seventh, but it was absorbed by Babcock & Wilcox, Ltd., in 1952. Otherwise the membership has been unchanged since the formation of the Association. A brief description of these members must be given. The first is Babcock & Wilcox, Ltd., the giant of the industry, and some eighty per cent. of its business is concerned with the manufacture of boilers. Next is Clarke Chapman & Co., Ltd., and rather more than half of its business is concerned with the manufacture of boilers and ancillary plant. Third is International Combustion, Ltd., and eighty per cent. of its activities is in the manufacture of boilers. Fourth is John Thompson Water-Tube Boilers, Ltd. This is a subsidiary of John Thompson, Ltd., a holding company. The water-tube subsidiary is not itself a manufacturing company. It designs boilers and contracts to make and erect them, using for that purpose sub-contractors and buying from other companies in its group and outside it. Fifth is Simon-Carves, Ltd. Like John Thompson Water-Tube Boilers, Ltd., it is a company which designs boilers and contracts to make and erect them, but does not itself own any manufacturing plant. It sub-contracts and buys its requirements from others. The sixth and last member is Yarrow & Co., Ltd. It manufactures boilers, and about one-third of its activities is in the manufacture of boilers. The members are all companies of long standing in the boiler industry. They are large, and in two or three cases very large, companies, and all are financially strong. They all have world-wide reputations for work of the highest quality. D E F G H

The activities of boiler manufacturers may be divided into two classes. First, they design and manufacture the giant boilers required for central power stations both at home and abroad. It follows that from April, 1948, when the Central Electricity Authority was formed, it was the only home customer for these boilers. In 1955 its name was changed to British Electricity Authority and a separate authority was formed for the South of Scotland. In 1958 the Central Electricity Generating Board (to whom and to whose predecessor, the British Electricity Authority, we shall refer as "the Electricity Board") took over the distributing functions of the British Electricity Authority down to Area Boards. The present position is that the Electricity Board is the only customer in England and Wales for these boilers. The second class of boiler I

- A has been referred to as "the industrial boiler"; that is to say, a boiler required by manufacturing concerns, which may be for running their own steam plant and electrical generators, for manufacturing processes, for heating their premises, or for all these purposes. These boilers are generally much smaller than those required by the central power stations. As will appear later, about forty per cent. of the activities of the members of the Association are concerned with
- B the export of both types of boilers to countries overseas, principally, it would appear, to Australia, South Africa and India.

- After the war there was a greatly increased demand for electricity, a demand which it has been estimated increases annually at seven per cent. or thereabouts of installed capacity at the beginning of each year. Thus the demand for electricity in this country should double itself every ten to twelve years. Apart
- C from a few hydro-electric schemes, this demand had to be met by steam turbo generators, the steam being produced either in coal or oil-fired conventional boilers or in nuclear-powered "heat exchangers", which, however, in essence, are water-tube boilers. The day when some means is discovered of converting nuclear heat directly into electrical energy without the intervention of steam turbo generators has been treated by all as remote. The boilermaking industry
- D had not the capacity to produce boilers to meet this post-war demand for electricity, and so, in about 1949-50, the Electricity Board encouraged members of the Association and others to expand their manufacturing capacity. They also invited a few other concerns who were not previously concerned with the manufacture of land water-tube boilers to come in to the industry, and at least one, John Brown Land Boilers, Ltd., did so. At this time, the Electricity
- E Board planned for a standard rating of sixty-megawatt boilers (that is, boilers whose steam capacity would produce some sixty megawatts of electricity) and a large number of these were ordered and delivered. Until the year 1956 or 1957 there was, therefore, a heavy demand on the boilermaking industry, although it is true to say there were considerable fluctuations due to the government limitation of capital investment in equipment in certain years, noticeably
- F 1953 and 1954. This was, however, fully made up by a large expansion in 1955. On the whole, however, it is broadly true to say that the industry was employed to capacity.

- The boilermaking industry is making great technical advances, not only in the size of boilers being built, but in the temperatures and pressures employed. This is because the science of steam production is now advancing at a rapid
- G rate. Much research is going on into the behaviour of water and steam at ever-increasing pressures and temperatures, for it is found that the higher the pressure and temperature, the more efficient is the plant. Some of this research is a fundamental scientific research carried out at universities and elsewhere, such, for example, as the research into Boiler Circulation Theory just completed at Cambridge University. This brings with it many other problems, both
- H theoretical and practical; for example, as to the physical quality, size and thickness of the water-tubes at these great temperatures and pressures. Then new methods of using the flue gases by "reheaters" between the expansion stages of the turbine have recently been produced. Many other examples of the advanced scientific and technical knowledge required on the part of an up-to-date boilermaker could be given.

- I In the actual process of making and erecting a boiler, much "know-how" is employed. An expensive laboratory staff must be maintained. Let us give one example only. There may be over a hundred miles of water-tubes in a big modern boiler, with thousands of welded joints. The drum of the boiler must itself be welded. Every weld must stand these enormous pressures and temperatures, and much testing by various scientific means is necessary. Furthermore, every boiler must be specially designed for its particular job on its particular site and have regard to the fuel to be used, even if it be built to
- some standard rating of capacity.** As it has been said, each must be tailor-made.

This involves the maintenance of a large highly qualified design staff capable of turning the latest scientific and technical discoveries to practical account. The construction and erection staff must also be highly skilled. We are satisfied that the boilermaking industry is highly specialised, requiring the services of highly qualified scientists, technicians and artisans, and that scientifically it is today making great progress. This means that the industry has to be capable of bearing, in the present period of rapid development, exceptionally heavy overheads. A B

Let us give a few figures to illustrate this changing face of the industry. In the early 1920's, a large boiler would produce about 40,000 lb. of steam per hour at 250 lb. to the square inch at a steam temperature of six hundred degrees Fahrenheit. The latest boiler now under construction for the Electricity Board is designed to produce no less than 3,750,000 lb. of steam per hour at a pressure of 2,400 lb. to the square inch at a temperature of 1,055 degrees Fahrenheit. The research on Boiler Circulation Theory was concerned with pressures of over 3,000 lb. to the square inch. An industrial boiler is now under construction to work at 3,300 lb. per square inch. These great advances in scientific and technical knowledge have led to the building of boilers of greatly increased size and cost. After the war the Electricity Board planned, as we have said, for boilers of a standard rating of sixty megawatts. With the great advance in scientific knowledge, however, the board now have under construction by one manufacturer of the Association a boiler to produce 550 megawatts. In the future it is thought that the probable general trend will be for boilers perhaps not quite so large, but capable of producing 350 to 370 megawatts. This interesting feature of the industry makes the maintenance of highly qualified research staffs of great importance. Large staffs for this purpose are maintained by the larger members and at considerable cost. In addition, the Association maintains a research department under its technical officer, Mr. Simonson. He has one assistant. The functions of both of them are entirely administrative. Under the Association's Research and Development Committee they organise research in universities and by other bodies. The Boiler Circulation Theory research already mentioned is one example. Many others could be given and we only mention one or two others by way of further illustration: Tube plate design, undertaken by University College, London; Stresses in thick pressure vessel heads, undertaken by the University of Nottingham. Mr. Simonson also represents the Association on a number of scientific committees; for example, the Boiler Availability Committee, the British Coal Utilisation Research Association, the Flame Radiation Research, and a number of other bodies and committees. The members also sometimes submit specified problems for the consideration of an ad hoc committee, usually presided over by Mr. Simonson. C D E F G

The annual budget of the research department is some £80,000, which is shortly to rise to £100,000. Of the £80,000, some £73,000 is spent in direct research, and the balance in overheads, salaries and office expenses. This sum is provided by the members in, we understand, unequal proportions. The boiler industry stands fairly high in a list produced to us from the records of the Department of Scientific and Industrial Research showing the expenditure of research expressed as a percentage of net output. However, we do not attach much weight to this figure, for expenditure on boiler research must, from the nature of the industry, be a costly business compared with many other industries. H I

We have already mentioned that two of the members are designing and erecting companies only and do not themselves manufacture boilers. They must necessarily do all that by sub-contract or purchase. But sub-contracting and purchasing are striking features of this industry, not only by these two members but by the manufacturing companies themselves. It was noticeable that, though Yarrow is a manufacturing concern, when it obtained a very large contract from the Electricity Board for the Blyth Power Station, no less than

A five-sixths of the contract price represented sub-contracting and purchasing. The existence of the Association undoubtedly encourages the members to sub-contract among themselves rather than with outside boilermakers, but it is clear that, in practice, a number of sub-contracts are placed with outside companies. Ancillary machinery is, of course, purchased from the expert companies specialising in such machinery who are not themselves boilermakers.

B The industry, though small in terms of the number of companies engaged, is a very considerable industry in size. Thus, over the years 1952 to 1958 inclusive, orders for boilers (including orders for heat exchangers for nuclear power stations, which, however, constitute only a small proportion of the output) were as follows:—

Orders placed by the Electricity Board

C	with members	£138,480,000
	with outside U.K. boilermakers	£55,810,000
	with foreign boilermakers	Nil

Other home orders placed, i.e., for industrial boilers

	with members	£30,560,000
	with outside U.K. boilermakers	£7,570,000
D	with foreign boilermakers	£760,000

Foreign orders placed within scope of territory of Association's Agreement

	with members	£93,240,000
	with other U.K. boilermakers	£6,250,000
E	i.e., a total of £99,490,000 compared with orders placed in such territory with foreign boilermakers of £16,660,000.	

Foreign orders placed with members outside the scope of the agreement were £13,050,000. The total of all home orders over the same period is £233,180,000 and of all (home and foreign manufacturers) overseas orders within the scope of the Association's agreement £116,150,000. The industry has, therefore, a substantial and important export side, but its backbone is undoubtedly the Electricity Board.

F The cost of a boiler varies enormously. The great 550-megawatt boiler now under construction will cost something in the neighbourhood of £6,000,000. Many of the smaller ones for central power stations may cost between £1,000,000 and £3,000,000. From tender to completion of the contract may easily take four or five years. An industrial boiler will cost much less but may be several hundred thousand pounds.

G We must now examine the effect of these great and recent advances in scientific theory and design of boilers and in their size and cost on the economics of the industry. Shortly, it means that the numbers of orders for boilers will be greatly reduced, although, of course, the value of each boiler will be much more substantial. Just as a measure of this problem, it may be useful to give one or two tentative and necessarily approximate figures as to the future. When the board was considering generating plant under construction or planned at Mar. 31, 1955, for the five years to the end of 1960, the indicated programme was for 210 boilers, mostly of sixty megawatts; but it is now thinking in terms of much larger boilers. Though the figures must be regarded as very tentative, the number of smaller boilers planned has been much reduced, and the probability seems to be that the number of boilers planned or under construction in 1962 for the five years ending in 1967 will be thirty-four much larger ones. The effect of this means that, starting in the quite near future, there will only be three or four orders placed for boilers each year for most of the next decade. Now, while each boiler is very much greater in cost and capacity than those formerly ordered, in fact the cost and the number of persons employed in manufacture of, say, a three hundred-megawatt boiler are certainly nothing like ten times that of a thirty-megawatt boiler, and, therefore, it follows that there will be a

considerable shortage of orders and work in the industry compared to the decade now ending. The unchallenged evidence was that the industry is now in a position of difficulty. Furthermore, it appears that there is a recession in the important and substantial export business, which, however, is expected to revive with a rise in prices of primary commodities. The position, therefore, at the moment, we are satisfied on the evidence, is that the industry is now, and probably for one or two years has been, in a state of recession. There are too few orders both at home and overseas, leaving a substantial capacity in the industry unfilled. A B

It is always speculative to forecast the future of any industry, but the terms of s. 21 of the Restrictive Trade Practices Act, 1956, make it our duty to consider likely future conditions, and we do so, though with reluctance. It is a matter on which we have heard much evidence from those engaged in the trade, and from economists. As we see the future, this recession may possibly increase as the big boiler programme of the Electricity Board gets under way; we do not, however, see any reason to anticipate a deep depression or slump conditions. However, the recession is unlikely to decrease and may be expected to last for something in the region of five years, until the middle of the 1960's. Thereafter there is likely to be an up-turn in boilermaking activity. This is so for several reasons: (i) The working life of a boiler is twenty to thirty years; a replacement demand will be starting for those installed in the immediate post-war era, bearing in mind the length of time required for the erection of the modern giant boiler. (ii) To meet the annually increasing demand for electricity, the Electricity Board expects its orders for the giant boilers to expand to about eight per annum during the decade 1965-75. (iii) A revival in overseas demand is expected. We, therefore, envisage a return to substantially greater activity in the middle and later 1960's, not a sudden surge but, having regard to the necessity for long-term programming by the great power station authorities or companies, a gradual and well ordered increase in demand. On the long term, say from the 1970's onwards, economists and those engaged in the industry agreed that there would be a heavy demand for boilers which would probably exceed present capacity. This view is based primarily on the expected demand for electricity from the under-developed countries (much of which must be satisfied by turbo-electric rather than hydro-electric means) coupled, of course, with expanding demand at home. No doubt the emphasis will, in due course, turn from conventional boilers to nuclear power heat exchangers, but we find it quite impossible to make any forecast on this. D E F G

The position, therefore, of the boilermaking industry is a very special one which we now summarise very briefly. The industry itself requires highly scientific and technical knowledge, and rapid advances in this are constantly being made. Research is very important. A boiler designer or maker requires a relatively larger highly skilled staff than is common in industry generally, and this involves him in high overhead costs, a large proportion of which represents cash outgoings. The industry is concentrated in the hands of some eight or nine companies, of which the six principal ones are in the Association. These companies are all old established, all comparatively large and some very large, they are efficient and financially strong with world-wide reputations for the highest quality work. They all maintain the necessary scientific, technical and expert artisan staff to compete in world markets and to employ the latest scientific and technical improvements. The present trend of central power house boilers is towards larger boilers giving rise in the near future to a few orders for very large boilers, each taking four or five years to erect and costing some millions of pounds. In the home trade there is only one customer for these boilers. On the short-term view, the industry has, and will have, excess capacity, but on the long term the demand is likely to exceed capacity. Sub-contracting is a feature of the industry. In view of the expected long-term expansion in demand, we are satisfied that it would not be in the national interest that any H I

A of these member companies should be forced by economic pressure to give up boiler production. This, however, is not directly a relevant matter.

We must now consider in detail the restrictions operated by the Association. At the request of the parties, we have considered only the main restriction, that contained in r. 5 mentioned below, and no others. We understand there are certain subsidiary restrictions, but by agreement they have been stood over for consideration at a later date after the decision of the court on r. 5 is known. Until it was brought to an end at the beginning of 1957, the Association operated a system whereby, putting it very briefly, they met and allotted a given contract to one of their members and the others all quoted higher prices. It was recognised that that was a restriction within the meaning of the Restrictive Trade Practices Act, 1956, and, as a direct result of the passing of that Act, that scheme was abandoned and a new one was substituted. The new scheme, which began in February, 1957, covers, like its predecessor, only certain territories, that is to say the home trade and the British Commonwealth (except Canada) together with some other countries such as Palestine, Persia, Siam and one or two other places. The reason for this is, it appears, historical, and this territorial limitation seems to have gone back to the time that the Association was formed. In the United States of America, some members had affiliations which precluded the operation of any agreement; other countries were too under-developed to be interesting to boilermakers. It is possible that the territory chosen for the operation of the agreement was selected as being the most promising field for exports; but, after this lapse of time, the evidence on the point is meagre.

Rule 5 of the rules of the Association (1) is the one which governs the new procedure when an inquiry is received for a boiler, but, as it is very lengthy, we do not propose to set it out in full but to explain it by showing how it operates. When a member of the Association receives an inquiry for a boiler, it is his duty to report it to the Director of the Association, Mr. McKillop. If no other member reports a similar inquiry, then nothing further is done and the member is entirely free to deal with the inquiry without any restriction. This covers the great majority of inquiries. In fact, from February, 1957, to the end of December, 1958, there were 1,048 inquiries, and of these 688 were sole inquiries to which r. 5 had no further operation. If two or more inquiries are received and notified to the director, the matter is considered at the next regular monthly meeting of members under a file number, so that only those members who have received the inquiry know to what it refers and nothing is disclosed to other members. The members who have received the inquiry then decide on the next step. It may be a case to which r. 5 is "not applicable". This sometimes happens in relation to certain overseas territories where some members have associated companies who will be tendering and the member will not and so cannot table his price as later explained. It may be a case where the parties decide that the operation of r. 5 is "to be deferred", usually because the inquiry is not firm, or calls only for an approximate figure without detailed specification. Then there have been a few cases where, for exceptional reasons, and sometimes in the early days of working the scheme through mistake, the parties decided r. 5 was "not to be operated". Finally, they may decide that it shall be operated. That has happened in eighty-three cases out of the 1,048 inquiries that we have already mentioned. In those cases the following procedure operates. One member volunteers to produce a price schedule form, based on common data, to assist evaluation; that is, he takes out of the specification certain common items for ancillary machinery, for example, soot blowers by X; fans by Y. This is sent to each member. Then a date is fixed for a special meeting of the interested members to consider the whole matter. That meeting takes place, as nearly as is practically possible, immediately before the tendering date. This is done for two reasons: first to give the interested members the maximum amount of time to prepare their tenders; secondly because, as Mr. McKillop candidly admitted, it gives the

(1) The terms of r. 5 are set out at p. 260, letter H, to p. 261, letter I, ante.

members less time to have second thought and possibly to yield to some temptation A
not to act strictly in accordance with the rule.

At this special meeting, the director acts as independent chairman. The
persons attending are high executives of their respective companies and, in
important inquiries, will be accompanied by their experts. The first matter to
be considered is which member, if any, should be what is called the "selected
member". That is determined normally on what has been called the "record B
of trading". The object is to spread the work having regard to the needs of
members to secure a contract. For this purpose, the director has prepared a
record of trading for each of the members from the years 1947 to 1956 inclusive.
This record is in the form of a series of tables showing home orders (one table C
including nuclear power and another excluding such orders) and overseas orders
for each of certain overseas territories; for example, one table for Australia, one
for India and so on, so that information is readily available for each member
to see and compare the orders he has received over that period in each country
relative to the other members; percentages are worked out, showing in each
table each member's orders as a proportion of the total. The director also pre-
pares month by month precisely similar tables showing the results of trading
for the last five years (sixty months) preceding the particular monthly meeting. D
If a member in the course of that five years' trading shows a substantially less
percentage of the total amount of trading compared with his percentage from
1947 to 1956 in the relevant trading area, then he is in a favourable position to
be considered as the selected member. For this purpose, the figures to be com-
pared are the figures in the country from which the inquiry originates; for
example, if the inquiry originates from Australia, figures relating to home and E
all other countries are ignored. Naturally the matter is frequently the subject
of very considerable argument. We are satisfied that there is one serious defect
in this system, a defect admitted by the members themselves and which they
now have under consideration. The figures relating to record of trading do not
include figures of sub-contract work which, in an industry depending so much on
sub-contracting, obviously gives the figures an unrealistic bias. Another defect F
is that the basic record seems to be frozen in the period 1947 to 1956.

For the purposes of this discussion, orders for nuclear plant are ignored except
as a last-ditch argument. We may add at this point that, though the rule is so
drawn as to bring boilers for nuclear power stations into its ambit, it has never
yet operated in such cases up to now, for the Electricity Board has given orders
for power stations complete to various consortia which have been formed to G
undertake the work. Another matter that may be taken into account is what is
called "customer preference"; that is to say, having regard to the history of the
matter or some other circumstance, one member may claim that the customer
would prefer, other things being equal, to give the contract to him. In connexion,
however, with the home trade, it is extremely difficult for any of the members
successfully to claim customer preference and, normally speaking, the matter is H
decided on the record of trading as we have briefly described it. Ultimately, then,
a decision is reached whether any member shall be chosen as the selected member
and, if so, which. Sometimes, and it has happened more frequently lately, two
members may be chosen as joint selected members.

Now the director will have received in confidence from the members the prices
which they propose to quote, in answer to the inquiry. The figures will give I
very full details of the constituent prices making up the total quoted price, and
he prepares very full schedules, available for each interested member, showing,
putting it shortly, the breakdown of each member's total price. At this stage,
after the selected member has been chosen, the director "tables" these prices,
and there follows a prolonged inquiry into the respective merits of the prices
tabled. That is to say, the members meet with their experts and try to evaluate
the prices on a common basis so that they may be sensibly compared "material
for material and performance for performance". That is necessary because

A members do not necessarily tender on precisely the same basis. Many details of performance, or of building or construction, may vary considerably, or a member may produce an alternative scheme because, as it was put in evidence, the tenderer may think that he knows better than the customer what is best for the particular situation and may put in a quotation which does not follow the specification. A great deal of detailed evidence was properly given before us on the price evaluation stage which we do not think it necessary to repeat here. Suffice it to say that, after a prolonged discussion which may last some hours or go on next day, the parties have so far always been able to agree on these evaluated prices, and the lowest price is called the "lowest evaluated price".

C Now follows the whole essence of the operation of r. 5. No one except the selected member may thereafter at any time alter the price which he has tabled. The selected member has this option if, but only if, his price is not the lowest evaluated price, that he may reduce his price either wholly or in part down to the lowest evaluated price but not below it. If he is found to have the lowest evaluated price, then he, like the others, cannot alter his price. If he is not the lowest, the selected member is normally required to declare then and there at the meeting if he elects to reduce and, if so, by how much. When comparing the prices for the purpose of evaluation, each member will have worked on the basis of the price schedule prepared by the volunteer member. But he may prefer to quote for some other make or type of ancillary equipment. This he shows in his tabled price as a "variation", setting out the difference in value, plus or minus as the case may be, and the price as actually tendered to the customer will be varied accordingly.

E The result of this procedure is that the customer, on receiving tenders, may find that two members are quoting equal or nearly equal prices. He, therefore, has an enlarged choice, if price is the material consideration. The customer may want a revision of the specification and, consequently, a revision in the quotation as received from a member. This must be reported to the director, who has authority to decide (if necessary, after consulting the technical officer of the Association) whether the variation is major or minor. If minor, then the member goes ahead and quotes a revised price without further reference to the other members. But if it is a major variation, then the whole of r. 5 must be operated all over again as though it was a new inquiry.

G The scheme has great advantages to the selected member. He knows that he can, if he so desires, submit what will normally be as low an evaluated price as any of the members and lower than all except one other (or two others, if there are joint selected members) and will thus be in a good position to get the contract so far as the members are concerned. We say "normally" because some of the big customers, and noticeably the Electricity Board, keep an expert staff who go through a similar process of evaluation when the tenders are received. This process may take a month or more and is much more elaborate than the process we have briefly described above. When prices are very close and competitive, the experts of the Electricity Board, for instance, may reach a conclusion different from that reached by the members at their meeting. In such cases, the contract may go to a member who is neither the selected member nor the member who has tabled the lowest price. In any event, it may go to a boilermaker not a member of the Association.

I Of the eighty-three cases in which the rule has operated up to the end of 1958, it is interesting to note that the selected member tabled the lowest price in no less than forty-three cases. In the remaining forty cases, the member reduced wholly or partially on twenty-five occasions but elected not to reduce at all in fifteen cases. Of these eighty-three cases, fifty-one have to date resulted in orders being placed. Of these fifty-one orders, thirty-seven have been placed with members. The remaining fourteen have gone to outside boilermakers or to foreign competitors. Of the thirty-seven cases placed with members, the selected

(or joint selected) member also had the lowest evaluated price and secured the order in eighteen cases. The selected member reduced wholly or in part and secured the order in eight cases. A non-selected member who also had the lowest price secured the order in six cases. A non-selected member who was not lowest secured the order in five cases. In these thirty-seven cases, the total value of orders obtained by members was about £37,000,000. A

We are satisfied, having heard Mr. Brook of Simon-Carves and Mr. Brown of Yarrow and Mr. McKillop, that this scheme is honestly worked in the manner that we have described. We are completely satisfied, having seen him in the witness-box, that Mr. McKillop is a strong independent chairman. We are further satisfied on the evidence that the prices tabled by members at these meetings are really competitive and keen prices, by which we mean prices which cover overheads and depreciation and allow a small, but only very reasonable, margin of profit. In this connexion, we desire to say that the evidence of the profit margin was not satisfactorily produced to us in a convincing manner, being unsupported by accounts. We accepted such evidence as was tendered in this case only because we realised that the scheme has been operating for such a short time and the contracts take so long to work out that figures of actual profits obtained on these contracts may not yet be available. However, it is clear from figures produced to us of cost per kilowatt, and is, indeed, plain from the fact that the members have been so successful in securing orders, that their prices compare very favourably with outside boilermakers. We are also satisfied on the evidence that the operation of r. 5 brings other advantages to members almost, if not quite, as great as winning the prize of selection. First, it prevents them from yielding to the practices followed by some customers of resorting to "Dutch auctions"; that is, the customer goes round to one or more of those who have tendered and tries to persuade them that a little reduction in the price will secure the contract. That is particularly valuable in a period of depressed trade. B C D E

Secondly, after the meeting, each member takes away and makes a careful study of his rivals' figures appearing in the detailed schedules prepared by the director. This enables each member to keep a close check on the general level of prices. It enables him to see if his estimators are keeping generally in line with his rivals. Some error in his design or costing may appear from an examination of these documents. That will enable him to correct the error and to put in a keener estimate on the next occasion. Furthermore, it leads to very careful preparation of the price to be quoted, for the member's detailed figures will be carefully examined by his rivals and he would not like it to appear that compared to his rivals he has made some mistake or miscalculation. We are satisfied that r. 5 is of great benefit to members and is so operated that, on the one hand, it does not result in inflated prices being quoted but competitive prices which only include a low but reasonable margin of profit, and, on the other, does not result in "slashed" or uneconomic prices being tabled, for it is the acknowledged object of the scheme to keep prices higher than they otherwise would be in times of slack demand. The case of the Association is this, that, without such a scheme, prices would fall to a wholly uneconomic level and would mean that the members would not make an adequate profit on their contracts and might indeed suffer severe losses. F G H

We accept this view of the situation. We think that, without the scheme, there would be a severe cut in prices. Here is an industry consisting of few companies having an excess capacity and chasing too few very large but infrequent orders. Even with the scheme, some of the members have been without any orders from the Electricity Board for some years. With the scheme, however, each member knows whether his tendering is in line with those of his fellow members and each time he fails to secure an order he knows that his record of trading will give him a better chance of becoming the selected member next time; his quoted prices will become even keener and his hope of a big contract may legitimately increase. Without the scheme, all he knows is that he misses contract I

A after contract. He does not know if his design is at fault, whether his estimators are out of line, or whether he is falling behind in technical achievement. The time arrives when he must have an order at any cost if he is to remain in the industry and to retain his key personnel. He will slash his prices to obtain an order, not attempting to make a profit or even to meet all his overheads, and this will lead to a general fall in prices. We had an excellent example of this in evidence with

B regard to one of the outside United Kingdom manufacturers. A tender was called for and then there was a re-tender, by which time he had learnt of his competitors' tenders. In the re-tender, he cut his price by twenty per cent., which must have involved him in severe loss, but he obtained the contract. The strength of the Association, however, apparently averted any serious fall in prices in later contracts.

C We now turn to consider the submissions of the Association in relation to the Act. First it is said that the operation of r. 5 brings them within s. 21 (1) (b), which we do not pause to read. It is said that the operation of the rule tends to preserve capacity. By that is meant really retention within the industry of key personnel. We have already said enough to show that it is vital in this highly technical and progressive industry to keep the key scientists, designers, chief

D draughtsmen, and metallurgists and estimators if a particular company is to be in a position to deal with the expected expansion of orders in the future. Further, they must keep with them the experienced and highly technical efficient workmen, foremen, skilled artisans, welders and the like, including those specially trained to erect the boiler on the site. It is said that, without this scheme, the companies would be compelled to dismiss much of this skilled personnel, for they cannot

E afford the overheads in keeping them under-employed during the expected period of depression for the next four or five years.

We are unable to accept this argument. All the members are companies of long and high standing, financially well placed, and reports of the companies have been read to us which show that the directors are keenly alive to the vital necessity of keeping this highly skilled and technical personnel on the pay-roll.

F That has appeared again and again in the reports that have been read to us. In the depression as we see it over the next five years or more, we have not the slightest doubt that, in fact, the directors will not take the risk of dismissing their key personnel. They may dismiss a number of their skilled draughtsmen and artisans, and that, indeed, has already happened while the scheme still operates, as was proved by the figures given before us; but we are satisfied

G that they will keep the essential key personnel who are there to organise the departments and will be there ready to train the less skilled personnel when the expected increase in demand arises. Putting it shortly, all of the members are strong long-established boilermakers and there is no evidence to show that they lack the resources to keep in business during the contemplated recession. The directors realise perfectly well that if they are to remain in the business, they

H must retain these personnel; they will do so.

✓ Secondly, it is said that, without the scheme, the collective research department which we have already mentioned will close down. We have already pointed out that some £80,000 to £100,000 a year is being spent by the Association in collective research. This is a negligible amount compared to the very large overhead expenditure involved in this industry, and we are quite satisfied that, if it is

I thought by the members to be worth while to keep the department in being during a period of recession, they will, in fact, continue to provide this comparatively small expenditure. If they do not think it is worth while, they will, no doubt, reduce or close down the research department. There is nothing in this point.

✓ Thirdly, it is said that, unless the scheme is continued in operation, the individual research departments will have to be closed down. It is, no doubt, true that the individual research departments do cost the companies in the aggregate a great deal of money. It may be that, if a period of very deep depression is to

be anticipated for a considerable number of years, the companies would be compelled to close down their research departments, but we have already said we do not envisage such a deep depression. We have no doubt, for the reasons already given, that the companies will be well able to maintain their essential research departments over the expected recession for the next four or five years and take advantage of the gradual return to full demand which we expect to occur after that period. A

✓ Then it is said that, if the scheme goes, quality will deteriorate. It is said that, at present, tenders provide a "generous" fulfilment of the specification; that is to say, that boilers are designed which not merely carry out the tests laid down in the specification on trial runs when everything, the quality of the coal and so forth, is at its most favourable, but will provide an equally good day-to-day performance in normal operating conditions. We do not think that this is a valid argument. The Electricity Board has itself a very expert staff in boiler performance. Industrial users will normally consult eminent and very experienced engineers. These experts are fully alive to the difference between test runs and day-to-day performance and it is to be expected that they will so frame their specification as to give the day-to-day performance which they expect. This is a minor consideration only. B C

✓ Finally, it is said that the preservation of the scheme will tend to keep the sub-contracting among members. So be it, but we do not follow this argument. We have already stressed the sub-contracting feature of this industry and, whether the Association's restrictions remain in being or not, sub-contracting will go on whether among members of the Association or outside. Indeed, we think that it is advantageous to the public that sub-contracting should not tend to be limited to the members, for there may be outside boilermakers who are specialists in particular ancillary goods which are more suitable for the contract in question. In fact, it appears that members do not contract exclusively amongst themselves, but frequently go to outside bodies for ancillary machinery. We think the tendency to keep sub-contracting to members operates as a detriment to the public. D E

In conclusion, though the Association has proved that the scheme contains many advantages for the members, we are of opinion that they have entirely failed to prove that its abrogation would deny to the public any benefits. F

We turn then to the Association's claim under s. 21 (1) (d) of the Act; that is, the preponderant buyer paragraph. That paragraph reads as follows:

"that the restriction is reasonably necessary to enable the persons party to the agreement to negotiate fair terms for the supply of goods to, or the acquisition of goods from, any one person not party thereto who controls a preponderant part of the trade or business of acquiring or supplying such goods, or for the supply of goods to any person not party to the agreement and not carrying on such trade or business who, either alone or in combination with any other such person, controls a preponderant part of the market for such goods." G H

It is claimed that the Electricity Board controls a preponderant part of the market for boilers. We do not propose to attempt any definition of the word "preponderant"; it seems to us that it must be a question of fact in all the circumstances of each particular case whether or not a particular purchaser can be so described. Nor do we propose to attempt any definition of the word "market". It was submitted to us that the word "market" did not mean merely the home market but that it meant the whole market available to the members of the Association. Whichever definition of "market" be taken, we are satisfied that the Electricity Board is properly described as controlling a preponderant part of the market. The board is the only customer for Central Electricity Power Station boilers in England and Wales. Let us restate a few of the figures we have already mentioned. During the years 1952 to 1958 inclusive, the total I

- A amount known to have been placed in the home market was £233,000,000. Of this total, the amount placed by the Electricity Board was £194,000,000. In the same period overseas orders, for territories within the scope of the agreement, known to have been placed with home and foreign boilermakers, amounted to £116,000,000. The board, therefore, placed eighty-three per cent. of the total home orders and fifty-six per cent. of the combined home
- B and overseas orders for the period. It seems to us clear, on those figures, that the Electricity Board is properly described as controlling a preponderant part of the market, and we so stated during the hearing. It is, we think, also permissible to take into account as an element, but only as an element, the unique prestige and reputation of the Electricity Board. We were satisfied on the evidence that, if an overseas buyer who has made an inquiry of a
- C member can see and inspect some recent and up-to-date installation of the latest and most advanced design which that member has recently erected for the Electricity Board, this will have an important influence on the overseas customer and may result in the award of a contract to the member. Apart altogether from the desire to fill the member's order book, the importance therefore of getting orders from the Electricity Board cannot be over-stressed.
- D The question remains whether the restriction is reasonably necessary to enable the members to negotiate fair terms for the supply of goods to the Electricity Board. As we have earlier pointed out, immediately after the war the Electricity Board was faced with the necessity for ordering a vast amount of new equipment to meet the greatly increased demand for electricity, so that they invited companies to increase their capacity. Their method of placing orders at this time
- E was by direct allocation. From 1954 onwards, however, all orders for boilers have been placed by competitive tender, save in exceptional circumstances. In 1954 a committee of inquiry was set up to inquire into the electricity supply industry, under the chairmanship of Sir Edwin Herbert. This committee reported in January of 1956, and entirely approved of the method of placing orders after inviting tenders. Indeed, the Herbert Committee went so far as to suggest that the
- F Electricity Board should obtain tenders not only from home boiler manufacturers but from those abroad. We do not doubt that the procedure of putting out these vast orders to competitive tender by the Electricity Board is business-like, entirely proper and in the national interest.

If the rule is abolished, however, we have already given our reasons for thinking that the probable effect in a period of depression will be that the members and

G others will quote prices which will be uneconomic and which will depress prices generally in the industry to a level at which few, if any, of the boiler manufacturers will be able to conduct their business at a profit. The Electricity Board has in evidence before us, however, made it quite clear that they do not desire to force down prices to an uneconomic level. They are anxious to see that the members and other persons invited to tender put in prices for boilers which give

H them a small but reasonable profit. Counsel for the registrar is, therefore, quite right when he submits that the Electricity Board is not trying unfairly to force down prices by adopting this system of competitive tender. He then submits that, to bring para. (d) into play, it is necessary to show that the preponderant buyer is likely to use his powers to negotiate unfair terms. That, he says, is not proved in this case and he says that, if the members of the Association like to

I put in tenders at uneconomic levels, that is their business, but it does not bring para. (d) into operation.

We cannot agree with counsel's construction of the paragraph. We have to see whether, in all the circumstances of the case, the restriction is reasonably necessary to enable the members to negotiate fair terms for the supply of boilers to the Electricity Board. We do not think that the paragraph necessarily requires proof of the existence of a preponderant buyer who is likely to try to enforce unfair terms. It is, we think, sufficient if, in fact, in all the circumstances of the case without the restriction the suppliers will not be enabled to negotiate fair

terms, but, in the hope of getting an occasional contract, are likely to tender at uneconomic prices. By "fair terms" we understand the paragraph to mean terms on which the efficient manufacturer can make and sell his goods at a reasonable, but no more than a reasonable, profit. A

In the special circumstances of this case, we think that the conditions for the operation of the paragraph are satisfied. We must not be understood as saying that, whenever there is a preponderant buyer who employs the method of competitive tender, a case for some restriction is at once made out. In the ordinary case where such a procedure is followed, the normal results of competition will come into play. The more efficient tenderers will gradually obtain a bigger share of the market and will drive the less efficient out of business. That is as it should be, and will not usually give rise to the necessary conditions for the operation of the paragraph. In the case before us, however, there is no room for the free play of competition in the ordinary sense. Here we have six big and efficient firms who ought in the national interest, having regard to the expected long-term demand, to stay in the business. In the meantime, there are these very few, very large, orders which it is expedient should to some extent be spread over the industry and not concentrated in the hands of very few. B C

That, however, does not conclude the matter in the Association's favour, for we have to consider whether this particular restriction, that is r. 5 itself, is reasonably necessary to enable the members to negotiate fair terms with the preponderant buyer. It seems to us clear that the rule as it stands is not reasonably necessary for that purpose, for the simple reason that it applies not only to contracts with the Electricity Board but to all other contracts for home industrial boilers and all contracts of every kind situate in a large number of overseas territories. It is, in fact, quite unnecessarily wide. It is said that, if r. 5 is to operate only in connexion with Electricity Board orders, it will be operated so seldom that it will not fulfil its purpose of enabling members to judge of the general level of prices. We cannot accept this argument. Under this paragraph, the object of the rule is not to enable members to obtain knowledge of the general level of prices, but to negotiate fair terms with the Electricity Board. Therefore, the application under para. (d) fails on this ground. D E F

We now come to the last paragraph relied on by the Association; that is s. 21 (1) (f). It is in these terms:

"that, having regard to the conditions actually obtaining or reasonably foreseen at the time of the application, the removal of the restriction would be likely to cause a reduction in the volume or earnings of the export business which is substantial either in relation to the whole export business of the United Kingdom or in relation to the whole business (including export business) of the said trade or industry." G

Before dealing with this paragraph in detail, however, we desire to add one or two facts on the operation of r. 5 when it is applied to the overseas territories. In the first place, the members interested usually have an early preliminary meeting before the tabling meeting. At this meeting there is a very detailed discussion on the specification. There is a much greater exchange of technical knowledge and "know-how" than in the case of home orders, for we are satisfied on the evidence that the principal object of members, when dealing with overseas orders in an included territory, is to bring the order home to this country and there is less emphasis placed on the record of trading. Not only is there a much greater exchange of technical and commercial information, credit and other requirements, but the members pool information and tell one another what they have heard, possibly only by way of rumour, as to other likely outside or foreign manufacturers who are going to tender for the particular inquiry. This consultation is far more important in dealing with overseas inquiries. Alternative specifications may be discussed. This may be of the utmost use to members. Then, in the case of these overseas orders, much greater emphasis is placed on H I

A customer preference and far less on the record of trading. In some overseas territories, one or two of the members maintain offices and a competent staff, and the question of customer preference frequently settles itself. It is, of course, clear that, as in the home market, one object of the operation of r. 5 is to maintain prices, but it was agreed that the rule is applied much more flexibly to overseas inquiries. How then, runs the registrar's argument, with much force, can it be B that the existence of the rule enables members to obtain a larger share of the export market than would otherwise be the case, for it is not in dispute that the outside and foreign boilermakers are intensely competitive? He submits, if the rule is abolished, members will tender at lower prices and are, therefore, more likely to win the competition against their foreign and outside rivals.

Paradoxical though it may seem, we do believe in fact that the continued C existence of the rule will enable the members to obtain a larger share of overseas orders (which cannot be numerous) than would be the case if the restriction was abolished. If there were no rule, a member tenders in the dark. It may be that he has made some mistake or that his estimators have got out of line and he may put in a tender which will just miss the order although he may be the contractor preferred by the customer. When, however, the matter has been thoroughly D thrashed out, first at a preliminary meeting and then at the ordinary tabling meeting, any interested member may be reasonably satisfied that his tender is strictly in line with the general level of prices and that his estimators or designers have made no mistake, or, if they have, he can rectify that if he is the selected member. He also knows that, if he really is likely to be the member to whom the foreign customer would want to give the order, he is likely to be chosen as the E selected member. Accordingly, it enables him to put in the keenest possible price which will, therefore, give him a still better chance of securing the order. The combination of customer preference and the lowest price must help to secure overseas business. There is another way in which we think that the rule may operate to maintain export orders. We have already mentioned that some of the members keep considerable staffs and offices in some overseas countries. We F think that, if the restriction were to be removed, there would be a likelihood at any rate of some of these offices being closed and extremely valuable local contacts lost, with consequential loss of orders. With the restriction in force, the members gain that extra confidence which makes it worth while to keep these expensive organisations overseas in being.

The figures as to foreign trade given to us show, indeed, how successful the G members have been in the past, and that the rule has not been applied to the detriment of overseas trade. We have formed the opinion that consultation between interested members, each contributing to the background of knowledge essential to a proper assessment of market possibilities, is of great, and, perhaps, even of crucial, value in dealing with inquiries from abroad. We are satisfied that, if the restriction is removed, having regard to the conditions which may reasonably be foreseen, there is likely to be a reduction in foreign orders obtained by H members of the Association.

This brings us to an important question of construction on para. (f). Counsel for the Association submits that, in order to bring the paragraph into operation, the export business must be shown to be substantial in relation to the whole business (including export business) of the trade or industry in question. In I this case, he shows that without difficulty. If that be so, then he submits he only has to show the likelihood of any reduction, however small, in the volume of earnings of that substantial export business in order to satisfy the paragraph.

Counsel for the registrar, on the other hand, submits that the Association must show that it is the reduction which is substantial; that is to say, comparing the expected reduction in the volume or earnings of the export business with the whole business, including export business, of the trade or industry, it must be shown that the reduction expected is substantial. Counsel for the Association relies on a strict grammatical construction of the paragraph. He says the word

"which" naturally refers to the immediately antecedent noun "business". He submits further that, if counsel for the registrar's construction is correct, it should be read "business which *would* be substantial" and not "is". While we recognise the force of counsel for the Association's argument based on the strict grammar of the paragraph, we do not think that it is the correct construction. We think that, without doing violence to the words of the paragraph, it can be read in the manner suggested by counsel for the registrar. We think that is what Parliament intended. The export business may be quite small both in volume and earnings compared to the total volume of earnings of the business both at home and abroad; nevertheless, it may, in absolute terms, be valuable, and if the reduction is expected to be substantial, then it seems to us that the paragraph is intended to operate. The section taken as a whole is clearly directed to a comparison between the state of affairs with the restriction in force compared to the expected situation if it is removed, and the comparison must show a substantial or serious change; not something small or insubstantial. Thus, in para. (b), the court must be satisfied that the removal of the restriction would deny specific and substantial advantages to the public. Under para. (e), the court must be satisfied that the removal of the restriction would be likely to have a serious and persistent adverse effect on the general level of unemployment. And so, when one comes to para. (f), it seems reasonably clear that Parliament's mind is directed to a substantial reduction in exports.

It is, indeed, a very difficult matter in this case to express a view on the question whether the removal of the rule will cause a substantial reduction in this very substantial export trade. It is not possible to express any quantitative views on it. What seems to us important, however, is that the size of boilers is increasing not only at home, but throughout the world, and it may be reasonably expected that the value of overseas individual boiler contracts will tend in the future to follow the expansion which has been so noticeable in this country. Consequently, the loss in any year of even one overseas contract may represent a substantial reduction in the export figures of the industry, and that, indeed, is made reasonably clear, we think, by a perusal of the record of trading relating to some of the overseas countries.

We have reached the conclusion that, giving the matter the best judgment that we can, the abolition of r. 5, operated in the way that it is in relation to overseas orders, would be likely to cause a substantial reduction in the volume or earnings of the export business compared to the total of the whole business (including export business) of the trade or industry. Accordingly we have reached the conclusion that the Association, on the particular facts of this case, satisfy para. (f) of s. 21 (1).

We turn then to the final balancing provision at the end of sub-s. (1). On one side of the balance is the circumstance that the removal of the restriction is likely to cause a substantial reduction in the volume or earnings of the export business. On the other side of the balance, we have to consider what is the detriment to the public resulting, or likely to result, from the operation of the restriction. In this case, the public concerned are the purchasers and users of central power station and industrial boilers. Having regard to the definition of "goods" to be found in s. 36 of the Act (2), it seems to us clear that the public do not include the users of electricity; in any event, the difference in the price of a unit of electricity to a member of the public by reason of the fact that the Electricity Board or some other power station authority has to pay rather more for its boilers would be infinitesimal.

The grounds of detriment relied on by the registrar are to be found in para. 19 of his answer. The first two grounds allege that the effect of the restriction is to

(2) "'goods' includes ships and aircraft, minerals, substances and animals (including fish), and references to the production of goods include references to the getting of minerals and the taking of such animals."

A prevent or restrict the free play of competition between firms of differing efficiency and that the scheme for influencing the distribution of contracts tends to prevent the concentration of business on the low-cost boilermakers and involves an uneconomical use of the nation's productive resources. We have already given our reasons for not accepting the first of these submissions, in the special circumstances of this case, when we were considering para. (d). As to the second,

B as we have already stated, we are satisfied that with or without the scheme there will be no reduction of capacity in the industry.

The registrar next alleges that the price restrictions are likely to lead to the submission to the customer by members of prices which are higher than those which the members would quote in the absence of such an agreement. He

C then alleges that it is a detriment to the public that any arrangement should be maintained which discourages the manufacturer from reducing his prices if he is in a position to do so. Finally, he says that, by the operation of the restrictions, the selected member may be faced with a temptation of reducing the price which he is prepared to tender by lowering the standard of his work. We have already considered this point and we regard the detriment as

D a minor one.

We must, however, deal in detail with the registrar's submission that the price restrictions will lead to higher prices and that the member will be discouraged from reducing his prices if he is in a position to do so. It is, of course, true that the members may tender somewhat higher prices than if the restriction is abolished, especially in times of depression, and it is, no doubt, equally true that a

E member will not put in a price which does not give him a fair return. In our judgment, the real detriment to be weighed against the reduction in exports is that the purchasers of boilers may have to pay rather more than they otherwise would for their boilers. In all the circumstances of this case, we do not think this detriment to the public outweighs the national benefit resulting from the maintenance of exports which we anticipate if the scheme continues.

F

Accordingly, in this case the Association succeed in discharging the onus cast on them by s. 21 of proving that the restriction is not contrary to the public interest.

Solicitors: *Claremont, Haynes & Co.* (for the Water-Tube Boilermakers' Association); *Treasury Solicitor.*

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

Re ROYCE'S WILL TRUSTS. TILDESLEY v. TILDESLEY AND OTHERS.

[COURT OF APPEAL (Lord Evershed, M.R., Hodson and Romer, L.J.J.), July 13, 14, 1959.]

Will—Attestation—Solicitor attesting—Provision for trustees' remuneration—Provision for solicitor's professional charges—Solicitor appointed trustee subsequent to death of testator—Whether entitled to remuneration or professional charges—Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 15.

By his will dated Apr. 20, 1933, a testator appointed two persons to be his executors and trustees, and the will was attested by the first defendant, a solicitor, and another. By cl. 16 of his will the testator declared that if and so long as his trustees retained any part of his trust fund and received and applied the income, the trustees should pay to themselves five per cent. of such income as remuneration for their services. By cl. 17 the testator provided that any executor or trustee of his will who might be a solicitor should be entitled to charge for his professional services. On Apr. 22, 1933, the testator died, and on June 6, 1933, the two executors and trustees proved the will. In 1934 one of the trustees died and by a deed of appointment in that year, the first defendant was appointed to be one of the trustees. On a question as to his rights under cl. 16 and cl. 17 of the will,

Held: (i) section 15 of the Wills Act, 1837, on its true construction rendered void those beneficial interests only of which it could be predicated at the time when the will was attested (or possibly at the time of the testator's death) that they were thereby given to an attesting witness; as it could not have been predicated at either such time that the first defendant would be a beneficiary under cl. 16 or cl. 17 of the testator's will, he was not disqualified from benefiting under those clauses by his subsequent appointment as trustee.

Reasoning of MATHEW, J., in *Thorpe v. Bestwick* ((1881), 6 Q.B.D. at p. 312) applied.

(ii) benefits under cl. 16 and under cl. 17 were not gifts of the same amount for the same services, and the first defendant was entitled to the cumulative benefits of both clauses.

Wilson v. O'Leary ((1872), 7 Ch. App. 448) considered.

Decision of WYNN-PARRY, J. ([1958] 3 All E.R. 586) reversed.

[As to the attestation of wills and the effect of gifts by will to a witness, see 34 HALSBURY'S LAWS (2nd Edn.) 66, para. 85; and for cases on the subject, see 42 DIGEST 122, 1177, 1178, and 44 DIGEST 277, 1101.]

For the Wills Act, 1837, s. 15, see 26 HALSBURY'S STATUTES (2nd Edn.) 1338.]

Cases referred to:

Thorpe v. Bestwick, (1881), 6 Q.B.D. 311; 50 L.J.Q.B. 320; 44 L.T. 180; 45 J.P. 440; 44 Digest 277, 1101.

Wilson v. O'Leary, (1872), 7 Ch. App. 448; 41 L.J.Ch. 342; 26 L.T. 463; 44 Digest 1008, 8658.

Appeal.

This was an appeal by the first defendant from an order of WYNN-PARRY, J., dated Nov. 5, 1958, and reported [1958] 3 All E.R. 586, made on an originating summons issued by one of the trustees of the will of Sir Frederick Henry Royce, Bart., deceased, for the determination of the following question (among others): whether, having regard to the fact that the first defendant was an attesting witness to the testator's will, the first defendant was entitled as a trustee of the will: (a) to receive remuneration for his services under cl. 16 of the will: or (b) to charge professional remuneration as a solicitor against the testator's estate under cl. 17 of the will.

The first defendant, a solicitor, attested the will which was made on Apr. 20,

A 1933. On Apr. 22, 1933, the testator died without having revoked or altered his will which was proved by the plaintiff and Albert William Claremont on June 6, 1933. By a deed of appointment dated July 16, 1934, the first defendant was appointed trustee to act jointly with the plaintiff. On Aug. 5, 1934, Albert William Claremont died.

The testator provided by his will:

B "16. I declare that if and so long as my trustees are retaining any part of the trust fund and receiving and applying the income it shall be lawful for them to pay to themselves out of such income before dividing the same such a sum as shall equal five per cent. thereof to be equally divided between them by way of remuneration for their services.

C "17. I declare that Albert William Claremont or any person who may for the time being be an executor or a trustee of my will and who may be a solicitor shall be entitled to charge and shall be paid out of my estate for his services in the same manner as though not being an executor or trustee he had been employed by my executors or trustees to render such services."

D WYNN-PARRY, J., held that the first defendant as an attesting witness was disqualified by s. 15 of the Wills Act, 1837, from taking any benefit either under cl. 16 or cl. 17.

Sir Lynn Ungood-Thomas, Q.C., and *Raymond Walton* for the first defendant, the attesting witness.

H. E. Francis for the plaintiff, one of the trustees.

E. I. Goulding for the second defendant, contingently interested in residue.

E *Denys B. Buckley* for the Attorney-General.

LORD EVERSLED, M.R., stated the facts and continued: I may now state the question, which is this: Mr. Tildesley, the first defendant, is one of the two persons who attested the will: is he, therefore, disqualified, having now become, by virtue of the appointment, a trustee, from claiming a benefit under either one of, or both, cl. 16 and cl. 17 of the will? That is the problem which the learned judge, WYNN-PARRY, J., felt to be difficult. There is also before us the second defendant, Mrs. Minnie Elizabeth Beare. She is one of the children of the sister of the testator mentioned in cl. 9, and, therefore, puts the argument on behalf of those who are interested (1) to resist the claim of the first defendant to enjoy the benefits conferred by cl. 16 or cl. 17; and on behalf of the second defendant a subsidiary point has been put forward, viz., that in the circumstances, as a matter of construction of the clauses, the first defendant in any event cannot claim to receive benefits under both cl. 16 and cl. 17. To that I will return presently; for the first question is: Having attested the will, can he now take any benefit at all under any of the provisions of the will? The argument which succeeded in the court below is that he could not; and it is put on the broad lines that, having been an attesting witness, he cannot, within the terms of the Wills Act, 1837, s. 15, take any benefit at all under the will which he attested.

H I have myself, with all respect to the learned judge, come to a different conclusion; and I am at least comforted by the circumstance that he himself stated that he could well imagine that different minds might take different views. Putting it in its briefest form, it seems to me that the argument that counsel for the second defendant and the Attorney-General have put forward makes the section read as though it said: "If any person shall attest the execution of a will he shall not thereafter take any benefit thereunder". That would perhaps have been a simple way to express the intention had that been the view of the legislature. But it is not the language of the section. The relevant terms are:

I "... If any person shall attest the execution of any will to whom ... any beneficial ... interest ... shall be thereby given ...",

(1) By cl. 9 the testator gave one-tenth of his residuary estate on trust for such of the children of his sister as should be living at his death.

then such beneficial interest shall be wholly null and void. As a matter of English, it seems to me that the language which I have read points, on the face of it, to an inquiry at one date only, viz., the date when the will is being attested; and the question has then to be posed: At the time of the attestation is any beneficial interest given to the attesting witness under the instrument the execution of which he is going to attest? The phrase "any beneficial . . . interest . . . shall be thereby given" has, however, this possible equivocation in it, that, in strictness and according to general principle, you cannot (of course) speak of a "beneficial interest" being "given" by a will before the testator has died. For certain purposes, therefore, it may be arguable (though it does not, as I think, arise in this case, and I prefer, therefore, to express no view) that it would be relevant to look at the date when the will came into operation. But subject to that possibility, it seems to me, I confess, that the section is contemplating a point of time when somebody is attesting a will; and the question has to be asked: Is any beneficial interest given to him under the instrument which is in question?

It will be noted that in the present case the right (if there be a right) to receive a benefit under the will does not arise by virtue of any expression used by the testator. When the execution of the will was attested Mr. Tildesley's name did not anywhere appear in it; and equally, of course, when the testator died, he was not a beneficiary under the will. It has happened that, by an event—an act—of persons other than the testator, which occurred after the testator's death, Mr. Tildesley has been appointed a trustee—as anybody in the world might have been appointed trustee—to take the room of one named by the testator who had died or retired; and his interest under the will arises, therefore, from what might, I think, naturally, in other circumstances, be called, properly, a *novus actus interveniens*; and I for my part have come to the conclusion that it cannot be said, therefore, of this attesting witness that he was one, at any relevant date, to whom any beneficial interest was given by the will which he attested.

That view, to my mind, is supported also by two other considerations. The first is one of the history of the section which I have read. The first relevant enactment was that of the Statute of Frauds, 1677, which is set out in *BURN'S ECCLESIASTICAL LAW*, p. 94, together with considerable discussions about its effect on the part of *LORD MANSFIELD* and *LORD CAMDEN*. I do not find it necessary to refer to what *LORD MANSFIELD* or *LORD CAMDEN* stated; but it is perhaps appropriate to read s. 5 of the Statute of Frauds:

"All devises and bequests of any lands or tenements, devisable either by force of the Statute of Wills, or by this statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions and shall be attested and subscribed in the presence of the said devisor, by three or four credible witnesses, or else they shall be utterly void, and of none effect."

It is, I think, clear that the effect of s. 5 of the Statute of Frauds was this, that, unless the devise or bequest was attested by three "credible" (i.e., not disqualified) witnesses, the whole instrument, or at the very least the whole devise or bequest, was entirely void; and a witness was held to be incompetent if he, under the will, took any interest whatever in the subject-matter of the devise or bequest. The result was that if a non-competent person did attest a will, and there were not three other competent ones who did, the whole instrument, or (as I have said) at least a very material part of it, was avoided altogether.

The Wills Act, 1752, was clearly intended somewhat to mitigate that effect. The Wills Act, 1752, was (so far as is relevant for present purposes) exactly in the terms of s. 15 of the Act of 1837, save that in the latter there is a reference to the wife or husband of an attesting witness—a matter to which I shall come back later. But it was admitted by counsel for the second defendant (and, if I may say so, rightly so) that the object of these enactments was to protect a

A testator who was in extremis, or otherwise weak and not capable of exercising judgment, from being imposed on by someone who came and presented him with a will for execution under which the person in question was himself substantially interested; and if that is indeed the real object (as I think it is) of these enactments, then, to my mind, the object is not achieved if this section is construed so as to disqualify someone who, at the time he attested the execution of a will, had no interest whatever under the will as it stood and only became interested under it by some later event or act—what I have called a *novus actus interveniens*: e.g., if he should be the object of some appointment made by some person named in the will having a power to appoint; or (as in the present case) if he happened to be a person who was later appointed a trustee of the will by the then existing trustees.

C The second consideration which in my judgment supports the view I take is that which I have already anticipated, viz., the reference to “wife or husband”. In my readings of the section I omitted the references to wife and husband; but I will now read the relevant part of the section with the reference to “wife or husband” in it.

D “... If any person shall attest the execution of any will to whom or to whose wife or husband any beneficial ... interest ... shall be thereby given [then such beneficial interest] shall, so far only as concerns such person attesting ... or the wife or husband of such person ... be utterly null and void ...”

E If (following the argument of counsel for the second defendant and of counsel for the Attorney-General) the relevant words ought to be read as equivalent to “If any person shall attest the execution of a will who shall thereafter take any benefit”, and you add in the reference to the husband and wife—“who or whose husband or wife shall thereafter take any benefit”, then I must say that I find it extremely difficult to see how you can limit the wife or the husband, as the case may be, to an individual who happened to be the wife or the husband at the time the will was attested. If an interest subsequently taken as a result (as in this case) of a later appointment is sufficient to disqualify a trustee from his remuneration, then it would appear to me difficult to say that subsequent marriage to an attesting witness would not equally be a disqualification, since, at the time when the wife or husband took, she or he had acquired the character of being wife or husband of an attesting witness. But MATHEW, J., in 1881, decided to the contrary in *Thorpe v. Bestwick* (2). In that case the marriage with the attesting witness occurred after the attestation but before the death of the testator; and MATHEW, J., said:

H “I think the plaintiffs are entitled to judgment. The policy of the [Wills Act, 1837] in depriving the attesting witness of any legacy given by the document of bequest, is not to allow wills to be proved by the evidence of persons benefited by them, and it makes void any devise to an attesting witness, or to his or her wife or husband. In the present case the plaintiff, at the time when the will was attested, took no benefit under it, but he subsequently married the devisee, and I am asked to hold that the result of this marriage is to destroy the validity of the devise.”

I In my judgment the reasoning of that decision is consistent, and consistent only, with the view that in this case the attesting witness is not disqualified by the fact that after attestation—indeed in this case after the death—he became interested by virtue of the appointment made of him as a trustee by Mrs. Tildesley and Mr. Claremont.

For those reasons, therefore, I myself conclude that Mr. Tildesley is not, by virtue of s. 15 of the Wills Act, 1837, excluded from taking benefits under cl. 16

and cl. 17 of the will, if he be otherwise, on their true construction, entitled to them. A

That brings me to the second question. I will not re-read the clauses; but it will be observed that the remuneration which is given in cl. 16, consisting of a share in five per cent. of the income, is stated to be "by way of remuneration for their services". By cl. 17 the testator states that Mr. Claremont or any other executor or trustee B

"who may be a solicitor shall be entitled to charge . . . for his services in the same manner as though not being an executor or trustee he had been employed . . . to render such services."

On behalf of the second defendant it is said that this is really a duplication: that two legacies (for both operate in the nature of legacies) are given for one and the same thing, viz., services as a trustee; and although there is, or may be, a general rule in favour of cumulative gifts, if it appears that two gifts are given to the same person in one will, it is said that that rule does not apply in the case of gifts in favour of an executor for a specific purpose. But in my judgment that consideration does not here apply. In the case to which counsel referred, *Wilson v. O'Leary* (3), the rule against double gifts in favour of an executor was intimated, D in passing, in the judgment as applicable to the case where the same amount was given to the same person for the same service. It is to be noted that here the amounts are quite different—in the one case a share of five per cent. of income; in the other (in effect) the right to charge profit costs. But the services to my mind are also not the same. The language perhaps might be improved; but cl. 16 relates to the general services of trustees as trustees—whether lay or professional: cl. 17 relates to professional services rendered by a solicitor E in the course of his professional work. That is shown quite plainly by the very last words of the will—"as though not being an executor or trustee he had been employed by my executor or trustee to render such services".

It was necessary for counsel to concede that, if he was right, notwithstanding the very clear and express language and the reference by name to Mr. Claremont, F Mr. Claremont was equally disabled from taking under both clauses. Without saying more, I construe cl. 16 and cl. 17 as giving the right first to Mr. Claremont and now to the first defendant (s. 15 of the Wills Act, 1837, being out of the way) to enjoy the benefits under both cl. 16 and cl. 17. The result is that, for the reasons which I have attempted to state, in my judgment the appeal should G be allowed, and it should be declared accordingly that Mr. Tildesley, the first defendant, is entitled, notwithstanding his attestation of the will, to the benefits which are conferred by cl. 16 and cl. 17.

HODSON, L.J.: I agree, and have nothing to add.

ROMER, L.J.: I agree; and have very little to add. The question, and the only question, for this court is whether an attesting witness is disqualified H from receiving a benefit which did not accrue to him—even as an expectancy—until long after the testator's death, the suggested disqualification deriving from s. 15 of the Wills Act, 1837.

It is to be noted that neither at the date of the testator's will nor at the date of his death had the first defendant any beneficial interest in the estate which was recognisable at law or in equity; nor would he ever have received any beneficial interest at all but for the intervention of third parties—viz., those in I whose hands lay the power of appointing new trustees. Take a gift of £1,000 to trustees, to invest and accumulate for ten years, and then to distribute at the trustees' discretion among the then employees of a particular company. A. attests the will, but is not in the employment of that company either at the date of the will or at the date of the testator's death. Subsequently to the

- A testator's death he enters the company's employment, and is still in it at the end of the ten years' period. On the argument of the second defendant, any benefit that he then receives under the exercise of the trustees' discretion is struck out by s. 15. I cannot believe that the section has such an effect. In the case supposed, it could not be said of A. at any relevant time that he was an attesting witness to whom a beneficial interest was given by the will. I cannot see how
- B the contrary view would be material in any way to the policy underlying the Statute of Frauds and the two Wills Acts—which was, to ensure that a man's testamentary disposition really does truly and freely express his own wishes, uncoerced by outside influence.

- For myself, I think that counsel for the first defendant was right in saying that in the present case the second defendant was *functus officio* as an attesting
- C witness long before it could be said of him in any sense that he was "interested" under the will. If that is right (and in my judgment it is), s. 15 cannot have any application to the case; and I accordingly agree that the appeal should be allowed.

Appeal allowed. Declarations accordingly.

- Solicitors: *Callingham, Griffith & Bate* (for the first defendant); *Jaques & Co.*, agents for *Ollard, Ollard & Sessions*, Wisbech (for the plaintiff and the second defendant); *Treasury Solicitor*.

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

E

LILLEY v. LILLEY.

[COURT OF APPEAL (Hodson, Sellers and Harman, L.JJ.), June 3, 4, 5, 9, July 30, 1959.]

- F
- Magistrates—Husband and wife—Maintenance—Wilful neglect to maintain—No matrimonial misconduct by husband—Wife suffering from neurosis—Danger to wife's mental health if she resumed cohabitation—No liability on husband—Liability of husband under National Assistance Act, 1948 (11 & 12 Geo. 6 c. 29), s. 42, s. 43—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 4.*

- G
- Divorce—Desertion—Intention—Capability of respondent spouse to have animus deserendi—Wife suffering from neurosis—Danger to wife's mental health if she returned to husband.*

- H
- The parties were married in 1948 and in 1952 a child was born. The birth of the child caused a gravely aggravated mental or nervous disorder in the wife which developed into an invincible repugnance to sexual intercourse with the husband. The parties separated, and on Oct. 12, 1954, a magistrates' court found the husband guilty of desertion and made a maintenance order in the wife's favour under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949. Thereafter the husband wrote to the wife letters which were found to contain a genuine offer to resume co-habitation which the wife refused to accept and on Aug. 23, 1957, the magistrates' court discharged the order. The husband continued to pay maintenance voluntarily for a short while but then ceased to do so and the wife made a complaint to the same magistrates' court alleging that the husband had wilfully neglected to provide reasonable maintenance for her. Medical evidence showed that the wife suffered from a neurosis which produced an acute revulsion to any physical contact with the husband and that if she returned to him there would be a serious breakdown in her health. The wife,
- I

whom the magistrate found to be capable of making a rational decision and of forming an intention to desert, said in evidence that she was determined not to live with the husband and would never return to him. She did not allege that the husband was guilty of any matrimonial misconduct and conceded that he was not in desertion of her but contended that he was liable to maintain her at common law and that his deliberate refusal to do so amounted to wilful neglect. The husband contended that he was under no liability to maintain the wife since (i) he was guilty of no matrimonial misconduct and (ii) she was in desertion.

Held: (i) as between a husband and his wife, the husband was not guilty of wilful neglect to maintain the wife unless he was a wrongdoer, failure to maintain her being itself a sufficient wrong for this purpose (see p. 289, letter A, post); and this liability of a husband to maintain his wife was not negated by an enforced separation, so that, if the wife were not in desertion, a separation enforced by her illness would not disentitle her to maintenance (see p. 289, letter G, post), but

(ii) the wife was in fact capable of making a decision to desert the husband and, on the facts, had so decided; accordingly she was in desertion and, therefore, was not entitled to maintenance.

Dictum of SINGLETON, L.J., in *Keeley v. Keeley* ([1952] 2 T.L.R. at p. 761) applied on point (i).

Leng v. Leng ([1946] 2 All E.R. 590) considered and applied on point (ii).

Observations on the distinction between the obligation of a husband under the National Assistance Act, 1948, s. 42 and s. 43 and the obligation of a husband to maintain his wife under the Summary Jurisdiction (Married Women) Acts, 1895 to 1949 (see p. 288, letters F to I, post).

Decision of the DIVISIONAL COURT ([1958] 3 All E.R. 528) affirmed on other grounds.

[As to the liability of a husband on ground of wilful neglect to maintain, see 12 HALSBURY'S LAWS (3rd Edn.) 482, para. 1077, text and note (h); and for cases on the subject, see 27 DIGEST (Repl.) 701, 6707 and Supplement; and as to capability of respondent spouse to have animus deserendi, see 12 HALSBURY'S LAWS (3rd Edn.) 245, para. 457, text and note (b); and for cases on the subject, see 27 DIGEST (Repl.) 346, 2876 and Supplement.

As to obligation of husband to maintain wife at common law, see 19 HALSBURY'S LAWS (3rd Edn.) 817, para. 1337; and for cases on the subject, see 27 DIGEST (Repl.) 80-82, 613-630.

For the National Assistance Act, 1948, s. 42, s. 43, see 16 HALSBURY'S STATUTES (2nd Edn.) 968-970.

For the Summary Jurisdiction (Married Women) Act, 1895, s. 4, see 11 HALSBURY'S STATUTES (2nd Edn.) 849.]

Cases referred to:

Baker v. Baker, (1949), 66 (pt. 1) T.L.R. 81; 27 Digest (Repl.) 82, 630.

Chapman v. Chapman, (Apr. 4, 1951), unreported.

Crowther v. Crowther, [1951] 1 All E.R. 1131; [1951] A.C. 723; 27 Digest (Repl.) 359, 2974.

Drew v. Drew, (1888), 13 P.D. 97; 57 L.J.P. 64; 58 L.T. 923; 27 Digest (Repl.) 358, 2966.

Jackson v. Jackson, [1932] All E.R. Rep. 553; 146 L.T. 406; 96 J.P. 97; 27 Digest (Repl.) 702, 6711.

Keeley v. Keeley, [1952] 2 T.L.R. 756; 3rd Digest Supp.

Leng v. Leng, [1946] 2 All E.R. 590; 175 L.T. 517; 110 J.P. 395; 27 Digest (Repl.) 351, 2910.

National Assistance Board v. Parkes, [1955] 1 All E.R. 700; [1955] 1 Q.B. 486; [1955] 2 W.L.R. 622; *affd.* C.A., [1955] 3 All E.R. 1; [1955] 2 Q.B. 506; [1955] 3 W.L.R. 347; 3rd Digest Supp.

- A** *Pardy v. Pardy*, [1939] 3 All E.R. 779; [1939] P. 288; 108 L.J.P. 145; 161 L.T. 210; 27 Digest (Repl.) 354, 2932.
- Pinnick v. Pinnick*, [1957] 1 All E.R. 873; 121 J.P. 256; [1957] 1 W.L.R. 644; 3rd Digest Supp.
- Price v. Price*, [1951] 2 All E.R. 580, n.; [1951] P. 413; 115 J.P. 468, n.; 27 Digest (Repl.) 85, 636.
- B** *Starkie v. Starkie* (No. 2), [1953] 2 All E.R. 1519; 118 J.P. 59; [1954] 1 W.L.R. 98; 3rd Digest Supp.
- Tulip v. Tulip*, [1951] 2 All E.R. 91; [1951] P. 378; 27 Digest (Repl.) 85, 635.

Appeal.

- C** The wife appealed from the decision of the Divisional Court of the Probate, Divorce and Admiralty Division, given on Oct. 29, 1958, and reported [1958] 3 All E.R. 528, dismissing her appeal against the dismissal by the stipendiary magistrate for Kingston-upon-Hull, on Feb. 26, 1958, of her complaint that her husband had been guilty of wilful neglect to provide reasonable maintenance for her. The facts appear in the judgment.

- D** *R. Lyons, Q.C.*, and *R. H. Hutchinson* for the appellant wife.
W. A. L. Raeburn, Q.C., and *K. M. McHale* for the respondent husband.

Cur. adv. vult.

July 30. **HODSON, L.J.:** The judgment which I am about to read is the judgment of the court.

- E** This is an appeal from a decision of the Divisional Court of the Probate, Divorce and Admiralty Division dismissing an appeal from the learned stipendiary magistrate of Kingston-upon-Hull, who had dismissed a summons taken out by the appellant, the wife of the respondent, alleging that he had been guilty of wilful neglect to maintain her. The summons now before this court was issued on Jan. 4, 1958, and was determined by the magistrate on Feb. 26, 1958, when he dismissed it on two grounds: (1) that the husband had no legal liability to maintain the wife because he had not been guilty of matrimonial misconduct; **F** (2) that the wife is herself in desertion and therefore not entitled to the order sought. The Divisional Court affirmed the decision on the first ground while rejecting the second.

- The argument for the wife before us has been that if, as the Divisional Court has found, she is not in desertion of her husband, and there is no allegation of adultery against her and no agreement to live apart without the support of her husband, he is obliged to maintain her although she cannot live under his roof and has expressed her fixed intention not to do so. The husband, on the other hand, has argued—and this is his main contention—that the magistrate was right in holding that the wife was in desertion and that for this reason his obligation **G** to maintain his wife is suspended and he cannot during that suspension be held guilty of wilful neglect to maintain her. In the alternative, he has sought to support the decision of the Divisional Court that even if she is not in desertion he is not liable to maintain her in the circumstances of this case because he is not guilty of wilful neglect. **H**

- The magistrate had had the parties before him on two earlier occasions. **I** First, on Oct. 12, 1954, he had made an order in the wife's favour on her application, on the ground of the husband's desertion, together with an order for the custody of the child of the marriage. Secondly, on Aug. 23, 1957, on the husband's application, he discharged the 1954 order and at the same time made an order under the Guardianship of Infants Acts giving the wife the custody of the child and an order for the child's maintenance at the rate of 30s. a week. Nevertheless for a time the husband continued voluntarily to pay the wife maintenance for herself as well as the child at the rate of the previous order; but on Sept. 6, 1957, he ceased to pay anything over and above the amount of the 1957 order made in

respect of the child, and eventually, the husband having discontinued his voluntary allowance, this summons was issued. A

The wife was at the time of the hearing of the summons (in February, 1958) living with her mother and had been earning by part-time work as a secretary £3 10s. to £4 10s. a week since September or October, 1957. The magistrate found that she was receiving a salary of £4 10s. a week at the time of the hearing. No evidence was given as to the husband's means, and it is not clear that an order for maintenance would in the circumstances existing have been made, for the husband elected to call no evidence and to stand on his submission that whatever his means might be no order could be made since he was not guilty of the offence with which he was charged. The case has, however, been argued on the footing that the wife is or may be, having regard to the respective means of the parties, entitled to an order for her maintenance if she can prove that her husband has, in the words of the Summary Jurisdiction (Married Women) Act, 1895, been guilty of wilful neglect to maintain. B C

The parties were married on Oct. 2, 1948, and on Mar. 13, 1952, a child was born. The confinement was a difficult one, and thereafter the wife suffered from some mental or nervous disorder either caused or aggravated by the birth of the child. In particular she developed an invincible repugnance to sexual intercourse. She had no sexual intercourse with her husband after February, 1952—that is, before the birth of the child. On Oct. 2, 1952, her condition was such that she was admitted as a voluntary patient to a mental hospital, the Delapole Hospital at Hull, where Dr. Hendy, who was called as a witness in the case, was the assistant psychiatrist and had the wife under his care. She left the hospital in August, 1953, and returned home to her husband, but had to return to hospital on Sept. 15, 1953, where she remained, subject to short absences, until June, 1956, when she went to live with her mother and the child. Thereafter she visited the hospital regularly as an outpatient and was seen by Dr. Hendy every two or three weeks. Between April, 1954, and the week-end of June 24-25, 1954, in an attempt to get herself rehabilitated, the wife went home for week-ends on the footing that she and her husband occupied separate bedrooms and that there would be no sexual intercourse. When the wife left the last time it was expected that she would return, but she did not do so, and in July, 1954, Dr. Hendy told the husband that in his opinion the wife's condition was incurable. D E F

The husband then consulted solicitors, and on their advice wrote a letter dated Aug. 2, 1954, to the wife threatening proceedings for divorce, on which the magistrate found him to be in desertion and made the order of Oct. 12, 1954, already referred to. The next year there was a meeting between the parties with a view to reconciliation, after which the wife wrote to the husband a letter dated Sept. 8, 1955, in the following terms: G

"After seeing you and knowing how things stand between us, I have to say that there is no chance of a reconciliation between us. We are legally separated and under the court order you are allowed to see Margaret, and I shall not stop you from doing so. You know why this has happened and I ask you not to judge me too harshly. I am sorry to have caused you any unhappiness but remember I have suffered too." H

After the wife left hospital in June, 1956, the husband made further efforts at reconciliation in the hope and belief that the wife had recovered, but his letters were not answered. On Apr. 1, 1957, the husband wrote to the wife again on the assumption that she had recovered. Her reply, dated Apr. 3, 1957, was as follows: I

"I received your letter yesterday. There was no need to send me a registered letter because I receive *all* mail sent to me. As regards my mother being unco-operative, that is because I told her not to answer questions asked about me. I object to people wanting to know where and what I am doing. I have

- A my own life to live and I don't go around asking questions about you. Many are times I have heard you questioning Margaret, would you please refrain from doing it. Margaret is only a child and she does not understand what is going on. You know how I feel about coming back to you. I wrote you and gave you a definite answer when I last saw you at the hospital.
- B My answer is still the same. You know the reasons why. From a medical point of view it is impossible. If you doubt my word you need only ask Dr. Hendy and he will confirm this. Even though I am out of hospital the reasons are still the same and always will be. Please do not bring Margaret into our differences. She is very happy. I am devoted to her and she loves me and her life is a normal, healthy, happy one. If I have to starve she will not want. I am sorry to hear you are not well and hope you will soon recover.
- C Please accept this as a final answer."

The husband replied on Apr. 17 by a letter asking her to reconsider her refusal and making it plain that if she returned she could come back on the same conditions as before, meaning thereby that there would be separate bedrooms and no sexual intercourse. The wife did not accede to this request, and accordingly the order of Oct. 12, 1954, was discharged on Aug. 23, 1957, on the ground that the husband had ceased to be in desertion. The wife has never appealed against this order, and when she issued her present complaint conceded and still concedes that the husband is no longer in a state of desertion.

If the wife is in desertion that is the end of the matter; but since both questions to which we have referred have been fully argued it is right to express an opinion on them. The first question depends on the effect of the Summary Jurisdiction (Married Women) Act, 1895, which provides a remedy in the courts of summary jurisdiction for wives whose husbands have wrongfully failed to maintain them. Formerly a wife had no direct remedy in the common law courts, although she could, if she were able to do so, pledge her husband's credit for the necessities of life. Since the passing of the Matrimonial Causes Act, 1884, a wife has been able to obtain periodical payments in cases where her husband has disobeyed orders for restitution of conjugal rights. The existing statutory duty was stated in the Summary Jurisdiction (Married Women) Act, 1895, ss. 4, 5 and 7, as follows:

"4. Any married woman . . . whose husband shall have been guilty of . . . wilful neglect to provide reasonable maintenance for her or her infant children whom he is legally liable to maintain and *shall by such . . . neglect have caused her to leave and live separately and apart* (1) . . . may apply to any court of summary jurisdiction . . . for an order . . . under this Act . . .

"5. The court of summary jurisdiction to which any application under this Act is made may make an order or orders containing all or any of the provisions following, viz. . . . (c) A provision that the husband shall pay to the applicant personally, or for her use, to any officer of the court or third person on her behalf, such weekly sum not exceeding £2, (2), as the court shall, having regard to the means both of the husband and wife, consider reasonable . . .

"7. A court of summary jurisdiction . . . may, on the application of the married woman or of her husband . . . from time to time increase or diminish the amount of any weekly payment ordered to be made . . . If any married woman upon whose application an order shall have been made . . . shall voluntarily resume cohabitation with her husband, or shall commit an act of adultery, such order shall upon proof thereof be discharged."

There can be no doubt that this was intended to give a remedy in support of the

(1) The words printed in italics were repealed by the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 1 (1).

(2) "£5" has been substituted for "£2" by the Married Women (Maintenance) Act, 1949, s. 1 (1).

wife's common law right to maintenance at the hands of her husband. The common law right was not a right to an allowance but to be supported by being given bed and board, and under the statute a wife could not complain of wilful neglect to maintain because the husband was foolish enough to take the housekeeping out of her hands any more than she could have done at common law (see *Jackson v. Jackson* (3)). The remedy for wilful neglect to maintain was at first available only when such neglect in the joint home had driven the wife to leave the husband. This was remedied by an amendment of the statute in 1925 in order to deal with the case where the wife had nowhere to go and needed immediate relief: see s. 1 of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, which also, by s. 2 (2), provided that if she went back and lived with her husband the separate allowance ceased to be payable as from the date of resumption of cohabitation.

The offence charged is that as between husband and wife there has been a dereliction of that duty of maintenance, and questions have often arisen as to the circumstances in which the husband may be properly found guilty of the offence, which is in itself a form of matrimonial misconduct. In most cases where the spouses are living apart from one another the question whether there has been wilful neglect to maintain the wife depends on the same facts as the question whether or not there has been desertion on the part of either, and there is no point in taking proceedings on both grounds. We have said "most cases" for where there is a separation deed containing provisions for the support of the wife she will not be left to sue her husband under the deed if he defaults in payment, but can apply for an order on the ground of his wilful neglect to maintain her. Even if he complies with his obligations under the deed, the wife may show a change of circumstances since the execution of the deed and apply for an order: see *Tulip v. Tulip* (4) where the earlier authorities are reviewed, particularly in the dissenting judgment of HARMAN, J. Nevertheless, where the parties are living apart by agreement the husband is not necessarily guilty of wilful neglect to maintain his wife: see *Baker v. Baker* (5), approved by the Court of Appeal in *Chapman v. Chapman* (6) (unreported but cited in *Pinnick v. Pinnick* (7) and *Starkie v. Starkie* (No. 2) (8)).

In several cases in the Divisional Court of the Probate, Divorce and Admiralty Division, including this case, the learned President has pointed out the difference between the cases where the duty to maintain a wife has been enforced under the Summary Jurisdiction (Married Women) Act, 1895, and those cases where the obligation has been enforced by the National Assistance Board under the National Assistance Act, 1948. The same distinction has been drawn in the last type of case by LORD GODDARD, C.J., in the Divisional Court of the Queen's Bench Division in *National Assistance Board v. Parkes* (9). It has been decided in the last-mentioned case, and the decision was affirmed on appeal to this court (9), that having regard to the language of s. 42 and s. 43 of the Act of 1948 a husband is liable to maintain his wife as against the National Assistance Board notwithstanding an agreement to live apart without maintenance. Thus, under that Act the right to maintain subsists independently of the fault of the husband: see *National Assistance Board v. Parkes* (9). There it was held in this court that since s. 42 (1) of the Act provides that a man shall be liable to maintain his wife the board may bring any husband of an assisted wife before the court under s. 43 (1), but once he is before it the court by s. 43 (2) "shall have regard to all the circumstances" including any circumstance recognised by the law as sufficient to relieve a husband of his obligation to maintain his wife. It was further held that desertion or adultery by the wife is a highly relevant circumstance—and it may be a

(3) [1932] All E.R. Rep. 553.

(5) (1949), 66 (pt. 1) T.L.R. 81.

(7) [1957] 1 All E.R. 873.

(9) [1955] 1 All E.R. 700; [1955] 1 Q.B. 486; C.A. [1955] 3 All E.R. 1; [1955] 2 Q.B. 506.

(4) [1951] 2 All E.R. 91; [1951] P. 378.

(6) Apr. 4, 1951, unreported.

(8) [1953] 2 All E.R. 1519.

- A conclusive circumstance—against making an order. The authorities, in our opinion, are consistent only with the view of the law repeatedly enunciated by the learned President and his predecessor LORD MERRIVALE—that whatever may be the position as against the public authority, nevertheless, as between the husband and the wife he cannot be found guilty of wilful neglect to maintain her unless he is a wrongdoer. The wrongdoing may, however, consist of the very fact
- B of a failure to maintain. There need be no other matrimonial offence imputed to the husband. The way the court has interpreted the National Assistance Act, 1948, seems to be in accordance with practical sense, because otherwise a husband and wife might agree together to part without maintenance with the intention that the wife might receive her maintenance from the community through the hands of the National Assistance Board without the husband suffering any
- C diminution of his income. In our judgment the authorities are consistent on this point, for the dissenting opinion of DENNING, L.J., expressed in *Price v. Price* (10) and in *National Assistance Board v. Parkes* (11) to the effect that the Probate, Divorce and Admiralty Division has at all times misunderstood the liability of husbands to maintain wives in making orders under the relevant statutes has not, so far as we know, found support. The authorities are discussed fully in the judgment of the learned President in *Pinnick v. Pinnick* (12).

- There is in this case no agreement to live apart, but there is a de facto separation which is explained by the wife's state of neurosis, because of which, as the learned stipendiary found, the wife would be risking grave consequences to her mental health if she returned to her husband at the present time. She maintains that in the circumstances if he does not maintain her apart from him he is guilty
- E of wilful neglect to maintain just as much as if she were separated from him by necessity. Examples of separation by necessity come readily to mind where the occupation of the husband makes it necessary for him to spend long periods apart from his wife by reason of his absence at sea or otherwise away from his home. The changes and chances of life may often, where there is a separation of necessity, put on the husband the obligation to support his wife when she is separated
- F from him, and if he does not do so he will be guilty of the offence with which he is charged. This duty must surely subsist if separation is forced on the parties by illness which compels residence in hospital, and this would be the same whatever the nature of the illness, even if it be mental disorder, provided always that the intention of the absent spouse to return to the other continues. Compare the observations (13) of SINGLETON, L.J., in *Keeley v. Keeley* (14). We see no reason
- G why the obligation to maintain which exists when the husband and wife are living together should be affected by an enforced separation. If the husband does not maintain his wife while in the home he is clearly in default under the statutes, and an enforced separation of itself can make no difference. We would, therefore, with all respect to the opinion expressed by the Divisional Court and by the learned stipendiary magistrate, have been of opinion that if the wife was not in
- H desertion the husband must, in the circumstances of this case, have committed the offence with which he is charged, subject to consideration of the relative means of the parties.

- The remaining question is, therefore, whether the wife is in desertion since she failed to respond to the husband's request to return contained in his letter of Apr. 17, 1957. Accepting the finding of the learned stipendiary, confirmed by the
- I Divisional Court, that because of her neurosis the wife would be risking grave consequences to her mental health if she returned to her husband at the present time, the fact remains that there is a de facto separation between the parties and that all that is necessary to make the wife into a deserter is the intention to

(10) [1951] 2 All E.R. 580, n.; [1951] P. 413.

(11) [1955] 3 All E.R. at p. 4; [1955] 2 Q.B. at p. 517.

(12) [1957] 1 All E.R. 873.

(13) These observations are set out in [1958] 3 All E.R. at p. 532.

(14) [1952] 2 T.L.R. at p. 761.

desert. Compare *Pardy v. Pardy* (15), where a separation which began consensually was altered so as to put the husband in desertion by proof of a supervening animus deserendi. SIR WILFRID GREENE, M.R., said (16):

"The first question which arises is whether or not it is possible in law for a separation, which began by being consensual, to acquire the character of desertion without a previous resumption of cohabitation. Looking at this question on principle and apart from authority, I can see no reason why the answer to it should not be in the affirmative. The word 'desertion' may describe an act, or it may describe a state. For the act of desertion both the factum of separation and the animus deserendi are required. A de facto separation may take place without there being an animus deserendi, but if that animus supervenes, desertion will begin from that moment unless, of course, there is consent by the other spouse. Thus a husband who leaves his wife for a business voyage may nevertheless become guilty of desertion without the necessity of a previous return. All that is required to establish desertion in such a case is the presence of a supervening animus deserendi (a matter to be inferred from the words and conduct of the deserting spouse), a continuance of the de facto separation, and the absence of consent by the other spouse."

That there may be physical inability to end the desertion does not prevent it remaining desertion: see *Drew v. Drew* (17), where the deserting husband was in prison. This case was cited with apparent approval by LORD PORTER in *Crowther v. Crowther* (18) where the question was whether a husband was in desertion who during part of the material time was detained under a reception order in a mental hospital. It had been held in the courts below that a person of unsound mind could not have the intention to desert, but their Lordships were of opinion that it was nevertheless open to the petitioner to prove if she could that the respondent, notwithstanding that unsoundness of mind, was capable of having an intention to desert his wife.

In this case the only medical evidence called was that of Dr. Hendy, who expressly said that the wife's condition was neurotic rather than psychotic, and we think that her evidence as well as that of Dr. Hendy went to show that she was capable of making a rational decision to desert. The letters which she wrote to her husband support this view. So also does her own evidence given at the hearing before the learned stipendiary. The following questions and answers are taken from the transcript of her evidence:

"Q.—At any rate, you are determined that you cannot live with him at the present time? A.—Yes. Q.—And never can? A.—Definitely not. Q.—Do you accept that he wants to live with you? A.—Yes. Q.—That he has a home for you to go into? A.—Yes. Q.—That he has kept the home in the hope that you will go back to him? A.—I have repeatedly told him I can't go back. Surely, he should have accepted that by now. Q.—And whatever promises he made to you with regard to how he would treat you if you came back to him, you still would not have him back? A.—No. Q.—Do you think, under those circumstances, it is fair to ask him to maintain you? A.—Yes."

She then gave reasons in support of her contention that it was fair to ask for maintenance. As to the wife's capacity to make a rational decision, the stipendiary said:

"It is clear from the evidence and indeed in no way in dispute that the wife is capable of making a rational decision and of forming an intention to desert."

(15) [1939] 3 All E.R. 779; [1939] P. 288.

(16) [1939] 3 All E.R. at p. 782; [1939] P. at p. 302.

(17) (1888), 13 P.D. 97.

(18) [1951] 1 All E.R. at p. 1133; [1951] A.C. at p. 731.

A The learned President did not, however, consider that this finding was justified by the evidence. He based his decision on an answer given to the court in cross-examination by Dr. Hendy. The question was in this form:

"As I understand it, you say that this lady is rational and in normal mental health except so far as it relates to her husband? A.—Yes, and as I said just now, to other men."

B This question was phrased in an unfortunate form, for it contains two questions. The answer "Yes", if taken to apply to both parts of the question, no doubt qualifies in an important respect the doctor's evidence that the wife was rational, but having regard to the rest of his evidence and the express finding of the learned stipendiary already read that the rationality of the wife was not in dispute, we cannot regard this answer as sufficient to destroy the effect of Dr. Hendy's evidence in this essential matter, consistent as it is with the view which the magistrate must have formed of the effect of the evidence of the wife herself, and of her letters and her demeanour in court. As SIR WILFRID GREENE, M.R., said in *Pardy v. Pardy* (19), the animus deserendi must be inferred from the words and conduct of the deserting spouse. In the present case we are of opinion that D the conclusion of fact reached by the stipendiary on this issue was amply justified by the evidence before him. The attitude of the wife went far beyond saying "I cannot return to you at present". She added in effect "and I never will". This expression of her fixed intention appears both from the letters and her statements in court. It had all the appearance of a rational conclusion: it was reached, as is shown by her letter of Apr. 3, 1957, on the advice of the psychiatrist, in whom E she trusted. She is not a person of unsound mind, as was for a time the husband in *Crowther v. Crowther* (20). She has made a deliberate choice for all time, and she cannot properly complain of the natural consequences of her act.

This is no doubt a strong case, for the neurosis of the wife is severe and may be incurable. It may appear hard, therefore, that she should be guilty of desertion if she expresses herself as unwilling ever to return to her husband, but we think F that the conclusion that she is in desertion is inevitable on the evidence as it stands at present. We think, moreover, that there is support for the view which we have formed in the decision of the Divisional Court, consisting of the learned President and BYRNE, J., in *Leng v. Leng* (21). It was there emphasised that the neurotic condition of a husband and nothing more is not in law sufficient ground for a wife's refusal to live with him. The learned President pointed out that G unless that were so the ultimate result of a justices' order might in effect be a divorce on the ground of neurosis. In this case we do not think that the neurotic wife can in law justify a refusal ever to return to cohabitation now that the state of desertion for which her husband was responsible has been terminated. From this it follows that she is herself in desertion.

In the result, although for different reasons from those expressed by the H Divisional Court, we would dismiss the appeal.

Appeal dismissed.

Solicitors: *Dawson, Lancaster & Co.*, Hull (for the appellant wife); *Smith & Hudson*, agents for *Williamson, Stephenson & Hepton*, Hull (for the respondent husband).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

(19) [1939] 3 All E.R. at p. 782; [1939] P. at p. 302.

(20) [1951] 1 All E.R. 1131; [1951] A.C. 723.

(21) [1946] 2 All E.R. 590.

BHARAT, Son of DORSAMY *v.* R.

[PRIVY COUNCIL (Lord Tucker, Lord Denning and Mr. L. M. D. de Silva), July 23, 29, 1959.]

Privy Council—Fiji—Criminal law—Murder—Provocation—Judge sitting with assessors—Failure of judge to direct assessors on provocation.

At the trial of the appellant on a murder charge before a judge sitting with assessors, the trial being, by s. 246 of the Criminal Procedure Code of Fiji, by the judge "with the aid of assessors", the judge, when summing-up to the assessors, wrongly directed them on provocation. The assessors gave it as their opinion that the appellant was guilty of murder. The judge then gave a reasoned judgment, in which he did not mention provocation, and convicted the appellant. The case was one in which provocation should have been considered. An appeal by the appellant to the Court of Appeal was heard by two judges who had been specially appointed to hear it and who came from New Zealand. They reserved judgment and sent written judgments to Fiji where the registrar of the Court of Appeal read them in open court. The appeal was dismissed, neither judge being present at the dismissal of the appeal.

Held: as the assessors had been misdirected on a vital point, their opinions were vitiated and the judge had disabled himself from taking proper opinions into account as he should have done; in the circumstances, the conviction must be quashed.

SEMBLE: the dismissal of the appeal was bad in view of s. 30 of the Court of Appeal Ordinance of Fiji, which required a judgment of the Court of Appeal to be pronounced by a judge present at the appeal.

Appeal allowed.

[As to the constitution of courts in the Pacific territories, see 5 HALSBURY'S LAWS (3rd Edn.) 668, para. 1425.

As to the duty of a judge in summing-up, see 10 HALSBURY'S LAWS (3rd Edn.) 424, para. 780.]

Case referred to:

Bullard v. R., [1957] A.C. 635; 121 J.P. 576; [1957] 3 W.L.R. 656; 3rd Digest Supp.

Appeal.

Appeal by special leave by Bharat, son of Dorsamy, in forma pauperis from an order of the Court of Appeal of Fiji (SIR GEORGE FINLAY, Acting President, and SIR JOSEPH STANTON, Judge of Appeal), dated Feb. 16, 1959, dismissing the appellant's appeal against his conviction of murder and sentence of death in the Supreme Court of Fiji (LOWE, C.J., sitting with five assessors) on Oct. 18, 1958. The facts are set out in the judgment of the Board.

E. F. N. Gratiaen and *L. Kadirgamar* for the appellant.

D. A. Grant for the Crown.

LORD DENNING: On the night of May 29, 1958, two men named Chanan Singh and Govindappa were killed in Fiji. On the next day the appellant, Bharat, son of Dorsamy, was charged with the murder of them. Two separate indictments were afterwards laid against him. The first to be tried was the indictment charging him with the murder of Chanan Singh. The other remained on the file. The trial was held in October, 1958, before the Chief Justice of Fiji (LOWE, C.J.), sitting with five assessors. On Oct. 18, 1958, the appellant was found guilty of the murder of Chanan Singh and sentenced to death. He appealed to the Court of Appeal against his conviction. The appeal was heard by two judges who had been appointed specially to hear it. They came from New Zealand. They were SIR GEORGE FINLAY (who acted as President of the

A Court of Appeal) and SIR JOSEPH STANTON. After hearing argument, they reserved their decision and returned to New Zealand. They afterwards sent their written opinions to the registrar of the Court of Appeal, and he read them in open court. It appeared from their opinions that the two judges were equally divided. SIR GEORGE FINLAY was for allowing the appeal and SIR JOSEPH STANTON for dismissing it. In the result, the appeal was dismissed. Thence the appellant appealed to Her Majesty in Council.

It was submitted to their Lordships that the dismissal of the appeal was bad in law because it had not been pronounced by the senior judge or, indeed, by any judge who had been present at the appeal, as required by s. 30 of the Court of Appeal Ordinance of Fiji (1). Their Lordships were inclined to agree with this contention, but they were disinclined to enter into it too closely, because it had nothing to do with the merits of the case. It could be corrected quite readily by having the dismissal properly pronounced and the case then brought back again before their Lordships. Their Lordships, therefore, proceeded to hear the argument on the other points.

The appellant was the barman at the Tavua Hotel in Fiji. On the evening of May 29, 1958, he was on duty in the bar. Chanan Singh and Govindappa were drinking there. About 9 p.m. the appellant left the bar. About half-an-hour later the other two left. Neither of them was ever seen alive again. Some little time afterwards a house-girl from the hotel found their dead bodies on a road not far away. The appellant was arrested. He at first denied any knowledge of the killing, but later admitted that he did it. At the trial, after the evidence for the prosecution had been heard, he gave evidence on his own behalf and said:

E "I went off and went for a stroll towards town. I went nowhere in particular but went along the road some distance and then walked back towards the hotel. On my way about three or four chains from the hotel I met Chanan Singh and Govindappa. They both stood and Govindappa said: 'You were showing a lot of cunning in the hotel. I will fix you up now'. Then he attacked me with a stick. He raised the stick. As he tried to deliver the first blow I got hold of the stick. A struggle for possession of the stick ensued and the stick fell to the ground. To save myself I wanted to run away. Just then Chanan came and got hold of me. Govindappa came and got hold of my throat. I struggled to free myself. My state of mind was upset. I was helpless and could not do anything so I took out my pocket knife and attacked. While Govindappa had me by the throat F Chanan Singh was holding me. I was very excited, so much so that I did not know what I was doing. I can't even say on whom and how many times I struck with the knife. After a while I found myself free of the others. I got up and ran towards the hotel. Later on S/Insp. Akuila came and sent me to the police station. I knew Chanan Singh for about three years before that night. I had no trouble with him at any time during that period. H He was an acquaintance of me. There was never any trouble with him at any time nor was there any trouble with him at the bar that evening."

That evidence clearly raised two issues for consideration. First, self-defence, second, provocation. The appellant was, of course, cross-examined on it. After all the evidence was concluded and speeches made, the judge summed up to the assessors, as s. 306 of the Criminal Procedure Code (2) contemplates. I He discussed at large the issue of self-defence. And then he mentioned the issue whether there was provocation such as to reduce the offence from murder

(1) Section 30 of the Court of Appeal Ordinance of Fiji provides:—"In an appeal under this part of the Ordinance the judgment of the Court of Appeal shall be pronounced by the senior judge present at such appeal, or by such other judge present as the senior judge may direct, and no judgment with respect to the determination of any question shall be separately pronounced by any other judge of such court . . ."

(2) Section 306 provides "the judge may sum up the evidence for the prosecution and the defence, and shall then require each of the assessors to state his opinion orally".

to manslaughter. Unfortunately, the judge directed the assessors wrongly on this point. He said to them: A

"It has been suggested that you might think the accused guilty of manslaughter. Before you could be justified in thinking that you would have to come to the conclusion that the accused's story in that particular respect is true. You would have to be satisfied beyond reasonable doubt that it might be that the Crown were wrong as to that aspect, and you would have to believe that the accused received such provocation that he was justified in resisting force by using force. I think you might find it difficult to believe that such was the case." B

It was conceded by the Crown that this direction was erroneous in point of law. It wrongly puts the burden of proof on the accused, and it gives a wrong description as to what amounts to provocation in law. After hearing the summing-up, each of the five assessors gave his opinion that the appellant was guilty of murder. It was then for the judge to give judgment and he did so. He came to the same conclusion as the assessors. He gave a reasoned judgment holding the appellant to be guilty of murder. In it he dealt fully with the question of self-defence and rejected it. But he did not mention the question of provocation. C

What is the consequence of the misdirection given by the judge to the assessors? According to s. 246 of the Criminal Procedure Code, the trial is by the judge "with the aid of assessors". The judge is not bound to conform to their opinions, but he must at least take them into account. If they have been misdirected on a vital point, their opinions are vitiated. Take this very case. Suppose the assessors had been properly directed, is it not possible that one or more of them might have been of opinion that the appellant was guilty of manslaughter only? If the majority of them had given such an opinion, the judge might possibly have accepted it in preference to his own. At any rate, he could hardly have rejected it without saying why he did so. He has, in truth, by his misdirection, disabled the assessors from giving him the aid which they should have given; and thus, in turn, disabled himself from taking their opinions into account as he should have done. This is a fatal flaw. D

On behalf of the Crown, it was said that the misdirection did not matter, because the judge disbelieved the appellant's story altogether, and there was thus no foundation on which an issue of provocation could be raised. Their Lordships cannot accept this contention. Apart altogether from the appellant's evidence, there was some evidence of a struggle having taken place. Their Lordships think this was clearly a case where the question of provocation should have been considered: see *Bullard v. R.* (3). The failure of the judge to direct the assessors properly on it, or to consider it himself in his summing-up, means that his judgment cannot stand. E

For these reasons, their Lordships have advised Her Majesty that the appeal should be allowed and the order below set aside and the case remitted to the Court of Appeal in Fiji with the direction that they should quash the conviction for murder and enter a verdict of manslaughter and pass sentence accordingly or order a new trial, whichever course they consider proper in the interests of justice in the existing circumstances. The Court of Appeal need not for this purpose be constituted by the same judges as it was before. F

Appeal allowed. G

Solicitors: *T. L. Wilson & Co.* (for the appellant); *Charles Russell & Co.* (for the Crown). H

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

A Re BENNETT (*deceased*). SUCKER AND ANOTHER *v.*
 ATTORNEY-GENERAL.

[CHANCERY DIVISION (Vaisey, J.), July 23, 24, 1959.]

B *Charity—Scheme—Jurisdiction—Direct gift without any trust—Residuary gift to non-existent body—General charitable intention—Valid bequest to be applied in accordance with directions to be given under royal prerogative.*

C Where a testamentary gift is made to a non-existent beneficiary, but a general charitable intent in relation to the gift is disclosed, then if the gift is by way of a declaration of trust the court has jurisdiction to order a scheme; but if no trust is declared, and the gift is made direct, the court has no jurisdiction and the subject-matter of the gift must be administered as directed by Her Majesty.

[As to the jurisdiction over charities, by the Crown, where there is a gift to charity generally without a trust, see 4 HALSBURY'S LAWS (3rd Edn.) 407, para. 848; and for cases on the subject, see 8 DIGEST (Repl.) 503, 2227-2238.]

D Cases referred to:

Moggridge v. Thackwell, (1803), 7 Ves. 36; 32 E.R. 15; *affd.* H.L., (1807), 13 Ves. 416; 33 E.R. 350; 8 Digest (Repl.) 450, 1462.

Paice v. Canterbury (Archb.), (1807), 14 Ves. 364; 33 E.R. 560; 8 Digest (Repl.) 451, 1466.

Adjourned Summons.

E The plaintiffs, Ellen Emma Sucker and Robert Bush, executors of Laura Sarah Bennett, deceased (the testatrix), applied to the court by originating summons for a scheme to be settled for the disposition of the one-quarter share of the residue of the estate of the testatrix by her will dated Mar. 28, 1957, devised and bequeathed to "The Hospital for Incurable Women of Brompton Road, London".

F By her said will, the testatrix appointed the plaintiffs to be her "executors and trustees" and gave thirty-six pecuniary legacies absolutely. She then bequeathed pecuniary legacies to the trustees of each of two almshouses to be invested and out of the income to distribute sums of money to the inmates. The only other disposition was a residuary devise and bequest of "all my real and personal estate not . . . otherwise . . . disposed of . . . but subject to and charged

G with the payment of my debts funeral and testamentary expenses and the legacies . . . and the duties on any such legacies bequeathed free of duty to Doctor Barnado's Homes . . . The Salvation Army . . . The Hospital for Incurable Women of Brompton Road London and to St. Dunstons . . . in equal shares absolutely." The testatrix declared that the receipt of the treasurer or secretary of those institutions should be a sufficient discharge to her trustees. There were only two institutions which could be found which might answer in any way to the description "The Hospital for Incurable Women of Brompton Road London", and both had relinquished any formal claim to the one-quarter share of residue.

Raymond Walton for the plaintiffs, the executors.

Denys B. Buckley for the defendant, the Attorney-General.

I VAISEY, J.: In this case the question is whether a defect in a will ought to be corrected by way of scheme or whether it is a matter which falls to be dealt with under the royal prerogative.

The point is of a very familiar character. There is a gift in the will of one-quarter of the residuary estate (which is something over £1,000) to "The Hospital for Incurable Women of Brompton Road London". There is no such hospital and there are two hospitals with rather similar names. The whole question is to what institution or for what purpose this one-quarter of the residuary estate should be applied. It is very curious that the matter seems to depend, on the

authorities (1), almost entirely on the question whether the gift to the non-existent beneficiary was created by means of a trust or by a direct gift. If it was created by means of a trust, then the usual procedure would follow, that it would be for the court to direct by scheme what should be done with the disputed amount. If, on the other hand, the gift to the non-existent hospital is not by way of trust, but a direct gift, then it seems that under a very long series of authorities (not altogether consistent and not altogether easy to interpret), it falls to be dealt with by the royal prerogative.

The problem is stated at great length in the latest edition of TUDOR ON CHARITIES (1929) (5th Edn.) at pp. 174-177, under the heading "The Court and the Crown". The leading case on the subject is *Moggridge v. Thackwell* (2). Although the distinction between a gift by way of trust and a gift which is direct has not always been fully considered in some of those cases and might appear to have been disregarded, yet it may well be that a fuller statement of the facts and a closer consideration of the terms of the relevant instruments would throw a different light on the decisions and make them reconcilable. I am not going to refer to them, but there are three cases (3) which seem to be out of step with the principle and in which the court has been apparently induced to deal with the matter as if the disposition were by way of trust when, so far as the report shows, it was otherwise. I am not at all sure that in this case it is necessary to attempt to reconcile these authorities. I think that it is quite fair to say that they are out of line with the others, of which I have referred already to *Moggridge v. Thackwell* (4); and there is also *Paice v. Archbishop of Canterbury* (5). Having said, however, that the distinction may well not have been carefully attended to on more than one occasion in the past, and having accepted from counsel for the plaintiffs that there is some difficulty about some of the cases, yet on looking at the matter and the reported authorities broadly, I think that in this case, where there clearly is not a trust and it is an ordinary case of a gift to a non-existent charitable institution, the principle of *Moggridge v. Thackwell* (6) and *Paice v. Archbishop of Canterbury* (7) applies. There is undoubtedly uncertainty about the position; but I am not giving a disquisition on the whole of the law on this rather obscure subject. I am considering what has to be done in this particular case where there is the admitted puzzle of a gift to a non-existent institution in terms which quite clearly import a charitable intention and where there is a plain unambiguous and undoubted devotion to charity and the only question is as to how that gift should be implemented and carried out.

Let me say at once (and I express my deep gratitude to counsel for the Attorney-General for the very interesting argument that he has put before me on this rather obscure and strange backwater of the law) that without saying that the decisions are unanimous, and without saying that they are wholly free from ambiguity, I think that in such a case as this, which is quite a simple case, as between the jurisdiction arising from the royal prerogative and the jurisdiction of the court, I feel no doubt at all that I should conclude that the royal prerogative must be

(1) The following cases, in addition to those mentioned in the judgment, were referred to in argument: *Clifford v. Francis* ((1679), Freem. Ch. 330); *Sanford v. Gibbons* ((1829), 3 Hare 195n.); *Simon v. Barber* ((1829), 3 Hare 195n.); *Thorley v. Byrne* ((1830), 3 Hare 195n.); *Re Pyne, Lilley v. A.-G.* ([1903] 1 Ch. 83); *A.-G. v. Syderfen* ((1683), 1 Vern. 224); *Bennett v. Hayter* ((1839), 2 Beav. 81); *Re Clergy Society* ((1856), 2 K. & J. 615); *Re Maguire* ((1870), L.R. 9 Eq. 632); and *Re White, White v. White* ([1893] 2 Ch. 41, 50).

(2) (1803), 7 Ves. 36.

(3) See the notes to *Reeve v. A.-G.* ((1843), 3 Hare 193 at p. 195). There are there brief notes of several cases, which were cited in argument (see note (1) supra), in which the court is reported to have declared that the right to give directions was in the Sovereign by sign manual: the cases include *Sanford v. Gibbons* (Mar. 20, 1829), *Simon v. Barber* (June 22, 1829), and *Thorley v. Byrne* (Dec. 4, 1830).

(4) (1803), 7 Ves. 36.

(5) (1807), 14 Ves. 364.

(6) (1803), 7 Ves. 36.

(7) (1807), 14 Ves. 364.

A appealed to, to enable justice to be done. This is a case in which there is no trust. Curiously enough, there are references to trustees in the will in which this gift appeared. First of all, certain persons are appointed to be executors and trustees of the will of the testatrix, and then those persons are defined in this way:

B “they or the survivor of them or other the trustees for the time being hereof are hereinafter called my trustees.”

That certainly is a beginning which promises that we are going to have some trusts, and which defines the persons who the testatrix designated as trustees clothed with a trust of some kind; but, curiously enough, one does not find any trust. There are two references in a common-form clause that the receipt of the treasurer or secretary of an institution is to be a good discharge for the testatrix’ “trustees”; but that does not seem to me to create a trust of any sort or kind. We have a direct gift, appointment of executors who are defined as “my trustees”, and references to trustees quite apart from any tangible or intelligible trust. We have this gift, ambiguous so far as the personality of the legatee is concerned, not given by way of trust but given straightaway by way of immediate gift; and I think that looking at all the authorities, in a case of this description, once I have come to the conclusion that there is not a trust but a direct gift, and the further conclusion that there is here an ambiguity to be resolved, this court, the Court of Equity, has no jurisdiction. As counsel for the Attorney-General pointed out, my jurisdiction is based almost exclusively on the supposition of a trust; and, as I cannot find any trust, I must decide that the difficulty falls to be resolved by an appeal to the royal prerogative. Certainly I have no duty to insist on the court’s jurisdiction unless I am quite satisfied that the court ought to have jurisdiction, because the jurisdiction of this court is derived from the Crown just as much as the royal prerogative and the rights under the royal prerogative are derived from the Crown. There is no kind of conflict. The only question is whether this peculiar particular problem falls within my jurisdiction as a judge of the High Court or has to be dealt with behind and beyond and away from this court by the authority which is at the base of both jurisdictions; that is to say, the Crown itself. I cannot direct a scheme, but I will declare that the bequest of one-quarter of the residue for the Hospital for Incurable Women of Brompton Road is a valid charitable bequest and ought to be applied in accordance with the directions of Her Majesty.

Order accordingly.

Solicitors: *Smith & Hudson*, agents for *Jackson & Walton*, King’s Lynn (for the plaintiffs); *Treasury Solicitor*.

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

Re ST. MARTIN'S THEATRE.
BRIGHT ENTERPRISES, LTD. v. WILLOUGHBY
DE BROKE (LORD).

[CHANCERY DIVISION (Danckwerts, J.), July 7, 1959.]

Discovery—Originating summons—Landlord and tenant—New tenancy.
Landlord and Tenant—New tenancy—Business premises—Opposition by landlord
—Discovery—Discovery relating to tenants' ability to perform covenants—
Discovery relating to landlord's financial position—Landlord and Tenant
Act, 1954 (2 & 3 Eliz. 2 c. 56), s. 30 (1) (a), (c), (g).

An application by the tenants, a company, by originating summons for the grant of a new tenancy of business premises (used as a theatre) was opposed by the landlord, the grounds of opposition being those provided by para. (a), para. (c) and para. (g) of s. 30 (1)* of the Landlord and Tenant Act, 1954. The question under para. (a) regarding lack of repair had been referred to an official referee, whose report indicated that there were breaches of covenant under the current tenancy. The landlord applied for discovery of the tenants' balance sheets and profit and loss accounts for the period of the current tenancy; and the tenants applied for disclosure and inspection of the landlord's income tax returns for the past three years, his bank pass sheets and any other relevant documents relating to his financial position, for the purpose of disputing the ground of opposition under para. (g) of s. 30 (1), namely, that, on the termination of the current tenancy, the landlord intended to occupy the holding for the purposes of a theatrical business.

Held: (i) the landlord was entitled to discovery of the tenants' balance sheets and profit and loss accounts for the period of the current tenancy, because the ability of the tenants, a limited company, to perform the covenants in the lease depended on their financial situation.

(ii) since the only question which the court would have to determine under para. (g) of s. 30 (1) on the hearing of the originating summons was whether the landlord genuinely intended to occupy the holding for the purposes of the business to which he referred, and since it was extremely doubtful whether the documents relating to his financial position for previous years had any relevance to his future ability to carry on the business, an order for discovery and inspection of those documents would be grossly oppressive to him and would not be made.

[**Editorial Note.** This case may be compared with *John Miller (Shipping), Ltd. v. Port of London Authority* ([1959] 2 All E.R. 713), where an application by a tenant for discovery with a view to disputing the fixity of the landlord's intention to occupy the premises was refused on the ground (among others) that no special circumstances for ordering discovery had been shown.

As to the discretion of the court in granting discovery, see 12 HALSBURY'S LAWS (3rd Edn.) 5, para. 5, and as to discovery in actions commenced by originating summons, see *ibid.*, p. 6, para. 5, text and note (p).

As to the ground of opposition based on a landlord's intention to occupy a holding, see 23 HALSBURY'S LAWS (3rd Edn.) 894, para. 1718.

For the Landlord and Tenant Act, 1954, s. 30 (1), see 34 HALSBURY'S STATUTES (2nd Edn.) 414.]

Procedure Summonses.

By an originating summons, dated Feb. 17, 1958, the applicants, as tenants of St. Martin's Theatre, West Street, London, claimed an order for the grant to them by the respondent, their landlord, of a new tenancy of the premises under the Landlord and Tenant Act, 1954. The applicants' current tenancy was a tenancy for twenty-one years from Oct. 18, 1937. By notice dated Oct. 21, 1957, the applicants requested a new tenancy and by notice dated Dec. 17, 1957, the

* The relevant paragraphs of s. 30 (1) are printed at p. 299, letters D to G, post.

- A respondent gave notice that he would be unwilling to grant a new tenancy on grounds therein specified. The landlord opposed the application under s. 30 (1) (a), (c), and (g) of the Act. By a summons in the proceedings, the landlord applied for discovery of the tenants' balance sheets and profit and loss accounts for the period of their current tenancy. The tenants took out two summonses, the one asking for discovery and the other for inspection of the landlord's income tax returns for the past three years, his bank pass sheets, and any other relevant documents relating to his financial position.

G. N. Eyre for the applicants, the tenants.

N. C. Tapp for the respondent, the landlord.

- C **DANCKWERTS, J.:** This is a case where there are cross applications for discovery in proceedings, which were commenced by originating summons, between the tenants, who are a limited company called Bright Enterprises, Ltd., and the landlord, Lord Willoughby de Broke, for the purpose, on the part of the tenants, of obtaining a further lease of a theatre known as St. Martin's Theatre, West Street, London.

- D The grounds given by the landlord for resisting the application for a new lease are those contained in para. (a), para. (c) and para. (g) of s. 30 (1) of the Landlord and Tenant Act, 1954. Paragraph (a) reads:

"where under the current tenancy the tenant has any obligations as respects the repair and maintenance of the holding, that the tenant ought not to be granted a new tenancy in view of the state of repair of the holding, being a state resulting from the tenant's failure to comply with the said obligations."

- E Paragraph (c) is of rather a similar character:

"that the tenant ought not to be granted a new tenancy in view of other substantial breaches by him of his obligations under the current tenancy, or for any other reason connected with the tenant's use or management of the holding."

- F The landlord originally relied also on the ground set out in para. (f), namely, that he intended to demolish and reconstruct the premises. Paragraph (g), on which he still relies, is in these terms:

"subject as hereinafter provided, that on the termination of the current tenancy the landlord intends to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein, or as his residence."

- G The landlord, in his affidavit, suggests that he intends to carry on a theatrical business on the property.

- H The discovery asked for on behalf of the landlord is of the tenants' balance sheets and profit and loss accounts for the period during which they have been the lessees of St. Martin's Theatre. The question of lack of repair was referred to one of the official referees, who has reported. His report shows dilapidations, as they are generally called, amounting to some £16,000. I understand that the tenants have some point that the present value of those dilapidations should be reduced below that figure. However that may be, the report indicates that there are breaches of covenant under the existing or past lease. It seems to me that the documents of which the landlord seeks discovery must be relevant and, indeed, of considerable importance on the question of the grant of a new lease to the tenants. In a case where a tenant is asking for a lease of property, the financial situation of the tenant is always of the greatest materiality to the landlord, who is not prepared as a rule to let his property without having some reliance on the financial stability of the prospective tenant, so that he will be likely to pay the rent and perform the covenants in the lease. It is particularly so if the prospective tenant is a limited company, as the company's ability to perform its covenants depends entirely on its financial situation. The only way in which it is

possible to establish the financial situation of a limited company is by means of its balance sheets and profit and loss accounts which show what assets the company has for the purpose of carrying on its business. Therefore, I have no doubt whatever that the tenants should disclose these documents. A

The counter application on behalf of the tenants requires the disclosure and inspection by the tenants of the landlord's income tax returns for the past three years, his bank pass sheets and any other relevant documents relating to his financial position. Normally, when there is going to be a transaction between landlord and tenant, the financial situation of the landlord is not a material issue in the matter at all. Therefore, *prima facie* these documents are quite irrelevant to the question whether the tenants should have a new lease or not. The only relevance, if at all, must be under para. (g) of s. 30 (1) of the Landlord and Tenant Act, 1954. The only relevance that there can be under that paragraph is if it is material to know whether a landlord, who says that he intends to occupy his own premises and carry on business therein, is in a financial position to carry on business or the kind of business which he says that he proposes to carry on. No doubt, the court has some discretion to require an answer from a landlord in those terms, but it seems to be a very limited one, and it seems to me that, as it is the landlord's own property, it must be rather unusual for it to be necessary to go into the landlord's financial abilities at all. The only point which the court has really to determine is whether the landlord genuinely intends to occupy the property and to carry on therein the business to which he refers. B C D

To some extent I think that a misleading element was introduced into this case by a statement in the landlord's affidavit that he had sufficient funds available to him for carrying out the works to which he referred in the affidavit. But those works related to a ground of opposition on which he relied under the terms of para. (f) of s. 30 (1). That ground has been abandoned and, consequently, it seems to me that these statements in the affidavit no longer have any relevance. E

I have considerable doubt whether the documents for which the tenants are asking have any relevance to the question to be decided in the landlord and tenant summons at all, but, even if there is any possible relevance to be deduced in respect of the documents in question, it seems to me that the request which has been made on behalf of the tenants is grossly oppressive. It is not a case where the documents must be relevant and, therefore, the question whether any oppression is involved does not matter: it is very doubtful if there is any relevance in them at all. For the past income tax returns and pass books of the landlord do not have much to do with his future ability to carry on a business on his own property; and it seems to me that to give the tenants' advisers a roving commission to go through the income tax returns and the bank pass books of the landlord is a gross interference with the affairs of the landlord, which would have no real bearing on the issues in the originating summons or on any possible issue, and ought not, as a matter of discretion, to be allowed by the court. I propose to dismiss the tenants' summonses for disclosure and inspection. F G H

Orders accordingly.

[On July 8, 1959, the Court of Appeal (LORD EVERSHED, M.R., and ROMER, L.J.) refused an application by the tenants for leave to appeal from the order of DANCKWERTS, J., dismissing their applications for disclosure and production. LORD EVERSHED, M.R., said that, when the originating summons came on for hearing, the landlord should produce sufficient evidence of his financial ability to carry on the business so as to avoid the necessity for an adjournment.] I

Solicitors: *Bartlett & Gluckstein* (for the tenants); *Boodle, Hatfield & Co.* (for the landlord).

[Reported by E. COCKBURN MILLAR, Barrister-at-Law.]

A Re PARISH OF ST. SWITHIN, NORWICH.

[NORWICH CONSISTORY COURT (The Chancellor (J. H. Ellison, Esq.)), February 13, June 22, 1959.]

B *Ecclesiastical Law—Consistory Court—Jurisdiction—Whether Consistory Court is a court for the purposes of Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 29.*

Ecclesiastical Law—Lease—Church—Option to take lease—Whether rector in whom freehold was vested had powers of tenant for life to grant option and lease—Settled Land Act, 1925 (15 & 16 Geo. 5 c. 18), s. 29 (1).

C Since 1871, the benefices of St. Swithin's and St. Margaret's, Norwich, had been united, and although St. Swithin's was still in theory the parish church only one service had been held there annually since 1939. During the war the church was used for the storage of goods by a commercial company. A Sunday service was held at St. Margaret's at which the congregation numbered between eight and ten persons. St. Swithin's had no lighting or heating and was a liability. Accordingly the rector (in whom the freehold of the church was vested) and churchwardens proposed to grant to a bank an option at any time during the ten years commencing Dec. 25, 1957, to take a lease of the church for seven years at an annual rent of £225. Until the exercise of the option the bank would pay the rector £75 a year and would renew the electrical installation. A faculty was now sought to licence these proposals which could, so it was contended, be carried out under s. 29 and s. 51 of the Settled Land Act, 1925, with the approval of the Consistory Court under the Charitable Trusts Amendment Act, 1855. So far as proposed user of the church was concerned the case was one in which the discretion to grant a faculty would be exercised.

E By s. 29 (1) of the Settled Land Act, 1925, trustees in whom land is vested on or for charitable, ecclesiastical or public trusts or purposes are given the powers of a tenant for life under the Act, including, by s. 51, the power to grant options.

F **Held:** the faculty could not be granted since

(i) consecrated buildings and lands such as churches and churchyards did not come within the scope of s. 29 (1) and therefore the rector had not the powers of a tenant for life by virtue of that subsection; and

G (ii) the Consistory Court was not a court of competent jurisdiction within the meaning of s. 29 of the Charitable Trusts Amendment Act, 1855.

[As to use of consecrated ground for secular purposes, see 13 HALSBURY'S LAWS (3rd Edn.) 396, para. 886; and for cases on the subject, see 19 DIGEST 356, 357, 1737-1739 and 7 DIGEST 534, 535, 144-150, 551-557, 291-337.

As to faculty jurisdiction, see 13 HALSBURY'S LAWS (3rd Edn.) 414, para. 922.

H As to powers of leasing conferred on trustees of charitable trusts, see 4 HALSBURY'S LAWS (3rd Edn.) 343, para. 706, note (o), para. 707, note (b).

For the Settled Land Act, 1925, s. 29, s. 51, see 23 HALSBURY'S STATUTES (2nd Edn.) 79, 126.

For the Charitable Trusts Amendment Act, 1855, s. 29, see 2 HALSBURY'S STATUTES (2nd Edn.) 876.]

I Cases referred to:

Bideford Parish, Re, Ex p. Bideford (Rector, etc.), [1900] P. 314; 64 J.P. 743; 7 Digest 556, 330.

Campbell v. Paddington (Parishioners & Inhabitants), (1852), 2 Rob. Eccl. 558; 19 L.T.O.S. 276; 163 E.R. 1413; 19 Digest 358, 1752.

Cleveland Literary and Philosophical Society's Land, Re, Bolchow v. Laughton, [1931] All E.R. Rep. 741; [1931] 2 Ch. 247; 100 L.J. Ch. 363; 145 L.T. 486; Digest Supp.

Mason's Orphanage & London & North Western Ry. Co., Re, [1896] 1 Ch. 596; 43 Digest 785, 2249. A

Oxford Group v. Inland Revenue Comrs., [1949] 2 All E.R. 537; 31 Tax Cas. 221; 2nd Digest Supp.

R. v. Twiss, (1869), L.R. 4 Q.B. 407; 38 L.J.Q.B. 228; 20 L.T. 522; 33 J.P. 516; 19 Digest 324, 1294.

St. Mark's Church, Lincoln, Re, [1956] 2 All E.R. 579; [1956] P. 336; [1956] 3 W.L.R. 147; 3rd Digest Supp. B

St. Nicholas, Leicester (Vicar) v. Langton, [1899] P. 19; 19 Digest 355, 1727.
Stratton, Re, Knapman v. A.-G., [1930] All E.R. Rep. 255; [1931] 1 Ch. 197; 100 L.J. Ch. 62; 144 L.T. 169; Digest Supp.

Petition for faculty. C

The rector and churchwardens of St. Swithin's, Norwich, together with Westminster Bank, Ltd., petitioned for a faculty enabling the rector to grant to the bank an option to take a lease of the church.

The facts appear in the judgment.

W. S. Wigglesworth for the petitioners. D

June 22. **THE CHANCELLOR** read the following judgment: This faculty suit is promoted by the rector and churchwardens of the parish of St. Swithin in the City and Diocese of Norwich together with Westminster Bank, Ltd. to whom for the sake of brevity I shall hereafter refer as "the bank." By their joint petition dated Nov. 28, 1958, they pray this court to decree a licence and faculty enabling the rector, in whom the freehold is vested, to grant to the bank an option exercisable on short notice at any time during the ten years commencing Christmas, 1957, to take a lease of the church for a period of seven years, but determinable by the bank at the end of the first three or five years if they wish, at an annual rent of £225, the bank paying rates and being responsible for internal repairs and otherwise subject to the terms and conditions of a draft lease filed with the petition. The bank would only wish to exercise the option if certain special events arose. In return, the bank propose to pay the rector the annual sum of £75 until the option is exercised or determined, and the arrangement gives them the right to determine by six months' notice after the first three years, and furthermore the bank would renew the present antiquated electrical installation in accordance with an approved scheme. I am much indebted to counsel who appeared for all the petitioners for his assistance in what is a difficult and somewhat unusual case. E

The facts proved by the rector, the Rev. Arthur Richard Freeman, and by Mr. Frank Mortimer, a churchwarden, in so far as they relate to the present situation, are briefly these. Since 1871 the benefice has been united with that of St. Margaret's. The union was effected under the Pluralities Act, 1838, (1), but that Act provided for the union of benefices only and not parishes. The two parishes are still separate and St. Swithin's is strictly the parish church. The separation is, however, purely theoretical, as for many years St. Margaret's and St. Swithin's have in practice been treated and worked as a single parish unit in which reside no more than forty souls. A service is held each Sunday at St. Margaret's and an evensong once a month, at each of which services the congregation varies between eight and ten persons. Save for one annual service St. Swithin's has not been used since 1939 and is redundant and superfluous to present or future foreseeable pastoral requirements. There is no lighting and no heating; in fact it is a liability; and the rector busies himself with another cure of souls elsewhere. I also understand that during the war years and for some time afterwards the church was used for the storage of goods by a certain commercial manufacturing company, the bishop having originally approved this F

(1) See 7 HALSBURY'S STATUTES (2nd Edn.) 11 (Preliminary Note on Unions). H

A under powers conferred by the Clergy (National Emergency Precautions) Measure, 1939, and the regulations made thereunder dated Sept. 3, 1939.

As regards the proposed user of the church by the bank at an early stage counsel made an application that the court should hear his observations and that part of the evidence in camera on the grounds that questions of the national interest were involved which it would be undesirable to discuss in public. In my judgment that was the proper course to be taken in the special circumstances. It would, therefore, be inappropriate for me to touch on those matters in detail in this judgment. Suffice it to say that if this court has a jurisdiction, this is a case where I should exercise my discretion in favour of granting the faculty sought. In saying this, no one should think that I am laying down a general proposition that a consecrated building when pastorally redundant may be used as a bank where the public may change their money. I certainly could not approve that. In *R. v. Twiss* (2) COCKBURN, C.J., made these strong remarks:

“... I do not hesitate to express a very decided opinion that the doctrine laid down by Dr. LUSHINGTON (3) is perfectly correct, that when ground is once consecrated and dedicated to sacred purposes, no judge has power to grant a faculty to sanction the use of it for secular purposes, and that nothing short of an Act of Parliament can divest consecrated ground of its sacred character...”

In that case the writ of prohibition was in fact refused and those remarks were obiter. Both before that case, for example in *Campbell v. Paddington (Parishioners & Inhabitants)* (4) and subsequently, the courts have granted faculties for secular and ecclesiastical purposes combined, provided that the secular purpose is not one of such nature as to be wholly inconsistent with the sacredness of consecration. The principles were fully discussed in *St. Nicholas, Leicester (Vicar) v. Langton* (5). Then there are the later well-known examples of *Re Bideford Parish, Ex p. Bideford (Rector, etc.)* (6) and *Re St. Mark's Church, Lincoln* (7). In those cases it was approved that parts of the churchyard could be used for road widening for the benefit of the public generally and in the later case benefit from such user also accrued to a commercial omnibus undertaking. In the present case the circumstances are peculiar. The events when a certain type of user by the bank would come into operation are exceptional. I am satisfied that the particular user in those events would not be repugnant to the principles laid down and would not be wholly inconsistent with consecration.

I now pass to the two more difficult questions which I have to decide. In the first place, has the rector the powers of a tenant for life under the Settled Land Act, 1925, in respect of a church the freehold of which is vested in him to grant an option of this nature? Secondly, is the Consistory Court a court of competent jurisdiction under the Charitable Trusts Amendment Act, 1855, able to approve such an arrangement? These are certainly novel points of far-reaching consequence and importance.

The first of those questions turns on the application of s. 29 and s. 51 of the Settled Land Act, 1925. The relevant parts of s. 29 provide as follows:

“(1) For the purposes of this section, all land vested... in trustees on or for charitable, ecclesiastical, or public trusts or purposes shall be deemed to be settled land, and the trustees shall, without constituting them statutory owners, have in reference to the land, all the powers which are by this Act conferred on a tenant for life and on the trustees of a settlement. In connexion only with the exercise of those powers, and not so as to impose any obligation in respect of or to affect—(a) the mode of creation or the administration of such trusts; or (b) the appointment or number of trustees

(2) (1869), L.R. 4 Q.B. at p. 412.

(3) In *Campbell v. Paddington* ((1852), 2 Rob. Eccl. at p. 559); and in *St. John's, Walbrook* ((1852), 2 Rob. Eccl. at p. 518).

(4) (1852), 2 Rob. Eccl. 558.

(5) [1900] P. 314.

(6) [1899] P. 19.

(7) [1956] 2 All E.R. 579; [1956] P. 336.

of such trusts; the statute or other instrument creating the trust or under which it is administered shall be deemed the settlement, and the trustees shall be deemed the trustees of the settlement, and . . . a separate instrument shall not be necessary for giving effect to the settlement.

"(3) Nothing in this section affects the jurisdiction of the court, Charity Commissioners . . . or other competent authority, in regard to the administration of charitable, ecclesiastical, or public trusts."

Section 51 provides:

"(1) A tenant for life may at any time . . . grant by writing an option to purchase or take a lease of the settled land . . . at a price or rent fixed at the time of the granting of the option.

"(2) Every such option shall be made exercisable within an agreed number of years not exceeding ten.

"(3) The price or rent shall be the best which, having regard to all the circumstances, can reasonably be obtained . . ."

Section 51 clearly applies to those persons on whom by reason of the provisions of s. 29 all the powers of a tenant for life are conferred. The terms of the proposed option fall within the section as regards duration and I am satisfied that the monetary arrangements are the best which could reasonably be made in the present circumstances. But in my opinion land vested in trustees for ecclesiastical purposes as referred to in s. 29 does not include consecrated buildings and land such as churches and churchyards which are vested in an incumbent for the duration of his incumbency. To hold otherwise would seem to me to introduce the gravest complications. It is true that to some extent an incumbent holds the land in a capacity as trustee for himself, for his successor incumbents and for the parishioners, present and future, in their respective spheres. The exercise of some of those elements of trusteeship seems to be antithetic to the exercise of some of the powers of a tenant for life. Section 29 (1) expressly confers all the powers of a tenant for life without any reservations and one such power is that of sale and exchange given by s. 38. If an incumbent can grant an option under s. 51 why should he not sell the church under s. 38? Any notion of sale or exchange is, of course, wholly inconsistent with the incumbent's duty to preserve the church with its ornaments, furnishings and beauty for posterity and also with the parishioners' rights at common law to worship in the church and be buried in the parish churchyard. If counsel's argument is correct, a curious situation would arise by reason of s. 29 (3). That subsection provides, in effect, that the jurisdiction of the court, the Charity Commissioners, the Minister of Education or other competent authority, is not affected in regard to the administration of (inter alia) ecclesiastical trusts. In the first place it would seem rather curious that Parliament omitted express reference to the ecclesiastical authorities if it intended that the Act should affect the vast number of churches and churchyards within the realm. But by reason of s. 113 (1) and (2) the court in that context means the Chancery Division of the High Court and the Palatine Courts of Lancaster and Durham. I do not think that Parliament ever intended that those courts should engage themselves in matters relating to consecrated churches and churchyards, the administration of which has from time immemorial fallen within the jurisdiction of the ordinary, exercised through the Consistory Court.

A further argument was addressed to me which, if I understand it correctly, was this. Section 29 of the Settled Land Act, 1925, must be read together with the Charitable Trusts Acts, 1853 and 1855. It was then said that the corporate property of deans and chapters of cathedrals on the one hand and of certain university colleges on the other hand would have fallen within the scope of those Acts had they not been expressly excluded by s. 62 of the Act of 1853. When one comes to the Settled Land Act, 1925, s. 29 (6) expressly excludes the lands

- A held by the university colleges but is silent on the question of lands held by deans and chapters of cathedrals. It is said, therefore, that by implication the Settled Land Act, 1925, applies to property held by deans and chapters. The reason why university colleges were excluded from the Settled Land Act seems to me a simple one, namely, that in the general reorganisation of real property law which took place in 1925 it was more convenient to treat those special
- B matters in a separate enactment passed at the same time, namely, the Universities and College Estates Act, 1925. It is not necessary for me to express any view to what extent the Settled Land Act, 1925, applies to the secular property and lands vested in deans and chapters such as farm lands or residential property situated within the close, indeed that is not a matter within the competence of the Consistory Court to decide. In so far as consecrated land is concerned,
- C ingenious though the argument is, I do not think that it is one of merit and it certainly does not inspire me to hold that, because consecrated churches are not expressly excluded, therefore by implication incumbents can exercise powers under the Settled Land Act, 1925, in respect of such churches. What I respectfully call the absurdity of the position was illustrated when counsel frankly conceded that the argument led by stages directly to the proposition that the
- D Dean and Chapter of Norwich Cathedral would have an unfettered power to sell the Cathedral Church, unfettered by reason that the cathedral is in any event outside the control or jurisdiction of the Consistory Court. Although charitable purposes as a rule include both ecclesiastical and public purposes, my view is that, in using all three expressions in s. 29 (1), Parliament intended no more than to include for that purpose those ecclesiastical and public trusts which are
- E not charitable in the legal sense. For example, it wished to include the case of a gift to a vicar for distribution among such parochial institutions or purposes as he shall select which is clearly a trust for an ecclesiastical purpose, but the court has held that the same would not qualify as a charitable trust (*Re Stratton, Knapman v. A.-G.* (8)). Similarly land vested in an unincorporated society comprising subscribing members the objects of which are the encouragement of
- F literature, science or art are public trusts within the section: see *Re Cleveland Literary and Philosophical Society's Land*, *Bolchow v. Laughton* (9), though these are not necessarily charitable trusts. *Oxford Group v. Inland Revenue Comrs.* (10) affords another example of a trust for ecclesiastical purposes in the sense of the promotion of religion, but the objects were such that it was held not to be a
- G charitable trust to whom taxation relief was available. I take the view that, had Parliament intended consecrated churches and consecrated land to fall within the scope of the Settled Land Act, 1925, it would have expressly said so and provided for the detailed administrative matters which would follow as a consequence.

- H The second question, namely, whether the Consistory Court or the chancellor are respectively a court or a judge of competent jurisdiction enabled under s. 29 of the Charitable Trusts Amendment Act, 1855, to approve trustees or administrators of charities making certain grants in relation to land comprising the trust, seems to be purely a question of construction. A "court" is referred to in s. 9 of the Act of 1855 in connexion with persons who refuse to comply with certain requisitions or orders of the board of commissioners. They are deemed to be in contempt of the Court of Chancery, now the Chancery Division of the High Court. The expression "a court or a judge" also occurs in s. 12 and s. 23 in connexion with the transfer of stocks and shares and the holding and payment of moneys but nowhere in that Act are those words precisely defined. There is no definition section. The Act of 1855 is, by and large, essentially an amending

(8) [1930] All E.R. Rep. 255; [1931] 1 Ch. 197.

(9) [1931] All E.R. Rep. 741; [1931] 2 Ch. 247.

(10) [1949] 2 All E.R. 537; 31 Tax Cas. 221.

Act, although I am mindful that in *Re Mason's Orphanage & London & North Western Ry. Co.* (11), LINDLEY, L.J., expressed the view that this s. 29 is in fact an additional section to the principal Act of 1853 rather than an amending section. Section 1 provides that the Act and the principal Act of 1853, namely, the Charitable Trusts Act, 1853, shall be construed together as one Act. Turning then to the principal Act one finds a number of different sections conferring jurisdiction on various courts and judges depending either on the situation of the charitable trust or the amount of annual income. For instance, s. 28 first refers to the ordinary, special or statutory jurisdiction of the Court of Chancery in relation to charities and then proceeds to confer on the Master of the Rolls and the Vice-Chancellors in chambers a like jurisdiction if the income exceed £30 per annum. Under s. 29 a like jurisdiction was conferred on the Chancellor and Vice-Chancellor of the County Palatine of Lancaster. Later, under the Palatine Court of Durham Act, 1889, a similar jurisdiction was conferred on that court also. Under s. 32 and s. 38 of the Act of 1853 the county courts were given jurisdiction if the charity income did not exceed £50 per annum. In my opinion a court or judge of competent jurisdiction means the Court of Chancery, now the Chancery Division of the High Court, or one of those courts or judges on whom jurisdiction is expressly conferred by the Charitable Trusts Act, 1853, and that does not include the ecclesiastical court. It is of interest to observe that in one place the ecclesiastical court is expressly mentioned, namely, in s. 11 of the principal Act of 1853, but this is not in a juridical context, it is in connexion with certain persons being granted power to examine and search its registers and records. In my judgment this court cannot entertain the present application and for the reasons which I have given this petition must be dismissed.

By way of postscript I should like to add these few words. Although I am left in no doubt that I must come to this decision as a matter of law, nevertheless the practical consequences are perhaps unfortunate. It means that this court is unable to assist these parishioners by relieving them of the burden of a redundant church which might otherwise be put to better use by others. I hope that this case may be brought to the notice of the commission now inquiring into the means of disposing of redundant churches. I am not advocating any extension of the Settled Land Act or the Charitable Trusts Acts because I doubt very much whether those branches of statute law are apt media for approaching questions relating to redundant churches. But some extension of the present rather limited powers of the Consistory Court would unquestionably be of assistance in solving that general problem. St. Swithin's is by no means the first case during my chancellorship where difficulties of a purely technical legal nature have been experienced preventing the court exercising its discretion on the merits.

Petition dismissed.

Solicitors: *Milles, Day & Co.*, agents for *Hansell, Hales, Bridgwater & Preston*, Norwich (for the petitioners).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

A D. F. MOUNT, LTD. v. JAY & JAY (PROVISIONS) CO., LTD.

[QUEEN'S BENCH DIVISION (Salmon, J.), July 1, 2, 17, 1959.]

B *Sale of Goods—Unpaid seller—Assent to other sale or disposition—Seller to be paid out of cash received from buyer's customers—Goods lying in warehouse—Delivery order by seller to buyer sent by buyer to warehousemen—Fresh delivery order by buyer to purchasers from him—Original seller not paid by buyer—Whether unpaid seller's right of lien on goods lost—Whether purchaser from buyer protected—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 47, proviso, s. 25 (2).*

C In September, 1957, the defendants, merchants trading in provisions, purchased five hundred cartons of tinned peaches, part of a larger consignment of tinned peaches lying at the wharf of D. Ltd. On Oct. 3, 1957, the defendants agreed to sell to one, M., for resale by M. to his customers, 150 and 100 respectively of these cartons. M. made it plain that the defendants would be paid with the cash that he received from his customers. The defendants made out two delivery orders, for 150 and 100 cartons, in favour of M., addressed to the superintendent of D. Ltd.'s wharf; M., having indorsed the orders, "please transfer to our sub order", sent them to D. Ltd. who received them at some time before Nov. 6, 1957. The defendants never received from M. any part of the purchase price of the 250 cartons. On Oct. 4, 1957, the plaintiffs agreed to purchase from M. the 250 cartons which M. had bought from the defendants; at the same time, M. offered to re-purchase the cartons from the plaintiffs, explaining to them that he was entering into these transactions because he was temporarily short of money. On Oct. 4 M. gave the plaintiffs a delivery order for the 250 cartons which the plaintiffs accepted in good faith; against that order, the plaintiffs gave M. a cheque for the amount of the purchase price which M. duly cashed. The re-purchase by M. was never completed by him. Subsequently twenty-five cartons were sold by the plaintiffs. On Nov. 6, 1957, the defendants cancelled their contract with M. and their delivery order in his favour. The plaintiffs now claimed delivery of the remaining 225 cartons stored with D. Ltd., while the defendants claimed in respect of these cartons the rights of an unpaid seller. The plaintiffs contended that the defendants "assented", within the meaning of s. 47 of the Sale of Goods Act, 1893, to the sale of the cartons by M. to the plaintiffs, and also relied on the proviso to s. 47 and on s. 25 (2) of the Act of 1893, as defeating the defendants' rights of lien.

G **Held:** on the facts the true inference was that the defendants had assented to the sale of the cartons by M. within s. 47 (which applied to a sale of unascertained goods), since they knew that he could only pay for the goods out of money received from customers and could only obtain money from customers against delivery orders to customers; accordingly, the defendants had lost their right of lien on the goods (see p. 310, letter G, post).

H Dictum of PICKFORD, J., in *Mordaunt Brothers v. British Oil & Cake Mills, Ltd.* ([1910] 2 K.B. at p. 507) applied.

I Per CURIAM: (i) the proviso* to s. 47 was confined to cases where a document of title was transferred to the buyer and the very same document was then transferred by the buyer to a person taking in good faith and for valuable consideration; therefore, it did not apply to the present case where the delivery order transferred by M. to the plaintiffs was a fresh document.

* For the relevant terms of s. 47 of the Sale of Goods Act, 1893, see p. 310, letter B, post, and for the terms of the proviso thereto, see p. 311, letter B, post.

(ii) on the true construction of s. 25 (2)* it was not confined to those cases where the buyer transferred the very same document as was in his possession with the consent of the seller, and the transfer by M. by the delivery order of Oct. 4, 1957, was valid as if expressly authorised by the defendants.

[As to the effect of dispositions by a buyer on an unpaid seller's right of lien, see 29 HALSBURY'S LAWS (2nd Edn.) 180-184, paras. 244-246. For cases on loss of an unpaid seller's lien, see 39 DIGEST 610, 611, 2070-2089.]

For the Sale of Goods Act, 1893, s. 25, s. 47, see 22 HALSBURY'S STATUTES (2nd Edn.) 1002, 1012.]

Cases referred to:

Ant. Jurgens Margarinefabrieken v. Dreyfus (Louis) & Co., [1914] 3 K.B. 40; 83 L.J.K.B. 1344; 111 L.T. 248; 39 Digest 611, 2085.

Laurie & Morewood v. Dudin & Sons, [1926] 1 K.B. 223; 95 L.J.K.B. 191; 134 L.T. 309; 39 Digest 522, 1372.

Mordaunt Brothers v. British Oil & Cake Mills, Ltd., [1910] 2 K.B. 502; 79 L.J.K.B. 967; 103 L.T. 217; 39 Digest 633, 2297.

Interpleader Issue.

On an interpleader summons issued by Delta Storage, Ltd. for relief against the claims of D. F. Mount, Ltd. and Jay & Jay (Provisions) Co., Ltd. to certain goods in the possession of Delta Storage, Ltd. it was ordered on Dec. 9, 1957, that an issue be tried, in which D. F. Mount, Ltd. should be plaintiffs and Jay & Jay (Provisions) Co., Ltd. should be defendants to determine who was entitled to 225 cartons of tinned peaches in the possession of Delta Storage, Ltd. who claimed no interest in the goods. The facts are set out in the judgment of SALMON, J.

S. C. Silkin for the plaintiffs.

S. H. Noakes for the defendants.

Cur. adv. vult.

July 17. SALMON, J., read the following judgment: In September, 1957, the defendants bought five hundred cartons each containing forty-eight tins of Dorchester brand Australian standard yellow cling sliced peaches for 21s. 10½d. per dozen tins. These cartons were part of a consignment of 4,500 cartons originally imported by Gaines & Gaines, Ltd. and lying in the warehouse of Delta Storage, Ltd. at Delta Wharf, East Greenwich. Towards the end of September, 1957, Mr. Jay, the defendants' managing director, told a Mr. Merrick that the defendants were offering these peaches for sale. On Oct. 3 Mr. Merrick telephoned Mr. Jay and said that he had a customer for 150 cartons at 22s. a dozen tins. The profit over the defendants' buying price would have been only £3 15s., but as the market was falling Mr. Jay agreed to sell 150 cartons to Mr. Merrick at 22s. per dozen for re-sale by Mr. Merrick. It was agreed between Mr. Merrick and the defendants that the profit should be divided equally between them. Later on the same day Mr. Merrick again telephoned Mr. Jay and said that he had another customer for one hundred cartons at 21s. 9d. per dozen tins. Mr. Jay agreed to sell the cartons to Mr. Merrick at this price. He informed Mr. Merrick that as there was only a small profit on the first transaction and an actual loss on the second, he wanted his money at once. Mr. Merrick told Mr. Jay that his customers were all first-class customers and would pay cash immediately. Mr. Merrick made it quite plain to Mr. Jay that he would pay the defendants with the moneys that he, Mr. Merrick, received from his customers.

Mr. Jay then had two delivery orders made out in favour of Mr. Merrick. They are addressed to the superintendent of the Delta Wharf, dated Oct. 3, 1957, "Please supply Messrs. L. S. T. Merrick", and then the address is given,

* For the relevant terms of sub-s. (2) of s. 25 of the Sale of Goods Act, 1893, see p. 311, letter G, post.

A "the under-mentioned goods entered by us in the ship Newcastle Star", and then some dates are given, "charges from seven days to be paid by goods". Then there is a description of the cartons and the signature of the defendants. The second delivery order is in precisely the same terms. Mr. Merrick's name and address were inadvertently omitted from the delivery orders. Mr. Merrick, however, repaired this deficiency, and also indorsed the orders, "Please transfer
B to our sub order". Mr. Merrick sent these delivery orders on to Delta Storage, Ltd., probably as soon as he received them from Mr. Jay. The precise date when these delivery orders were received by the wharf has not been established, but there can be no doubt, in my view, that it was well before Nov. 6, 1957. The defendants have never received one penny of the purchase price from Mr. Merrick.

C On Oct. 4 Mr. Merrick telephoned Mr. Denis Mount, the plaintiffs' managing director, and offered him the 250 cartons he had bought from the defendants. The price he asked was 20s. 6d. per dozen tins, making a total sale price of £1,019 17s. 6d. Mr. Mount agreed on behalf of the plaintiffs to buy these cartons at this price. At the same time Mr. Merrick offered to re-purchase the cartons from the plaintiffs on Oct. 11, giving the plaintiffs a profit of 6d. a dozen tins.
D Mr. Merrick explained to Mr. Mount that he was entering into these transactions as he was temporarily short of money on account of his wife's illness and some outstanding debts which he hoped to collect during the course of the week. The question arose whether the transaction between Mr. Merrick and the plaintiffs was in reality a sale, as it purported to be, or a loan. Counsel for the defendants has rightly conceded that this question cannot materially affect the
E result of this case. Mr. Mount was not cross-examined on the point, and I hold that the transaction was a sale.

After the telephone conversation of Oct. 4, Mr. Mount met Mr. Merrick on the same day, and received from Mr. Merrick a delivery order, against which Mr. Mount gave Mr. Merrick the plaintiffs' cheque for £1,019 17s. 6d. The delivery order, except that it is signed by Mr. Merrick and is in favour of the
F plaintiffs, is in the same form as the ones which I have already read. Mr. Merrick duly cashed the cheque to which I have referred. On Friday, Oct. 11, the plaintiffs sent the delivery order which they had received from Mr. Merrick to Delta Storage, Ltd., and this was received, as appears from the stamp on the delivery order and from the evidence of Delta Storage, Ltd.'s manager, by their parent company on Oct. 14. The delivery order is dated Sept. 4 instead of
G Oct. 4, but this discrepancy was not noticed by Mr. Mount at the time. On Oct. 11 the plaintiffs sent Mr. Merrick a delivery order for 250 cartons, and on the next day Mr. Merrick sent the plaintiffs a cheque for £1,045 in pursuance of the agreement to re-purchase the cartons. This cheque was dishonoured, and consequently the plaintiffs cancelled their delivery order in favour of Mr. Merrick, or purported to do so.

H The plaintiffs sold twenty-five of the cartons to Leon & Son, and gave a delivery order dated Nov. 6, 1957, to that firm, who, on the strength of that delivery order, obtained possession of the twenty-five cartons.

On Nov. 6, 1957, the defendants, who had been unable to obtain payment from Mr. Merrick, (a) wrote him a letter cancelling their contract with him, (b) wrote
I to the Delta wharf, asking them to cancel the delivery orders in favour of Mr. Merrick, and (c) sold some of the cartons to Balkwill & Storey, Ltd. This latter transaction was cancelled by mutual consent on Nov. 11, 1957.

The plaintiffs claim that they are entitled to delivery of 225 cartons (being the balance of the 250 cartons still in the wharf), whilst the defendants claim to be entitled to exercise all the rights of an unpaid seller in respect of these cartons. The cartons have been sold by consent and these proceedings will decide whether the proceeds of that sale shall go to the plaintiffs or to the defendants.

As a result of the various transactions I have described, Mr. Merrick obtained £1,019 17s. 6d. by fraud and was later duly prosecuted to conviction. The case, accordingly, raises the familiar problem—which of two innocent persons, the plaintiffs or the defendants, shall suffer for the trickery of a rogue.

The plaintiffs first rely on s. 47 of the Sale of Goods Act, 1893, which reads as follows:

“Subject to the provisions of this Act, the unpaid seller’s right of lien or retention or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.”

There is a proviso to the section, with which I shall deal in a moment. The plaintiffs contend that the defendants assented to the sale or disposition of the 250 cartons by Mr. Merrick to the plaintiffs, and thereby lost their right as unpaid sellers to the lien which they would otherwise have had on the cartons. The defendants contend that if they assented to the sub-sale by Mr. Merrick, their assent was not an assent within the meaning of s. 47, and rely on *Mordaunt Brothers v. British Oil & Cake Mills, Ltd.* (1). It is clear from the judgment of PICKFORD, J. (2), that the assent contemplated by s. 47 means

“an assent given in such circumstances as show that the unpaid seller intends that the sub-contract shall be carried out irrespective of the terms of the original contract”

and must be

“such an assent as in the circumstances shows that the seller intends to renounce his rights against the goods.”

PICKFORD, J., held that there had been no such assent on the part of the sellers. The facts of that case are, however, very different from those of the present case. There the sellers had at no time any reason to doubt the buyer’s ability to pay, and were not informed of the sub-sale until after the sale was effected. PICKFORD, J., held that the sellers had assented to the sub-sale merely in the sense that they acknowledged its existence and the right of the sub-buyer to have the goods subject to their own paramount rights under the contract with the original buyer to hold the goods until paid the purchase price.

In the present case the defendants were anxious to get rid of the goods on a falling market. They knew that Mr. Merrick could only pay for them out of the money he obtained from his customers, and that he could only obtain the money from his customers against delivery orders in favour of those customers. In my view, the true inference is that the defendants assented to Mr. Merrick re-selling the goods, in the sense that they intended to renounce their rights against the goods and to take the risk of Mr. Merrick’s honesty. The defendants are reputable merchants and I am sure that it was not their intention to get rid of their goods on a falling market through Mr. Merrick on the basis that if he defaulted, they could hold the goods against the customers from whom he obtained the money out of which they were to be paid.

The sale of the 250 cartons was a sale of unascertained goods. In my judgment, however, there is no reason why s. 47 of the Act of 1893 should not apply to unascertained goods, although I respectfully agree with PICKFORD, J. (3), that an inference can in some circumstances more readily be drawn against the seller in the case of a sale of specific goods than in the case of a sale of unascertained goods.

I hold that the defendants assented to the sale of the cartons by Mr. Merrick within the meaning of s. 47.

This is enough to dispose of the case, but I will deal briefly with some of the

(1) [1910] 2 K.B. 502.

(2) [1910] 2 K.B. at p. 507.

(3) [1910] 2 K.B. at pp. 506, 507.

A other points which have been canvassed. Counsel for the plaintiffs argues that even had there been no sufficient assent by the defendants, he would be entitled to succeed under the proviso to s. 47. The proviso, in so far as it is material, reads as follows:

B “Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale the unpaid seller’s right of lien or retention or stoppage in transitu is defeated . . .”

C It is conceded that the plaintiffs took the delivery orders made out by Mr. Merrick in good faith and for valuable consideration. Counsel for the defendants argues, however, that there has been no transfer by Mr. Merrick within the meaning of the proviso. The material words to consider are: “where a document of title to goods has been lawfully transferred to any person as buyer, and that person transfers the document to a person”. It seems to me that these words confine the proviso to cases where a document is transferred to the buyer and the same document is then transferred by him to the person who takes in good faith and for valuable consideration. If Mr. Merrick had indorsed the delivery orders he received from the defendants and transferred them to the plaintiffs, the proviso would, in my judgment, have applied; but he did not do so. He sent those delivery orders to the wharf, and made out a fresh delivery order in favour of the plaintiffs.

E It is strange that there appears to be no authority on this point. It is clear that the person who transfers the document of title to the buyer may originate it himself and need not have received it from some third party in order to “transfer” it within the meaning of the proviso: see *Ant. Jurgens Margarine-fabrieken v. Louis Dreyfus & Co.* (4). In my judgment, however, on the plain language of the section, it must be that very document which is transferred F by the buyer for the proviso to operate. I am conscious that this construction leads to a very artificial result, but I cannot avoid it without doing violence to the plain language of the section.

Counsel for the plaintiffs, however, also relies on s. 25 (2) of the Sale of Goods Act, 1893, which reads as follows, in so far as it is material:

G “Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale . . . thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile H agent in possession of the goods or documents of title with the consent of the owner.”

I It seems to me that the language of this subsection is less rigorous than that of the proviso to s. 47 and does not compel me to hold that the subsection applies only in those cases where the buyer transfers the same document as that of which he is in possession with the consent of the seller. I would observe that there seems to be no authority on this point. The object of s. 25 (2) is to protect an innocent person in his dealings with a buyer who appears to have the right to deal with the goods in that he has been allowed by the seller to be in possession of the goods or documents of title relating to them. In such a case the subsection provides that any transfer of the goods or documents of title by the buyer to a person acting in good faith and without notice of any want of authority on the part of the buyer shall be as valid as if expressly authorised by the seller.

In the present case the defendants sent the documents of title to Mr. Merrick with the intention that they should enable him to obtain money from his customers. With the help of these documents, which he sent to the wharf so that the wharfingers would give a reassuring reply to any inquiry that the plaintiffs might make, or at least not query any delivery order they received from the plaintiffs, Mr. Merrick managed to obtain a substantial sum of money from the plaintiffs.

In my view, the transfer by Mr. Merrick of the delivery order dated Sept. 4, (5), was, by virtue of s. 25 (2), as valid as if expressly authorised by the defendants.

The plaintiffs further relied on custom. The only custom which I find to be proved is the custom for delivery orders to state on their face the number of days (usually seven) from their date after which the person in favour of whom the delivery order is made out shall be liable to the wharfinger for his charges. When the wharfinger receives the delivery order from such person and registers it in his books, he is by custom entitled, without further notice, to charge such person warehousing charges from the date specified in the delivery order. This is a narrower custom than that for which the plaintiffs contend (6).

SCRUTTON, L.J., pointed out in *Laurie & Morewood v. Dudin & Sons* (7) that in the absence of proof of attornment by custom, there must be some sort of communication from the wharfinger to the person holding the delivery order to constitute an attornment. In the present case the wharfingers made no communication to the plaintiffs, but there exists the custom to which I have referred. I am not sure of its relevance here, since these proceedings are not against the wharfingers. It may well be, however, that after seven days from the date of the delivery order, the wharfingers would be precluded from denying the rights, at any rate, of any innocent party from whom they had received it. As I hold, however, the clear view that the plaintiffs are entitled to succeed against the defendants under the Sale of Goods Act, 1893, I need discuss custom no further.

There will be judgment for the plaintiffs.

Judgment for the plaintiffs.

Solicitors: *Gershon, Young & Co.* (for the plaintiffs); *Gouldens* (for the defendants).

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

(5) This was the date expressed in error for Oct. 4; see p. 309, letter G, ante.

(6) In addition to the custom found by HIS LORDSHIP, the plaintiffs had contended that the custom and practice of the plaintiffs' and defendants' trade was that the person having the right to possession of goods held by the wharfinger might issue delivery orders in favour of his customers and that his customers might issue orders in favour of their customers and so on, through successive customers. On receipt of each delivery order, and on being satisfied that he could record it in his books, the wharfinger so recorded the order. The record of receipt operated as an acceptance or acknowledgment of the order by the wharfinger and as an irrevocable transfer from the issuer of the order to the customer in whose favour the order was made of the right to delivery by the wharfinger of the goods referred to in the order. If the goods were an unascertained part of a bulk holding, the rights of holders of successive delivery orders were governed by the order in which the respective orders were received and recorded by the wharfinger.

(7) [1926] 1 K.B. at p. 237.

A **IMPERIAL TOBACCO CO. (OF GREAT BRITAIN AND IRELAND), LTD. v. PIERSON (VALUATION OFFICER).**

[COURT OF APPEAL (Lord Evershed, M.R., Romer and Sellers, L.JJ.), July 16, 28, 1959.]

B *Rates—Advertising stations—Neon sign—Grant of rights of fixing and exhibiting a flashing neon advertising sign to be erected by the grantee—Sign erected—Whether hereditament should be valued with sign erected or on the footing that the sign was yet to be erected—Local Government Act, 1948 (11 & 12 Geo. 6 c. 26), s. 56.*

C By an agreement made on June 21, 1955, a corporation granted to the ratepayers for three years the exclusive rights of fixing and exhibiting on premises of the corporation “a flashing neon advertising sign reading ‘Players please’ to be erected in [a specified position] and to be operated by an automatic time switch”, together with the right to connect the sign to the electricity supply and “to erect and maintain a permanent scaffold and iron ladder”. The ratepayers were given the right to enter on the premises to make the necessary fixtures and do other things for making the sign effective and to repair and maintain the apparatus and they undertook to keep and maintain the sign securely fixed and in good and substantial repair. They remained the owners of the sign and apparatus and were to remove them on the determination of the agreement. By a proposal for the alteration of the valuation list made on Apr. 12, 1956, the valuation officer proposed to assess the right at £165 rateable value under s. 56 of the Local Government Act, 1948, on the basis that at that date the right enjoyed was the right to use the corporation’s premises and the neon sign and frame by then erected under the agreement. The Lands Tribunal held that the assessment should be £150 rateable value on the basis that the right conferred on the ratepayers was the right to use the premises and a sign to be erected and not actually erected. On appeal, it was conceded that the neon sign and frame erected were a structure within the meaning of s. 56 of the Act of 1948.

E **Held:** the right which was deemed by s. 56 of the Local Government Act, 1948, to be a separate hereditament for rating purposes must be ascertained according to the true construction of the agreement of June 26, 1955, and was a right thereunder to use the whole structure that had been erected by Apr. 12, 1956 (which was the relevant date at which to determine what the right was); and, therefore, the rateable value of the hereditament was the agreed figure of £165.

G **QUAERE** (per LORD EVERSLED, M.R.) whether the “land” referred to in s. 56 of the Local Government Act, 1948, in the phrase “right to use any land... for the purpose of exhibiting advertisements” was the physical thing that was the grantor’s property, and did not include in the present case such apparatus as the neon sign and its frame, etc., which were not the grantor’s property and could be regarded as the advertisement for the purpose of exhibiting which the grantor’s land (viz., the wall) was to be used (see p. 316, letter G, p. 317, letters A and B, post, and cf. p. 318, letter C, post).

I Appeal allowed.

[**Editorial Note.** In relation to the query stated above it may be observed that the answer put forward on behalf of the valuation officer (see p. 316, letter F, post) seems inapplicable to an advertising sign that was not flashing or lit from within.

For the rating of advertising stations, see 27 HALSBURY’S LAWS (2nd Edn.) 368, para. 799 (now subject to the Local Government Act, 1948, s. 56); and for cases on the subject, see 38 DIGEST 458, 227-229.

For the Local Government Act, 1948, s. 56, see 20 HALSBURY'S STATUTES A
(2nd Edn.) 257.]

Case Stated.

The respondent ratepayers were the grantees under an agreement of June 21, 1955, of an exclusive right of fixing and exhibiting on premises of Bradford Corporation at the junction of Forster Square, Canal Road and Bolton Road, Bradford, a flashing neon advertising sign reading "Players please" which B
was assessed at £165 rateable value as an "advertising right" under s. 56 of the Local Government Act, 1948. On Apr. 12, 1956, they made a proposal for the alteration of the valuation list for Bradford City by reducing the assessment to £150 rateable value, and on Sept. 13, 1957, their appeal against the valuation officer's objection to the proposal was dismissed by a local valuation court of West Riding of Yorkshire (North) Local Valuation Panel. On Aug. 1, 1958, the C
Lands Tribunal (ERSKINE SIMES, Esq., Q.C.) allowed their appeal against this decision and reduced the assessment to £150 rateable value. The valuation officer appealed to the Court of Appeal. His grounds of appeal were that the tribunal was wrong in law in refusing to take into account work done (in affixing the sign, frame, etc., on the premises) after June 21, 1955, in arriving at the rateable value of the hereditament and that it was bound to take such work into account D
on the true construction of s. 56 of the Local Government Act, 1948, and s. 22 (1) (b) of the Rating and Valuation Act, 1925; that the tribunal wrongly failed to take into account as affecting the rateable value of the hereditament circumstances as they stood at the date of the ratepayers' proposal; that it was wrong in law in holding that the hereditament consisted only in "the right to exhibit E
advertisements on a structure to be erected" and that on a true construction of the agreement of June 21, 1955, the hereditament also included the right to use the structure and exhibit advertisements on it after it was erected.

Harold Williams, Q.C., and *G. F. Peter Mason* for the ratepayers.

Maurice Lyell, Q.C., and *J. R. Phillips* for the valuation officer.

Cur. adv. vult. F

July 28. The following judgments were read.

LORD EVERSHERD, M.R.: By an agreement dated June 21, 1955, between the lord mayor, aldermen and citizens of the City of Bradford, the corporation, and the Imperial Tobacco Co. (of Great Britain and Ireland), Ltd., the ratepayers by their authorised agents, it was provided as follows: The G
corporation agreed

"to grant to the [ratepayers] the exclusive rights of fixing and exhibiting upon the premises of the corporation at the junction of Forster Square Canal Road and Bolton Road in the City of Bradford (hereinafter called 'the said premises') a flashing neon advertising sign reading 'Players please' to be erected in the position shown in the rectophot attached hereto and to be operated by an automatic time switch Together with all necessary rights H
(a) to connect such sign to the switchboard and meters and to the main electric cable in the street (b) to erect and maintain a permanent scaffold and iron ladder."

Clause 2 provided for the corporation giving to the ratepayers liberty to enter on the premises to make the necessary fixtures, etc., and do other things necessary I
for making the sign effective, with liberty to enter for repairing and maintaining the apparatus. Clause 4 provided:

"The corporation will immediately inform the [ratepayers] in the event of the sign requiring attention or needing repair and the [ratepayers] will keep and maintain the same securely fixed and in good and substantial repair to the satisfaction of the corporation."

By cl. 5, the corporation was to pay rates and taxes payable in respect of the

A said premises, and the ratepayers were to pay any rates which might be imposed solely on the said sign. Clause 9 provided that the agreement should remain in existence for a term of three years certain and thereafter as contained in that clause. Clause 11 provided:

B "Upon the determination of this agreement the said sign and the apparatus used in connexion therewith shall remain the property of the [ratepayers] who shall remove the same within fourteen days and make good any damage done to the said premises in consequence of such removal."

C It is conceded that the ratepayers are properly rateable in respect of the "right" or "rights" which they obtained by the agreement, and which, for the purposes of s. 56 of the Local Government Act, 1948, are to be treated as a "rateable hereditament". Section 56 is in the following terms:

D "Where the right to use any land (including any hoarding, frame, post, wall or structure erected or to be erected on the land, and including also any wall or other part of a building) for the purpose of exhibiting advertisements is let out or reserved to any person other than the occupier of the land, or, when the land is not occupied for any other purpose, to any person other than the owner of the land, that right shall be deemed for rating purposes to be a separate hereditament in the occupation of the person for the time being entitled to the right, and shall be included in the valuation list as a separate hereditament accordingly, and, notwithstanding anything in s. 3 or s. 4 of the Advertising Stations (Rating) Act, 1889, in estimating the value of the land for rating purposes no account shall be taken of any value or, as the case may be, of any increased value arising from the use of the land for the purpose of exhibiting advertisements in accordance with that right."

The decision of the Lands Tribunal contained the following passage:

F "There is no dispute that the hereditament is properly described and entered in the valuation list, nor that its rateable value is to be ascertained under s. 22 (1) (b) of the Rating and Valuation Act, 1925. The question in dispute is whether the value to be ascertained is that of a right to exhibit advertisements *on a structure to be erected* on the land at the expense of the grantee, the right in fact conferred on the [ratepayers] by an agreement dated June 21, 1955, or that of a right to exhibit advertisements *on a structure erected* on the land, which was the position at the date of the proposal, Apr. 12, 1956. It is agreed between the parties that in the former case the rateable value should be £150, in the latter case £165."

G I am not entirely clear whether counsel for the ratepayers is prepared to concede that the question was properly stated in the passage that I have quoted, but he was prepared to argue on the footing that it was correctly stated. If so, the question is, What is the "right" that here is to be treated as the rateable hereditament; and the answer depends on the interpretation and effect of the agreement which I have read.

H No doubt the question must be asked and answered as on the date of the proposal, viz., Apr. 12, 1956; but the case of counsel for the ratepayers is that the right on that date is the same as that which was conferred on June 21, 1955, by the agreement, and is not (for present purposes, at any rate) to be enhanced by the fact of, or in consequence of, anything done by the ratepayers in the course of the existence of the right. So it was and is said by counsel for the ratepayers, and his argument is accepted by the tribunal, that the right is and was limited to exhibition of advertisements on the structure *to be erected*, and is not and has not become a right to exhibit on a structure *when erected*. It is to be noted that counsel for the ratepayers in his argument was prepared to assume (and he expressly so conceded here and before the tribunal) that the word "structure"

meant or included the actual physical framework and sign or lettering "Players please". To this I shall return later. A

But once the assumption to which I have referred is made, then, although I confess that I have felt greater difficulty than my brethren, I have in the end felt compelled (albeit with some reluctance and subject to what I say at the end of this judgment) to a conclusion different from that of the tribunal, i.e., that "right" must include the right to exhibit on or by means of the structure when erected and expressed as "to be erected" in that agreement. B

I refer particularly to cl. 4 of the agreement containing the obligation of the ratepayers to maintain the sign and apparatus when erected. The point is very short and not, I think, capable of elaboration; and I have not thought it useful or necessary to refer to the Act of 1889, mentioned in s. 56 of the Act of 1948, and now superseded, so far as this case is concerned, by the latter section. C

I desire, however, to add the following observations. As I have said, it was clearly conceded for the purposes of this case that the framework and sign, "Players please", were when erected, a "structure" within the meaning of s. 56; i.e., that the word "land" in the section, when expanded by the definition in the parenthesis, includes in this case the physical apparatus plus the sign itself above-mentioned. This concession having been made, it has seemed, in the end, to me that the result indicated must follow, since the rights acquired by the ratepayers must at least include the right to use the apparatus and the sign when erected. D

I am not, of course, saying that the concession was wrongly made; but since we were told that this was in the nature of a test case, I am venturing to suggest that for the purposes of other cases the matter should be further considered. I emphasise the words—highly significant as they seem to me—in the third line of the section (and later repeated), "for the purposes of exhibiting advertisements"—not, be it observed, "for the purposes of advertising". It was said by counsel for the valuation officer in this case that the "exhibition" of the advertisement consists of the use of the neon lights inside the frame of the sign, which, when in use, "exhibit" the advertisement, viz., "Players please"; and he pointed out that the cost of the neon light was not included in the calculation which resulted in the figure of £165. E

I confess for my part that I have felt and continue to feel uneasy on this matter. Judged by ordinary standards of language, there is surely much to be said (to say the least) for the view that it is the physical thing, the flashing neon sign, frame, letters, lights, the whole apparatus, that is the advertisement, and that the right acquired was to use the corporation's wall for the purpose of fixing and thereafter exhibiting that advertisement on it. References to words like "hoarding" and "structure", in parenthesis, would naturally cover cases where the hoarding or structure already existed and belongs to the occupant of the land, who then grants to the advertiser the right to use the hoarding or structure for exhibiting his advertisement. There might obviously be a case where there is a distinction between the actual sign or advertisement and the frame to which it is fixed; but no such distinction, as I understand, is made in the present case; and I note that when the agreement comes to an end, the frame, sign and all are the property of the ratepayers, who must remove the lot. F

This suggested view is at least supported by the terms of the agreement whereby the ratepayers were granted the right of "fixing and exhibiting on the premises of the corporation a flashing neon advertising sign" of a specified kind, and not—in terms, at any rate—a right to use the wall and any structure erected or to be erected thereon for the purposes of advertisement, which, as I have indicated above, I should have thought the more natural phrase on the basis assumed. No doubt, in the ordinary case, anything fixed to a building becomes part of the building; but the concession here made seems to involve the assumption that the "premises" mentioned in the agreement are different G H I

A after the sign is fixed from what they were before—in spite of the provision that at the end of the agreement the apparatus and sign are the property of the ratepayers and must be removed by them.

B Put otherwise, I venture to suggest that there is something to be said for the view that the formula in brackets in the section only means that land covers whatever is there or is to be put there as a wall, structure or otherwise, as part of the grantor's property, but does not include something (albeit in some sense a structure) added by the grantee temporarily as a means of exercising the right granted, and intended to be removed by the grantee when the grant determines.

Nevertheless, for the reasons which I have earlier stated, I have come to the conclusion that the appeal in this case should be allowed.

C **ROMER, L.J.:** It seems to me that the decision on this appeal depends on the answer to two questions. The first question is: What right was vested in the ratepayers on Apr. 12, 1956, under and by virtue of their agreement with Bradford Corporation dated June 21, 1955? The second question is: What is the effect of s. 56 of the Local Government Act, 1948, on that right?

D The answer to the first of these questions can only be found from the terms of the agreement itself. If, on the true construction of the agreement, all that was vested in the ratepayers on Apr. 12, 1956, was the abstract right of using the corporation's land (including a structure to be erected on the land) for the purpose of exhibiting advertisements, then the present appeal fails. If, on the other hand, the ratepayers had, at the relevant date, the right to use for exhibiting advertisements a structure which had by then already been erected on the land, the appeal succeeds.

E Immediately after the agreement had been signed, it is clear that the ratepayers had no right to use a structure erected on the corporation's land, for no such structure existed. It seems to me quite plain, however, as an irresistible inference arising from the terms of the agreement, that, once the structure contemplated by the agreement had been erected, the ratepayers were to be entitled to use it for advertising purposes for so long as the agreement remained on foot. This is clear enough from cl. 1 of the agreement, even if taken by itself. F The point, however, ceases to be arguable when one finds that under cl. 2 the ratepayers were given

G “liberty at all reasonable times to enter the said premises for the purpose of repairing renewing inspecting and testing the said sign and electric fittings and of doing all work necessary for maintaining the same in a state of efficiency”; and see also cl. 4.

H Counsel for the ratepayers concedes that the “flashing neon advertising sign reading ‘Players please’” referred to in the agreement is a structure within the meaning of, and for the purposes of, s. 56 of the Act of 1948. To be taken in conjunction with this concession are the facts that the sign had been erected by the ratepayers prior to Apr. 12, 1956; that they had a contractual right on that date, as I have already indicated, to use it; and that they were in fact using it.

Applying s. 56, then, to that state of affairs, the section reads, for relevant purposes, as follows:

I “Where the right to use any land (including any . . . structure erected . . . on the land . . .) for the purpose of exhibiting advertisements is let out . . . to any person other than the occupier of the land . . . that right shall be deemed for rating purposes to be a separate hereditament in the occupation of the person for the time being entitled to the right, and shall be included in the valuation list as a separate hereditament accordingly . . .”

What then, on Apr. 12, 1956, was the right which was to be deemed for rating purposes to be a separate hereditament in the occupation of the ratepayers? Surely not merely the right to erect a structure, for that right had already been

exercised and was, by then, exhausted. The right, in my judgment, was the right to use the structure which had already been erected. The only possible way of avoiding this view (on the conceded assumption that the sign is in fact within s. 56) appears to me to be that the ratepayers had no more than a contractual right to erect the sign and had no right under the agreement to use the sign after it had been erected. I am quite unable, as I have already intimated, to attribute such a limited effect to the agreement of June 21, 1955. A

If I am correct in thinking that the right which, on Apr. 12, 1956, was to be deemed for rating purposes to be a separate hereditament was the right to use for the purpose of exhibiting advertisements the structure which the ratepayers were then using, it follows that the question in the Case Stated must be answered in favour of the valuation officer. B

I would add in conclusion that, whilst in no way dissenting from the observations which the Master of the Rolls has made in his judgment as to the meaning of "the right to use any land (including any hoarding, frame . . .) for the purpose of exhibiting advertisements", I presume that the ratepayers' concession that the neon sign now in question is within s. 56 is based on the view that the framework which secures the sign is a structure and that it is the flashing lights themselves which constitute the advertisement. C D

SELLERS, L.J.: Under s. 56 of the Local Government Act, 1948, the right which is to be deemed for rating purposes to be a separate hereditament in the occupation of the person for the time being entitled to the right is the right to use any land which is let out or reserved to any person (other than the occupier of the land) for the purpose of exhibiting advertisements. Land includes any hoarding, frame, post, wall or structure erected or to be erected on the land and includes also any wall or other part of a building. E

Under the agreement of June 21, 1955, the ratepayers obtained from Bradford Corporation the exclusive right of fixing and exhibiting on the premises named a flashing neon advertising sign reading "Players please" to be erected in the position shown on a rectophot attached to the agreement together with (and this I think is of importance in this appeal) all necessary rights to connect the sign to the electricity supply and to erect and maintain a permanent scaffold and iron ladder. F

The scaffold or structure which was in fact erected at the expense of the ratepayers to carry the letters and neon tubing which formed the advertisement "Players please" is shown on a plan accompanying the Stated Case. At the time of the assessment all that structure was erected and in use by the ratepayers. They were using, not only the wall, but also the structure they had erected on the wall for the purpose of carrying or exhibiting their advertisement. This was clearly the whole purpose of the agreement. The right to use the wall was let out to them by the agreement. As they were given the right to erect the permanent scaffold at their own expense, its use might more appropriately be said to be reserved to them than let out to them, but it was a right they acquired by the agreement. In my opinion these factors and considerations establish that the ratepayers were in occupation of a separate hereditament used as of right consisting of the whole structure as erected and they are therefore liable to be rated thereon at the agreed figure of £165. G H

In assessing the right to use any land and structure it does not seem to me to matter whether any hoarding or structure is erected and paid for by the occupier of the land or the person deemed under the section to be in occupation of a separate hereditament. The purpose of the section is to place the liability to rates in respect of the exhibition of advertisements on land, as defined, directly on the person enjoying the right to advertise instead of on the occupier of the land. The argument for the ratepayers, as I follow it, would interpret the section as limiting the basis of assessment as well as altering its incidence so that I

A in this case the ratepayers would pay less in paying directly than if the assessment were in the first place on Bradford Corporation and then claimed over under cl. 5 of the agreement, which provides:

B “ In the event of the premises being reassessed for rates and the rateable value thereof being increased solely on account of the existence and user of the sign the [ratepayers] will pay to the corporation the difference between the sum payable for rates under the present assessment and the sum due in respect of such increased assessment.”

I cannot think that such a result was intended and I do not think it was achieved.

Appeal allowed. Leave to appeal to the House of Lords granted.

C Solicitors: *Solicitor to the Imperial Tobacco Co. (of Great Britain and Ireland), Ltd.* (for the ratepayers); *Solicitor of Inland Revenue* (for the valuation officer).
[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

NOTE.

D

SPYROPOULOS v. McCLELLAND.

[COURT OF APPEAL (Lord Evershed, M.R., Sellers and Harman, L.J.J.), July 9, 1959.]

E

Rent Restriction—Decontrol—Possession—Suspension of execution of order for possession—Costs—Landlord and Tenant (Temporary Provisions) Act, 1958 (6 & 7 Eliz. 2 c. 68), s. 4 (2).

[For the Landlord and Tenant (Temporary Provisions) Act, 1958, s. 4 (2), see 38 HALSBURY'S STATUTES (2nd Edn.) 604.]

Appeal.

F

G

H

I

This was an appeal by the defendant from a judgment of His Honour JUDGE BLADEN at Westminster County Court on Jan. 22, 1959, in proceedings by the plaintiff for possession of a flat of which the defendant had been a statutory tenant and which was decontrolled by s. 11 (1) of the Rent Act, 1957. During her tenancy the defendant, who was a widow and an old-age pensioner, provided accommodation in the flat for about six student nurses under an arrangement with a hospital authority. After the Act of 1957 came into force the plaintiff offered to the defendant a new tenancy, at a greatly enhanced rent, and containing a provision forbidding her to take any lodger or paying-guest. The defendant could not accept this offer because she could not have paid the rent unless she took lodgers. The plaintiff then offered her what he called “a gentlemen's agreement”, i.e., an understanding that no exception would be taken to her having three nurses in the flat; but it was stated on his behalf that this concession was without prejudice to the terms of the tenancy agreement and would not be legally binding on him. The defendant having failed to accept the offer of the new tenancy, the plaintiff commenced proceedings in the county court to recover possession. The defendant asked for suspension, under s. 3 of the Landlord and Tenant (Temporary Provisions) Act, 1958, of the execution of the order for possession. The county court judge made an order for possession and refused to suspend the execution of the order under s. 3 of the Act of 1958, on the ground that the defendant had not satisfied him that she had “not unreasonably refused” to accept the proposal for the grant of a new tenancy, within s. 3 (1) (a). The judge held that, although it was not unreasonable to refuse to accept the proffered tenancy, the situation was entirely altered by the offer of the “gentlemen's agreement” and that it was no longer reasonable to decline the offer.

On the appeal, the Court of Appeal held that the so-called “gentlemen's agreement” was in law a nullity, that the defendant had “not unreasonably

refused" the proposal for the grant of a new tenancy, within s. 3 (1) (a), and was entitled to the suspension of the execution of the order for possession for nine months from Jan. 22, 1959, the date of the order. A

On the question of costs, counsel for the defendant asked for costs in the Court of Appeal and in the county court. Counsel for the plaintiff referred to s. 4 (2)* of the Act of 1958 and submitted that the Court of Appeal had no power to make an order for costs except for special reasons (s. 4 (2) (b) of the Act of 1958) or that there should be no order for costs in the circumstances of the present case. B

H. C. Pownall for the defendant, the tenant.

N. E. Wiggins for the plaintiff, the landlord.

LORD EVERSHED, M.R.: The "court" referred to in s. 4 (2) of the Landlord and Tenant (Temporary Provisions) Act, 1958, is the court of first instance, not the Court of Appeal. The Act is providing an exception to the general rule about costs and must be restricted to the case with which it is dealing. If the words "the court" included the Court of Appeal, we could suspend the execution of the order for possession for nine months from the date on which the appeal is allowed. It has, however, been undisputed that we can allow a suspension only from the date of the judge's order. Nothing in the Act of 1958 affects the power of the Court of Appeal as to costs, and we will allow the successful defendant to have the costs of the appeal. There will be no order as to the costs below. C

Appeal allowed.

Solicitors: *W. Timothy Donovan* (for the defendant); *Cain, Tompkins & Co.* (for the plaintiff). E

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

PRACTICE NOTE.

COURT OF PROTECTION.

Person of Unsound Mind—Court of Protection—Practice—Title of proceedings under Trustee Act, 1925. G

The master has directed that para. (1), para. (2), para. (3) and para. (7) of the Practice Note† relating to the title of proceedings in the Chancery Division and dated June 18, 1959, shall, so far as applicable, be followed in the Court of Protection and applied accordingly.

E. F. ATKINSON, H
Chief Clerk and Registrar.

Oct. 1, 1959.

* Section 4 (2) reads: "In proceedings for the recovery of possession of a dwelling-house in which a suspension of execution is granted or refused under s. 3 of this Act (including any application under that section arising out of the grant of such suspension) the court shall not have power to make an order for costs except—(a) where a suspension of execution is refused or revoked in pursuance of sub-s. (6) (b) of that section; or (b) where it appears to the court, having regard to the conduct of the parties respectively in and in connexion with the proceedings, that there are special reasons for the making of such an order."

† Practice Note, [1959] 2 All E.R. 629.

SHARMA v. SHARMA AND DAVIS.

[COURT OF APPEAL (Lord Jenkins, Hodson and Sellers, L.J.J.), July 1, 2, 8, 1959.]

Divorce—Discretion—Exercise on evidence in existing suit—Previous suit between same parties—Subsequent undefended suit—Suspicion of petitioner's evidence—Suspicion due to view formed of petitioner by judge in previous defended suit—Duty of court.

The judge in an undefended divorce suit should assess the evidence given before him and should base his judgment on that evidence; if, for reasons such as the view formed by a court that tried a previous divorce suit between the same parties, the judge is in doubt as to the true facts, he should, unless in a position to reject the evidence given at the hearing, pronounce a decree nisi if the case otherwise merits the exercise of the discretion sought, and should send the papers to the Queen's Proctor for investigation (cf. p. 323, letter D, and p. 324, letter C, post).

Dicta in *Coleman v. Coleman* ([1955] 3 All E.R. at pp. 619, 620) applied.

On Mar. 31, 1958, a suit for divorce in which a husband charged his wife with adultery, and the wife counter-charged adultery and cruelty, was heard. The trial judge found both parties guilty of adultery, but that all the adultery had been condoned. He found the cruelty not proved, and accordingly dismissed the petition. He expressed a very unfavourable opinion of both the husband and the husband's mistress, who had given evidence before him, and said that if he had been called on to do so he would not have exercised his discretion. After this suit the husband discontinued his adulterous association and offered to have the wife back if she would do likewise. The wife did not come back, but continued her adultery. There was a child of the marriage, who was made a ward of court. On a second petition by the husband, which was undefended and in which these facts were proved, it was also proved that the husband wished to marry his former mistress (who did not give evidence). The judge at the second trial refused to exercise his discretion in favour of the husband because, having read the comments of the first trial judge on the husband and his former mistress, he felt doubt as to the true facts. On appeal by the husband to the Court of Appeal fresh evidence that the wife was pregnant by the co-respondent and that she and he wished to marry each other, was before the court, and it was stated that application for expediting the decree absolute would be made (which would involve notifying the Queen's Proctor) if the appeal were allowed.

Held: the old adultery having been condoned, and the husband having taken steps to re-establish the marriage and to prevent the wife's adultery continuing, there had been a change in the situation since the previous hearing and, in accordance with the principles stated by VISCOUNT SIMON, L.C., in *Blunt v. Blunt* ([1943] 2 All E.R. at p. 78), the discretion would be exercised and a decree nisi would be granted.

Per HODSON, L.J.: it was clearly right for the second trial judge to see the judgment in the first suit in order to ascertain the findings of fact of the first trial judge leading up to the conclusion which the latter reached (see p. 323, letter C, post).

Appeal allowed.

[As to the principles by which the court should be guided in exercising its discretion in divorce, see 12 HALSBURY'S LAWS (3rd Edn.) 311, para. 623; and for cases on the subject, see 27 DIGEST (Repl.) 427-431, 3582-3603.]

Cases referred to:

Blunt v. Blunt, [1943] 2 All E.R. 76; [1943] A.C. 517; 112 L.J.P. 58; 169 L.T. 33; 27 Digest (Repl.) 429, 3589.

Coleman v. Coleman, [1955] 3 All E.R. 617; [1955] 1 W.L.R. 1235; 3rd A
Digest Supp.

Appeal.

A husband petitioner appealed against the refusal of Commissioner SIR REGINALD SHARPE, Q.C., on Mar. 25, 1959, to exercise discretion in his favour in respect of his adultery, and to grant him a decree nisi of divorce on the ground of the proved adultery of his wife with the co-respondent. The facts appear in the judgment of HODSON, L.J. B

Gerald Gardiner, Q.C., and *M. P. Picard* for the husband.

The wife and the co-respondent did not appear and were not represented.

After argument on July 1, the hearing was adjourned to July 2, and then again to July 8, for evidence of the co-respondent's willingness to marry the wife to be filed. C

LORD JENKINS: I will ask HODSON, L.J., to deliver the first judgment.

HODSON, L.J., read the following judgment: This is an appeal from a decision of Commissioner SIR REGINALD SHARPE, Q.C., who on Mar. 25, 1959, dismissed the appellant husband's petition for divorce. The learned commissioner refused to exercise his discretion in favour of the petitioner husband in respect of his adultery. D

[HIS LORDSHIP then dealt with a point on which the case is not reported, and continued:] The parties were married on Nov. 30, 1950, being then aged thirty-four and twenty-seven respectively. Both had been previously married. A boy child was born to the parties on Nov. 22, 1951. This child has been a ward of court since April, 1958, and is at present at a boarding school. In 1951 after the conception of the child all intercourse ceased between the parties, but they continued to live together under the same roof, the wife accepting the shelter and support of her husband and the husband accepting such services as the wife was willing to render to him. This situation continued until Mar. 31, 1958, when a suit for divorce was heard by WRANGHAM, J. In that suit the husband charged his wife with adultery with two men called Thomas and Boyce Davis, and the wife counter-charged adultery by the husband with a Mrs. Roberts, and also cruelty. WRANGHAM, J., did not find cruelty to have been proved, he found no adultery had been proved against the man Thomas, that the wife's adultery with Boyce Davis, which had been admitted by her, had been condoned by the parties living together in the circumstances which I have briefly mentioned. He also found that the husband's adultery had similarly been condoned. He found further that neither party had connived at the adultery of the other, but that the wife had by her conduct condoned not to the inception but to the continuance of the husband's adultery. He, therefore, having found condonation on both sides, dismissed the petition as he was bound to do and no question of the exercise of discretion arose. The learned judge did, however, express in strong language his opinion of the parties concerned, including Mrs. Roberts who had given evidence before him, and said that if he had been called on to do so, he would not have exercised his discretion in favour of either. E F G H

After the dismissal of the petition and the rejection of the prayer in the wife's answer, the parties returned to the same house as before but lived separate lives. The husband, however (and in this he was corroborated by Mr. Money, a clerk in the employment of the firm of solicitors acting for him, who gave evidence on his behalf) said that he was prepared to accept the judge's finding and through his solicitors to arrange an interview with his wife at their office. [HIS LORDSHIP then read the husband's evidence, which was corroborated by Mr. Money, in which the husband described the interview on June 5, 1958, between himself and the wife, in the presence of their solicitors, at the husband's solicitors' office. At the interview the husband told the wife that he accepted WRANGHAM, J.'s judgment that he had been in the wrong and that he had I

- A finished with Mrs. Roberts and now saw her only in the presence of her family, who insisted that the adultery should cease. The husband said that he offered to take the wife back in a new flat, which had been offered to him, if she would never see the co-respondent Davis again. The wife replied that she would not see Davis for the next fortnight, and that during that time she would let the husband know what she intended doing. The husband stated that in fact
- B she never let him know, and that the parties never spoke or saw each other about the matter again. His LORDSHIP then continued:] She never accepted that offer [to have her back] and the husband made inquiries and found subsequently in that summer that she was living in adultery with the co-respondent, Boyce Davis. The husband thereupon instructed his solicitors and instituted the present proceedings.
- C The learned commissioner found that the adultery alleged had been proved and that it had never been connived at or condoned, but he refused to exercise his discretion in the husband's favour. He was, I think, embarrassed by the attitude taken by WRANGHAM, J., whose judgment he read. It was clearly right for him to see that judgment in order to ascertain the findings of fact of the learned judge leading up to the conclusion which he reached, but I am of
- D opinion that he was unnecessarily embarrassed by the fact that the learned judge expressed his opinion about the husband and Mrs. Roberts in the way in which he did. The latter had not given evidence before the learned commissioner although she had before WRANGHAM, J. It was for the learned commissioner to assess the evidence given before him and to base his judgment on that evidence.
- E It will be remembered that the observations which the learned judge had made about the exercise of discretion were obiter because the matter of discretion was not before him. The learned commissioner in refusing discretion disclaimed any intention of being fettered by the opinion expressed by WRANGHAM, J. Nevertheless he did say this in his judgment:
- F "Now I myself do not doubt for a single moment that in the present case the exercise of the court's discretion is entirely at large, and that if I think on the facts that it is proper for me to do so, I have power to exercise the court's discretion in favour of the petitioner and to grant him a decree. But the difficulty which I have felt is this: how am I to ascertain the true facts which it is necessary for me to know in order to be in a position to
- G decide the question of the exercise of the court's discretion? The case before me is an undefended one; how can I test anything which the petitioner has told me? I know what view WRANGHAM, J., formed about him in the previous proceedings, where he was cross-examined, and so on. WRANGHAM, J., said this about the petitioner in his judgment: 'In the witness-box'—referring of course to the petitioner's evidence—' (which he occupied for a considerable period) he was found out in a number of deliberate falsehoods and showed himself in my judgment to be a smug and plausible liar'. 'He was in addition, I think, unscrupulous', added WRANGHAM, J., a little further on, and in the judgment there is a reference to the petitioner having invented some of his evidence while he was in the witness-box. The
- H learned judge described Mrs. Roberts, the husband's mistress, as an immoral and untruthful woman whose evidence could be disregarded. I mention his view about Mrs. Roberts because, of course, the whole object of the present case, as appears from the petitioner's present discretion statement, is that he should be free to marry Mrs. Roberts . . . I cannot even be sure that what the petitioner has told me in evidence is true, except, of course, where he is corroborated. It is abundantly clear from the judgment of WRANGHAM, J., that there is a great deal more in this case than superficially appears in this present undefended cause. That is why I have, to a certain extent, considered the previous proceedings and read the
- I

judgment of WRANGHAM, J., which counsel for the husband very properly invited me to do. Manifestly, as it seems to me, I must take account of what WRANGHAM, J., said at the end of his judgment on the question of the exercise of the court's discretion, even though in view of his findings he was dealing with a hypothetical situation. I do not consider myself in any way bound by what WRANGHAM, J., there said, but I do consider that I must take those observations of his into consideration; they are necessarily, in my judgment, material which I am bound to consider."

The learned judge thus expressed himself in doubt as to the true facts. I sympathise with him in this respect. Indeed, in many undefended cases a situation of this kind is likely to arise. Nevertheless I think that, unless the court is in a position to reject the evidence of the witness at the hearing, in a case of this kind the right course is to pronounce a decree nisi if the case otherwise merits the exercise of the discretion sought and to send the papers to the Queen's Proctor for investigation.

I would refer to what was said in this court in *Coleman v. Coleman* (1). That case differed from this in that there what happened was that the respondent, while making no counter allegations against the petitioning wife, made a statement which got into the possession of the court making accusations of an informal nature alleging adultery against her. DENNING, L.J., in considering that matter said (2):

"In my judgment, in view of the one admitted act of adultery (3), the court should exercise its discretion and a decree nisi should be pronounced on the grounds of the husband's adultery, which has been clearly established, but, nevertheless, the court should send the matter to the Queen's Proctor so that he can look into it and see if there are any steps which he thinks he ought to take."

In my judgment I said (4):

"One does not wish to say anything which would lead any trial judge to suppose that it was not for him to ascertain the facts and make up his mind whether or not a witness is telling the truth, and, so far as he is able, difficult though it must necessarily be in these undefended cases, to see that the court is not deceived. Yet in this case, in the state of the evidence as it stands, I feel that the commissioner, the husband not having given evidence in support of his charge of adultery, should have pronounced a decree in the exercise of the court's discretion and sent the matter to the Queen's Proctor for investigation, and I think that that is the course which the court ought to take."

The learned commissioner also said that the adultery with Boyce Davis was a continuation of the wife's previous adultery. I think, with all respect to him, that this is not a correct approach. The old adultery had been condoned and the husband had taken steps (and his evidence was corroborated as to this) to re-establish the marriage and prevent the adultery with Boyce Davis continuing. There was thus, I think, a change in the situation from that which existed when the case was heard before WRANGHAM, J., which was not sufficiently recognised by the learned commissioner although he did appreciate that the earlier adultery had been condoned. There was this further matter which depends on the petitioner's evidence, namely, that at the instigation of Mrs. Roberts' family he had ceased adulterous relationship with her since the hearing before WRANGHAM, J., although he expressed his desire to marry her if free to do so. He was corroborated to this extent by Mr. Money in that he said he told his wife in Mr. Money's presence that he had finished with Mrs. Roberts. I have not referred in detail to Mr. Money's evidence, but he said that he was present during the interview and that in substance what the petitioner said was correct.

(1) [1955] 3 All E.R. 617.

(3) I.e., the adultery by the husband.

(2) [1955] 3 All E.R. at p. 619.

(4) [1955] 3 All E.R. at p. 620.

A The present position is that the wife through her solicitors during the pendency of this appeal has communicated with the petitioner's solicitors and they have written a letter dated June 18, 1959, in support of an application to expedite this appeal made by the petitioner, to this effect:

B "Our client, Mrs. M. Sharma, has handed to us the enclosed medical certificate from which you will see that she is expecting the birth of a child about the first week in August next. Mrs. Sharma has asked us to inquire whether in all the circumstances you would be prepared to apply to the Court of Appeal for the expediting of the appeal against the judgment of Commissioner SIR REGINALD SHARPE, Q.C."

The medical certificate enclosed was dated June 17, 1959, signed by a Dr. Chesser:

C "I certify that in my opinion Mrs. M. Sharma is pregnant. Expected date of delivery about Aug. 8, 1959."

We have now received an affidavit from the co-respondent Boyce Davis dated July 7, 1959, since the hearing of this appeal, to this effect:

D "I am a bachelor and were the above named Mary Sharma free to marry me now there would be no impediment on my part to such marriage. If the Court of Appeal see fit to grant a decree of divorce to the above named petitioner and if in due course the said Mary Sharma is free to marry me then it is my intention to marry her."

E So far as the question of the exercise of discretion is concerned, the matter is governed by what was said by VISCOUNT SIMON, L.C., in the House of Lords in *Blunt v. Blunt* (5), where four points were mentioned for the consideration of the court:

F " (a) the position and interest of any children of the marriage; (b) the interest of the party with whom the petitioner has been guilty of misconduct, with special regard to the prospect of their future marriage; (c) the question whether, if the marriage is not dissolved, there is a prospect of reconciliation between husband and wife; and (d) the interest of the petitioner, and in particular the interest that the petitioner should be able to re-marry and live respectably. To these four considerations I would add a fifth of a more general character, which must indeed be regarded as of primary importance, viz., the interest of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down."

G The interests of the child here would seem to be in favour of a decree being pronounced. If the husband and Mrs. Roberts marry, as he says they intend to do, there will at least be one regular home in which the child can live. It seems to me that the Chancery Division would be in a better position to decide the future of this child if this situation can be brought about than if the court is left with the position that both parties are leading irregular lives.

H On the facts as proved the petitioner's early adultery has been condoned and there was no further adultery on his part after the hearing before WRANGHAM, J., and the wife has, in face of the husband's prohibition, resumed her adulterous association with the co-respondent whom she (and, indeed, the co-respondent supports her in this) desires to marry before the birth of this child which is expected next month. In my view the court should *prima facie* be ready on those facts to exercise its discretion in favour of the husband on the basis of all those matters which I have enumerated from the speech of LORD SIMON which I have read. I put first the interests of the child, but all the other matters for consideration have application to this case.

I I would, therefore, allow the appeal.

In order to expedite the decree absolute, it will be necessary to give notice to the Queen's Proctor who will thus have an opportunity of investigating this case so far as it is possible to do so.

SELLERS, L.J.: I agree with the judgment my Lord has just delivered.

LORD JENKINS: I also am in complete agreement with the judgment delivered by my Lord, to which I cannot usefully add anything.

Appeal allowed.

Solicitors: *Buckeridge & Braune* (for the husband).

[Reported by HENRY SUMMERFIELD, Esq., *Barrister-at-Law.*]

WAGMAN v. VARE MOTORS, LTD.

[COURT OF APPEAL (Morris, Ormerod and Willmer, L.J.J.), July 8, 9, 10, 1959.]

Costs—Payment into court—Admission of liability—Sum awarded equalling sum paid in—Defendants' right to costs subsequent to payment in—Review by Court of Appeal—No materials for exercise of discretion—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5 c. 49), s. 31 (1) (h)—R.S.C., Ord. 22, r. 6.

In an action for damages for personal injuries alleged to be incurred through the negligence of the defendants, the defendants' solicitors wrote to the plaintiff's solicitors on Jan. 27, 1958, stating that they would not be contesting the question of negligence and that the only issue before the judge would therefore be that of damages. On Aug. 18, 1958, the defendants paid £575 into court. At the trial on Oct. 16, 1958, the judge awarded the plaintiff £575 damages. He made an order for the plaintiff to recover his costs up to Aug. 18, 1958, from the defendants but expressly, in the exercise of his discretion, made no order as to the defendants' costs after that date, stating that: "Rather a lot of time has been taken up in court by challenges on points that I have not been impressed by", and that he took into account "the fact that I was not, at any material time, giving less than that sum and was wondering about another £25". On appeal by the defendants on the question of costs (without leave of the judge),

Held: the defendants were entitled to their costs after the date of payment into court, because as from that date the defendants were successful on the one issue that then remained (namely, whether £575 was enough) and, though an order for costs was discretionary, in this case there had been a purported exercise of discretion to deprive successful litigants of costs without any material on which the discretion could have been exercised, and against that an appeal lay without the leave of the court or judge which otherwise would be required by s. 31 (1) (h) of the Supreme Court of Judicature (Consolidation) Act, 1925.

Principle stated by LORD GREENE, M.R., in *Hong v. A. & R. Brown, Ltd.* ([1948] 1 All E.R. at p. 185) followed.

Appeal allowed.

[As to costs after payment into court, see 26 HALSBURY'S LAWS (2nd Edn.) 99, para. 187; and for cases on the subject, see DIGEST (Practice) 874-876, 4156-4163.]

As to depriving a successful litigant of his costs, see 26 HALSBURY'S LAWS (2nd Edn.) 97, 98, paras. 182, 183; and for cases on the subject, see DIGEST (Practice) 854, 3995 et seq.

As to appeal as to costs, see 26 HALSBURY'S LAWS (2nd Edn.) 98, para. 186; and for cases on the subject, see DIGEST (Practice) 924, 925, 4671-4686.]

A Cases referred to:

Brown v. New Empress Saloons, Ltd., [1937] 2 All E.R. 133; 106 L.J.K.B. 331; 156 L.T. 427; Digest Supp.

Campbell (Donald) & Co. v. Pollak, [1927] A.C. 732, 812; 96 L.J.K.B. 1132; 137 L.T. 656; Digest (Practice) 855, 4004.

Findlay v. Railway Executive, [1950] 2 All E.R. 969; 2nd Digest Supp.

B *Hong v. Brown (A. & R.), Ltd.*, [1948] 1 All E.R. 185; [1948] 1 K.B. 515; [1948] L.J.R. 1816; 2nd Digest Supp.

Ritter v. Godfrey, [1920] 2 K.B. 47; 89 L.J.K.B. 467; 122 L.T. 396; Digest (Practice) 854, 4002.

Appeal.

C The plaintiff brought an action against the defendants for damages for personal injuries incurred through their negligence. By a letter written on Jan. 27, 1958, the defendants' solicitors informed the plaintiff's solicitors that the defendants would not be contesting the question of negligence and that the only issue before the judge would therefore be that of damages. On Aug. 18, 1958, they paid £575 into court. On Oct. 16, 1958, THESIGER, J., awarded £575 damages to the plaintiff and made an order that the plaintiff should recover costs up to the date of the payment into court, but made no order as to the costs of either party after that date. He refused the defendants leave to appeal against his order as to costs. D The defendants appealed against the judge's order as to costs. The plaintiff cross-appealed on the ground that the damages awarded were much too low. The cross-appeal was heard first by the Court of Appeal and was dismissed.

E *Martin Jukes, Q.C.*, and *B. Caulfield* for the defendants.
Stephen Chapman, Q.C., and *N. H. Curtis-Raleigh* for the plaintiff.

MORRIS, L.J.: On June 8, 1956, while a passenger in a motor vehicle, the plaintiff had the misfortune to suffer personal injuries as a result of a road collision. He brought an action by writ dated Oct. 28, 1957, and delivered his statement of claim on Dec. 4, 1957. The defence was delivered on Jan. 27, 1958.

F By their defence the defendants denied that they or their agents were guilty of the alleged or any negligence. They said that the collision was caused by an inevitable accident. They made no admissions as to loss, injury or damage and made a general denial in regard to the statement of claim. On the day on which the defence was delivered, however, the professional advisers of the defendants wrote a letter in these terms:

G "We write to inform you that notwithstanding the denial of negligence contained in our clients' defence, on the hearing of the action the question of negligence will not be contested and therefore the only issue which will have to be dealt with by the learned judge will be that of damages."

On the hearing of the summons for directions on Mar. 28, 1958, one order that was H made was that a medical report be agreed if possible, and, if it was not agreed, that medical evidence should be limited to three doctors for each party. The plaintiff had been examined by doctors on many occasions and on Sept. 30, 1958, his solicitors submitted four medical reports to the defendants' solicitors. Those medical reports were agreed on Oct. 3, 1958. It seems plain from a perusal of them that it was not in dispute that the plaintiff's principal injuries were the I result of his being involved in the motor accident.

The case came on for trial before the learned judge on Oct. 16, 1958. The issues being narrowed in the way that I have described, we are told that the trial did not occupy the time of the court for longer than about two hours. The learned judge considered all the matters before him and gave judgment. In the result he fixed the special damages at £200 and the general damages at £375. In regard to the special damage, the statement of claim had contained a number of quantified items which in total came to over £430. At an early stage after the trial was opened, the plaintiff abandoned two large items of special damage

which together amounted to £195. That left items to a total of something over £230, and in the result the learned judge awarded £200. That made the total damages £575. When that figure was announced, leading counsel then appearing for the plaintiff rose and informed the learned judge that that amount was to a penny the amount in court. Learned counsel said: "Your Lordship has a discretion about costs", and he proceeded to refer to what the learned judge had said in regard to parts of the physical injuries, for the learned judge had divided the £375 general damages by reference to particular physical injuries. The learned judge was then asked to deal with the question of costs. The defendants not unnaturally asked that they should have costs as from the date of the payment into court. The learned judge did not take that view and the order he made was that the plaintiff should have judgment for the amount found by him, with costs down to the date of the payment into court but that there should be no order as to costs from that date. Payment into court had been made on Aug. 18, 1958.

The defendants appeal to this court in regard to that order. They appeal by notice of appeal dated Nov. 24 stating these as the grounds:

"That the learned judge (1) in purporting to exercise his discretion on costs failed to act judicially, (2) went wrong in principle when in purporting to exercise his discretion he took into account the possibility that he, the learned judge, might have awarded the plaintiff a sum in damages greater than the sum that the defendants had paid into court, (3) failed to exercise his discretion at all, (4) deprived the defendants of their costs of the action after the date of payment into court although taking into account the facts that the sum paid into court was equal to the sum awarded to the plaintiff and that the defendants had admitted negligence on Jan. 28, 1958, the defendants were a successful party in the action and were entitled to their costs from the date of payment into court."

There followed a cross-notice of appeal by the plaintiff, who contested the award of the learned judge submitting that it was much too low. The two appeals came on together in this court and we thought that it was naturally convenient to hear the second one first. We decided that appeal and, following the rules which govern us, we felt compelled to come to the conclusion that the appeal as to the amount of damages could not succeed. This appeal, therefore, raises the question as to the order in regard to costs.

When the hearing of the appeal began, counsel for the plaintiff made the submission to us that it was not open to the defendants to appeal. Costs were, of course, in the discretion of the learned judge. It is unnecessary to read the words of s. 50 of the Supreme Court of Judicature (Consolidation) Act, 1925 (1), and the provisions of R.S.C., Ord. 65, r. 1. Counsel relied on the statutory provision contained in s. 31 (1) (h) of the Supreme Court of Judicature (Consolidation) Act, 1925, which reads:

"No appeal shall lie— . . . (h) without the leave of the court or judge making the order, from an order of the High Court or any judge thereof made with the consent of the parties or as to costs only which by law are left to the discretion of the court."

The defendants asked the learned judge for leave to appeal in regard to costs but the learned judge did not give leave. Counsel for the plaintiff therefore submits that the words of the statute just read are directory and preclude the prosecution of this appeal.

This topic in regard to appeals as to costs has been before the courts on many occasions and I think that I can usefully refer to the opening passage in the judgment of LORD GREENE, M.R., in this court in *Hong v. A. & R. Brown, Ltd.* (2).

(1) 18 HALSBURY'S STATUTES (2nd Edn.) 486.

(2) [1948] 1 All E.R. at p. 185; [1948] 1 K.B. at p. 517.

A In that case a preliminary objection was taken that, having regard to the provision of the Act of 1925 to which I have referred, appeal as to costs only could not be brought without the leave of the judge. LORD GREENE, M.R., said:

B "This is an appeal on a matter of costs only. Such an appeal cannot be brought without the leave of the court or a judge by reason of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (1) (h), but that statement requires the qualification that, as costs are in the discretion of the judge, it is always possible to attack his order if it can be shown that the discretion has never really been exercised. In that expression I would include two matters, each of which nullifies the purported exercise of a judicial discretion. One matter is the failure to act as a judge should act, i.e., act judicially; the other is really a branch of the same thing, namely, to purport to exercise discretion without any materials on which discretion can be exercised."

C We were naturally referred to many passages in the speeches in *Donald Campbell & Co. v. Pollak*. VISCOUNT DUNEDIN said (3):

D "The position under the Judicature Act of the Court of Appeal is very peculiar. When an appeal comes to them as to costs awarded by the discretion of a judge, they cannot exercise their discretion instead of his unless leave to appeal from his order as to costs has been given by him. By a long series of decisions the Court of Appeal has held that that does not prevent them upsetting what the judge has done if they can find that he had no proper materials on which his discretion was exercised."

VISCOUNT SUMNER said (4):

E "I should also like to point out, what I think may be very important in any further proceedings, that I do not understand your Lordships to pronounce any conclusion as to the validity of the practice, long as it has prevailed in the Court of Appeal, of entertaining appeals from a judge below, brought without his leave, against the exercise of his discretion as to costs when sitting without a jury."

F VISCOUNT CAVE, L.C., quoted (5) what LORD STERNDALE, M.R., had said in *Ritter v. Godfrey* (6):

G "This was a case tried without a jury before the judge alone, and therefore in the absence of an order by him neither party is entitled to any costs. It therefore differs from a case tried before a jury, where there is a statutory right to costs if there be no order to the contrary. But there is such a settled practice of the courts that in the absence of special circumstances a successful litigant should receive his costs, that it is necessary to show some ground for exercising a discretion by refusing an order which would give them to him. The discretion must be judicially exercised, and therefore there must be some grounds for its exercise, for a discretion exercised on no grounds cannot be judicial. If, however, there be any grounds, the question of whether they are sufficient is entirely for the judge at the trial and this court cannot interfere with his discretion. On the authorities as they now stand the line between cases tried before a jury and cases tried by a judge is very fine."

H The Lord Chancellor went on (7):

I "My Lords, it appears to me that the true view is substantially that taken by LORD STERNDALE in the above quoted passage in his judgment in *Ritter v. Godfrey* (8), although I would express it in somewhat different language. A successful defendant in a non-jury case has no doubt, in the absence of special circumstances, a reasonable expectation of obtaining an order for the payment of his costs by the plaintiff; but he has no right to costs unless and

(3) [1927] A.C. at p. 757.

(5) [1927] A.C. at p. 809.

(7) [1927] A.C. at p. 811.

(4) [1927] A.C. at p. 765.

(6) [1920] 2 K.B. at p. 52.

(8) [1920] 2 K.B. at p. 52.

until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion, like any other discretion, must of course be exercised judicially, and the judge ought not to exercise it against the successful party except for some reason connected with the case. Thus, if—to put a hypothesis which in our courts would never in fact be realised—a judge were to refuse to give a party his costs on the ground of some misconduct wholly unconnected with the cause of action or of some prejudice due to his race or religion or (to quote a familiar illustration) to the colour of his hair, then a Court of Appeal might well feel itself compelled to intervene. But when a judge, deliberately intending to exercise his discretionary powers, has acted on facts connected with or leading up to the litigation which have been proved before him or which he has himself observed during the progress of the case, then it seems to me that a Court of Appeal, although it may deem his reasons insufficient and may disagree with his conclusion, is prohibited by the statute from entertaining an appeal from it.”

Having regard to those various passages, it seems to me that we should follow what LORD GREENE, M.R., said in the words that I have quoted (9), and the issue, I think, is whether counsel for the defendants can in this case bring his submission within those words. Counsel for the plaintiff indicated that there might be some occasion on which somebody might wish to obtain a pronouncement in the highest tribunal, but it seems to me that we must follow what LORD GREENE, M.R., said.

That being so, the question arises: What was the position before the learned judge? Of course, he did not know about the payment into court until he had given judgment. When he was told of it, then by the provisions of R.S.C., Ord. 22, r. 6, he was required, in exercising his discretion as to costs, to take into account both the fact that money had been paid into court and the amount of such payment. There was some discussion before the learned judge after he was told of the payment into court. At an early stage in the discussion (which is recorded in the shorthand note) the learned judge said this: “I am inclined to think the proper order would be no order as to costs”—That meant no costs as from the date of payment in. The learned judge then said:

“Rather a lot of time has been taken up in court by challenges on points that I have not been impressed by, but in any case I think I have a discretion in this case, have I not?”

I have referred to the position in regard to the special damage and the way in which the figure was eventually fixed. The learned judge was not saying that there was any improper challenge; nor does a reading of the quite short transcript suggest that any line was taken on which adverse criticism could be made. There followed further discussion, and finally, learned counsel having said to him that plainly there was a discretion, the learned judge said:

“I take into account the fact that the sum of £575 has been paid into court; I take into account, in (I am certain) my discretion, the fact that I was not, at any material time, giving less than that sum and was wondering about another £25; and in all the circumstances I think that the proper course is to make no order as to costs.”

We were referred by counsel for the plaintiff to *Brown v. New Empress Saloons, Ltd.* (10) in this court. That case arose before the rule as to payment in was altered to its present form, and SLESSER, L.J., said that he agreed with the comment in the ANNUAL PRACTICE that the question whether liability was or was not denied when the payment in was made would still seem to be important. GREENE, L.J., ended his judgment in these words (11):

(9) See p. 329, letters A to C, ante. (10) [1937] 2 All E.R. 133.

(11) [1937] 2 All E.R. at p. 138.

A "I agree that, on the facts of this case, it is not possible for us to say that, in exercising that discretion, he omitted to take into account matters which he ought to have taken into account, or that he exercised it on some improper ground, or with a complete absence of ground."

A helpful authority to have in mind is *Findlay v. Railway Executive* (12), in this court. The headnote is helpful:

B "In an action for damages, brought by the plaintiff in respect of personal injuries which she had suffered in a railway accident, the defendants admitted liability and paid money into court. At the trial the plaintiff recovered a less amount than had been paid in. The judge gave the plaintiff the costs, notwithstanding the payment into court of a sum in excess of the amount of damages awarded. He gave no reason for penalising the defendants in costs, considering that the matter was in his absolute discretion. On appeal, Held: a defendant who has paid money into court which exceeds the sum awarded to the plaintiff is a 'successful party' within the meaning of the principle laid down by VISCOUNT CAVE, L.C., in *Donald Campbell & Co. v. Pollak* (13) and is entitled to be paid his costs as from the date of payment in."

D SOMERVELL, L.J., referred to the speech of the Lord Chancellor in *Donald Campbell & Co. v. Pollak* (13) and his citation of *Ritter v. Godfrey* (14) and said (15):

E "The first point to be decided here is whether a defendant who has paid money into court which has not been taken out and exceeds the sum awarded to the plaintiff is a successful litigant or a successful party within those two statements of the law. I hold that he is, and that the principles there laid down apply. The main purpose of the rules for payment into court is the hope that further litigation will be avoided, the plaintiff being encouraged to take out the sum paid in, if it be a reasonable sum, whereas, if he goes on and gets a smaller sum, he will be penalised wholly or to some extent in costs. Once, therefore, the money has been paid in, the lis between the parties simply is: Is that sum sufficient to cover the damage which has been suffered. Prima facie, therefore, the defendants in the present case are entitled to be paid their costs as from the date of payment in, but, of course, as in other cases, there may be circumstances connected with the case which entitled the judge to make some order other than that of giving the successful litigant his costs, and counsel for the plaintiff submitted that there were such circumstances in this case."

G The learned lord justice referred to those submissions and ended (15):

H "If I am right in holding that the defendants in the circumstances of this case are the successful litigants or parties then, on what I have read from the opinion of VISCOUNT CAVE, L.C., in the House of Lords, the learned judge went wrong in principle, and his order cannot stand, and this appeal must be allowed."

COHEN, L.J., began his judgment with these words (15):

I "I am of the same opinion. Counsel for the plaintiff urged that, on the authorities, we should not interfere with the learned judge's exercise of his discretion unless either there was no material on which he could have reached the conclusion he did, or it was plain on the evidence and from his judgment that he had gone wrong in principle in reaching that conclusion."

I propose to approach this case by considering whether, within the words used by GREENE, L.J., there was a purported exercise of the discretion without any materials on which that discretion could be exercised. It seems to me plain in this case that, although the learned judge naturally did not know of the payment

(12) [1950] 2 All E.R. 969.

(14) [1920] 2 K.B. 47.

(13) [1927] A.C. 732.

(15) [1950] 2 All E.R. at p. 971.

in, the real issue between the parties ever after Aug. 18, 1958, was whether £575 was or was not the right sum for the plaintiff to receive. After that date the plaintiff could have had £575. The plaintiff decided to go on with the litigation in the hope of getting more. The plaintiff was unsuccessful in his endeavour, but at all times after Aug. 18 he could have had the amount that was awarded by the learned judge. The defendants, therefore, were successful on the issue that was being contested before the learned judge. A

Was there then any ground on which the learned judge could exercise his discretion as he did? I have read the earlier passage in which the learned judge had said that he had not been impressed by some challenges in regard to the special damage. If the learned judge had wanted to follow up that matter, it could only have meant that to some very very small extent he might have made some special order. Sometimes a judge may say that the costs of a particular document are not to be allowed because it was wholly unnecessary. If the point referred to had remained within the judge's real consideration, it is conceivable that he might have said that some very very small part of the costs should be specially awarded to the plaintiff. But I do not read the transcript as denoting that that matter was operative in the learned judge's mind. What he said was that he took into account, in his discretion, the fact that he had never thought of giving less than £575 but that in his mind there had been times when he had thought of giving more than that amount. This shows the great care that the learned judge devoted to the matter, but, with the utmost respect, I do not feel able to accept the view that that reason is any valid reason for the exercise of a discretion. The learned judge thought over the matter and he came to his conclusion, to which he adhered, that £575 was the right amount. In my judgment it cannot be a good basis for any exercise of discretion to say that possibly a larger amount might have been awarded. It seems to me, therefore, that on any showing such a consideration could not properly be a component element of any exercise of discretion. In this case that appears to have been the operative reason for the exercise of discretion in the way in which it was exercised. That operative reason when analysed contains no substance. I think, therefore, that counsel for the defendants does bring this case within the words of LORD GREENE, M.R., (16) and that here was a purported exercise of the discretion without any materials on which it could be exercised. B C D E F

We asked counsel for the plaintiff whether, if we were of that opinion, he would want the matter to go back to the learned judge for an order to be made, but he said that it would be appropriate for us to deal with the matter. For the reasons that I have given it seems to me that we must disturb the decision of the learned judge and that we should say that in this case the costs after the date of payment in should be the costs of the successful party, namely, the defendants. G

ORMEROD, L.J.: I am in full agreement with the reasons which have been given by my Lord, and, although we are differing from the learned judge, I feel that there is nothing that I can usefully add in this case. H

WILLMER, L.J.: I also agree.

Appeal allowed. Judgment for the defendants for costs from date of payment into court.

Solicitors: Ponsford & Devenish, Tivendale & Munday (for the defendants); R. I. Lewis & Co. (for the plaintiff).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

A
Re WALKDEN SHEET METAL CO., LTD.

[CHANCERY DIVISION (Wynn-Parry, J.), May 11, July 27, 1959.]

B
Execution—Company—Execution not completed before winding-up—Creditor's rights—Money paid to avoid sale—Money remaining in hands of sheriff's officer—Notice of winding-up resolution given more than fourteen days after payment—Companies Act, 1948 (11 & 12 Geo. 6 c. 38), s. 325 (1), s. 326 (1), (2).

C
D
On Apr. 21, 1958, a debtor company, against whom a creditor had issued execution and of whose goods a bailiff, an officer to the Sheriff of Lancashire, was in possession, paid £500 to the bailiff to avoid a sale. Notice of a meeting at which a resolution for the voluntary liquidation of the company was to be proposed was received by the sheriff on May 8, 1958, and the resolution was duly passed on May 16. On May 27, 1958, the bailiff paid the balance of the £500, after making proper deductions, to the sheriff. The liquidator claimed to be entitled to that balance under s. 326 (2)* of the Companies Act, 1948, by which a liquidator is entitled to money paid to avoid sale if within fourteen days notice is served on the sheriff of a meeting at which a resolution for voluntary winding-up is to be proposed. The liquidator also claimed to be entitled to the balance under s. 325 (1)* or s. 326 (1)* of the Act of 1948.

Held: the liquidator was not entitled to the balance of £500 because—

E
(i) the fourteen days allowed by s. 326 (2) of the Companies Act, 1948, began to run from the time when the debtor company paid the officer of the sheriff a sum of money in order to avoid sale, viz., in the present case, Apr. 21, 1958, and therefore had expired before May 8, 1958, when the sheriff received notice of the meeting, and

F
(ii) the moneys paid to avoid sale were neither “the benefit of the execution” within s. 325 (1) of the Companies Act, 1948, nor “received in part satisfaction of the execution” within s. 326 (1), so that those enactments were inapplicable.

[**Editorial Note.** The present case may conveniently be compared with the decision in *Bluston & Bramley, Ltd. v. Leigh* ([1950] 2 All E.R. 29) as an instance where the notice of meeting was received within fourteen days but was followed by a resolution for compulsory, not voluntary winding-up, so that s. 326 (2) was not satisfied for that reason.

G
As to restrictions on the rights of creditors as regards execution, see 6 HALSBURY'S LAWS (3rd Edn.) 690, para. 1377.

For s. 325 and s. 326 of the Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 707, 708.]

Cases referred to:

H
Andrew, Re, Official Receiver v. Standard Range & Foundry Co., Ltd. (No. 2), [1936] 3 All E.R. 450; 155 L.T. 586; sub nom. *Re Andrew, Ex p. Official Receiver (Trustee) (No. 2)*, [1937] Ch. 122; 106 L.J.Ch. 195; Digest Supp.

Bellyse v. M'Ginn, [1891] 2 Q.B. 227; 65 L.T. 318; 5 Digest 818, 6948.

I
Godwin, Re, Ex p. Trustee v. Morris, Re Godwin, Ex p. Trustee v. British Reinforced Concrete Engineering Co., [1934] All E.R. Rep. 140; [1935] Ch. 213; 104 L.J.Ch. 189; 152 L.T. 392; Digest Supp.

Holland, Re, Ex p. Warren, (1885), 15 Q.B.D. 48; 54 L.J.Q.B. 320; 53 L.T. 68; 5 Digest 920, 7532.

Samuels, Re, Ex p. Trustee v. Tee, [1934] All E.R. Rep. 146; [1935] Ch. 341; 104 L.J.Ch. 197; 152 L.T. 454; Digest Supp.

* For the relevant terms of s. 326 (2), s. 325 (1) and s. 326 (1) of the Companies Act, 1948, see pp. 335 and 336, 334, 335, post.

Adjourned Summons.

The liquidator in the creditors' voluntary winding-up of Walkden Sheet Metal Co., Ltd., applied to the court by originating summons for a declaration that he, as liquidator, was entitled to the net sum of £448 16s. 10d., the balance of the sum of £500 recovered from the company on or about Apr. 21, 1958, at the suit of Douglas Elliot & Co., Ltd., a creditor and now held by the Sheriff for the County of Lancaster.

J. P. Brookes for the applicant, the liquidator.

R. O. C. Stable for the respondent, the creditor.

Cur. adv. vult.

July 27. The following judgment of **WYNN-PARRY, J.**, was read by **VAISEY, J.**: This is a summons by the liquidator in the creditors' voluntary winding-up of the company asking for a declaration that he is

"as such liquidator as aforesaid entitled to the net sum of £448 16s. being the balance of the sum of £500 recovered from the said Walkden Sheet Metal Co., Ltd., on or about Apr. 21, 1958, at the suit of the said Douglas Elliot & Co., Ltd., and now held by the Sheriff for the County of Lancaster."

The relevant facts may be stated shortly as follows. On Apr. 2, 1958, Douglas Elliot & Co., Ltd. (to whom I will refer as "the creditor") issued a writ of fi. fa. against the company. In the middle of that month an arrangement was come to with the aid of a Mr. Bowling, who was the bailiff or man in possession, under which on Apr. 21, 1958, £500 was paid by the company to him (in respect of the company's total indebtedness of £1,532) and the company undertook to pay off the balance by instalments of £70 per week, none of which in fact it was able to pay. Under cover of a letter dated May 7, 1958, the necessary notices convening meetings of creditors and shareholders for the purpose of placing the company in a creditors' winding-up were sent out to the appropriate persons (including the under-sheriffs), and on May 16, 1958, the company went into voluntary liquidation and the present liquidator was appointed. By letter dated May 20, 1958, the liquidator wrote to the under-sheriffs, Messrs. Wilson, Wright & Ashcroft, notifying them that the company was in liquidation and enclosing a copy of the relevant resolution. He also requested them to hand over the balance in their hands of the £500 paid by the company to Mr. Bowling. On May 27, 1958, Mr. Bowling transmitted £463 9s. 4d. to the under-sheriffs being the balance of the £500 less a debt which he had paid and his costs. The under-sheriffs now hold a net sum of £448 16s. 10d. in their hands and it is the destination of this sum which is in dispute.

Counsel for the liquidator contends that the liquidator is entitled as against the creditor to the balance in the hands of the under-sheriffs under s. 325 (1) or s. 326 (1) or s. 326 (2) of the Companies Act, 1948. It is agreed that the £500 paid by the company to Mr. Bowling is properly to be regarded as "money paid to avoid sale". This is a phrase which appears in s. 326 (2) and, at any rate at first sight, it would be surprising if such moneys, which are dealt with expressly in s. 326 (2), were found to be dealt with also in s. 325 (1) and s. 326 (1).

Section 325 (1) so far as material provides:

"Where a creditor has issued execution against the goods or lands of a company or has attached any debt due to the company, and the company is subsequently wound up, he shall not be entitled to retain the benefit of the execution or attachment against the liquidator in the winding-up of the company unless he has completed the execution or attachment before the commencement of the winding-up: Provided that—(a) where any creditor has had notice of a meeting having been called at which a resolution for voluntary winding-up is to be proposed, the date on which the creditor so had notice shall, for the purposes of the foregoing provision, be substituted for the date of the commencement of the winding-up; (b) a person who

A purchases in good faith under a sale by the sheriff any goods of a company on which an execution has been levied shall in all cases acquire a good title to them against the liquidator; and (c) the rights conferred by this subsection on the liquidator may be set aside by the court in favour of the creditor to such extent and subject to such terms as the court may think fit."

This case, so far as a consideration of s. 325 (1) is required, appears to me to raise a new point. It is established that the phrase "the benefit of the execution" does not refer to "the fruits of the execution" but to the charge which is conferred on the creditor as a result of the issue of execution: *Re Andrew, Official Receiver v. Standard Range & Foundry Co., Ltd.* (No. 2) (1), approving and applying *Re Godwin, Ex p. Trustee v. Morris, Re Godwin, Ex p. Trustee v. British Reinforced Concrete Engineering Co.* (2) and *Re Samuels, Ex p. Trustee v. Tee* (3). It is further clear that any money received by the sheriff or his officer and actually paid over to the creditor is outside the charge. The question, which, up to now, does not appear to have arisen for judicial decision, is what is the position of money paid to the sheriff or his officers in order to avoid sale, where that money still remains in the hands of the sheriff or his officer at the commencement of the winding-up? In my judgment, the correct view is that money so paid does not come within the charge created by the issue of execution: it is outside it: it is paid to prevent the charge operating, at any rate pro tanto, on the property of the debtor: and, therefore, it is not included within the phrase "the benefit of the execution" in s. 325 (1). I therefore conclude that s. 325 (1) has no application to the present case.

I now turn to s. 326 (1) which reads as follows:

E "Subject to the provisions of sub-s. (3) of this section, where any goods of a company are taken in execution, and, before the sale thereof or the completion of the execution by the receipt or recovery of the full amount of the levy, notice is served on the sheriff that a provisional liquidator has been appointed or that a winding-up order has been made or that a resolution for voluntary winding-up has been passed, the sheriff shall, on being so required, deliver the goods and any money seized or received in part satisfaction of the execution to the liquidator, but the costs of the execution shall be a first charge on the goods or money so delivered, and the liquidator may sell the goods, or a sufficient part thereof, for the purpose of satisfying that charge."

G That subsection appears to me to be dealing entirely with execution properly so-called. The vital words are "before the sale thereof or the completion of the execution". This phrase is followed by the words "by the receipt or recovery of the full amount of the levy", but later reference is made to "any money seized or received in part satisfaction of the execution". In my view money paid in order to avoid sale is not money paid in or towards satisfaction of the execution, but money paid to prevent or halt the execution, and therefore when the section refers to money received, it is not talking of money received to avoid sale, but of money received in the carrying out of the execution. Execution is a process designed to carry into effect the charge to which I have referred in discussing s. 325 (1). No case was cited which deals directly with this point, but, on the true construction of the wording of s. 326 (1), I take the view that moneys paid in order to avoid sale do not fall within its purview.

I There remains s. 326 (2) which deals expressly with money paid to avoid sale, and which, in my view, is the statutory provision which governs this case. It provides:

"Subject to the provisions of sub-s. (3) of this section, where under an execution in respect of a judgment for a sum exceeding £20 the goods of a

(1) [1936] 3 All E.R. 450; [1937] Ch. 122.

(2) [1934] All E.R. Rep. 140; [1935] Ch. 213.

(3) [1934] All E.R. Rep. 146; [1935] Ch. 341.

company are sold or money is paid in order to avoid sale, the sheriff shall deduct the costs of the execution from the proceeds of the sale or the money paid and retain the balance for fourteen days, and if within that time notice is served on him of a petition for the winding-up of the company having been presented or of a meeting having been called at which there is to be proposed a resolution for the voluntary winding-up of the company and an order is made or a resolution is passed, as the case may be, for the winding-up of the company, the sheriff shall pay the balance to the liquidator, who shall be entitled to retain it as against the execution creditor."

As it is agreed that the £500 is to be regarded as money paid to avoid sale, the sole question which arises under this subsection is when the period of fourteen days began. For the liquidator it was contended that the period began on May 27, 1958, when Mr. Bowling transmitted the balance of money in his hands to the under-sheriffs. If that contention is correct, then the statutory period of fourteen days had not elapsed by the time the notices of meetings for voluntary liquidation were received on May 8, 1958. On the other hand, it is contended on behalf of the creditor that the period of fourteen days started on Apr. 21, 1958, when the £500 was paid by the company to Mr. Bowling: in which case the period of fourteen days had expired before May 8, 1958.

The argument on behalf of the liquidator is based on the contention that the statutory period does not begin to run until the money is in the hands of the sheriff or the under-sheriff, and that it cannot be said to have been in his hands within the provisions of the subsection until May 27, 1958, because prior thereto it was in the hands of Mr. Bowling who is not a person falling within the definition of "sheriff" in s. 326 (4): see *Re Holland, Ex p. Warren* (4) and *Bellyse v. M'Ginn* (5). I agree with this argument to the extent that Mr. Bowling is not within the definition; but to my mind that does not conclude the matter. It was contended for the creditor that immediately after the receipt of the money by Mr. Bowling on Apr. 21, 1958, he could, after making all proper deductions, have properly paid the balance to the creditor. For the reasons which follow, I am unable to accept this contention. In my view, the proper way in which to approach this question is to consider the position of Mr. Bowling and his relationship to the sheriff. Mr. Bowling is described on his notepaper, and in my view correctly described as "Officer to the Sheriff of Lancashire". Therefore, although he does not fall within the definition "sheriff" in s. 326 (4), he is one who is employed by and is responsible to the sheriff: and his powers and rights cannot be greater than those of the sheriff. It follows, in my view, that even though he makes, as he did in this case, an arrangement to receive money on behalf of the creditor, as that money was paid by the company in order to avoid sale, he must be regarded as receiving money for the purposes of s. 326 (2) on behalf, in the first instance, of the sheriff. If that is right, then just as the sheriff would be bound, so he, on behalf of the sheriff, would be bound to retain the money for the statutory period of fourteen days. But, on that reasoning, it must follow that the statutory period of fourteen days started on Apr. 21, 1958. On that basis the period had expired before receipt by the under-sheriffs of the notices of the meetings on May 8, 1958.

I think that support for this view is to be found in the language of s. 326 (2). The material words are "... where ... money is paid in order to avoid sale ... the sheriff shall ... retain the balance for fourteen days". The force of that language is that the fourteen days runs from payment. There is no room for the interposition of a hiatus during which the money is held by someone other than the sheriff (as defined in s. 326 (4)). Thus it seems to me that the only sensible construction to place on the subsection is to say that once the debtor pays to an officer of the sheriff a sum of money in order to avoid sale, time begins to run in

A favour of the creditor. Any other interpretation must result in unfairness to the creditor. The policy of the legislature is that, after payment, only a limited period is to elapse before the creditor is to have the benefit of the payment. It cannot be right that where, through events quite beyond the control of the creditor, the money is not paid by the officer of the sheriff to the sheriff for some time—with the result that the sheriff does not actually handle the money until a date within fourteen days of receiving the notices of meetings for liquidation—the period should be treated as starting from the date of actual receipt by the sheriff and the creditor thus be deprived of the right to receive the money.

B For these reasons, in my view, this summons must be dismissed with the usual order as to costs, viz., that the liquidator will pay the taxed costs of the creditor, and be entitled to retain those costs and his own costs of the summons out of the assets of the company in the course of the liquidation.

C Order accordingly.

Solicitors: *Menassé & Tobin*, agents for *Whittingham, Glass & Morrison*, Manchester (for the applicant); *Ward, Bowie & Co.*, agents for *Booth, Wade, Lomas-Walker & Co.*, Leeds (for the respondent.)

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

NEWTON v. EDGERLEY.

E [MANCHESTER ASSIZES (Lord Parker, C.J.), July 16, 17, 1959.]

Child—Negligence—Parent's liability—Firearms—Child allowed to have .410 gun.

The defendant, a farmer, allowed his son, S., aged twelve years, to buy himself a .410 gun and showed him how to use it. Neighbouring farmers allowed their children, at any rate at the age of fourteen, to use guns. F The defendant told S. that he was not to take the gun off the farm and was not to use the gun when other children were present. Accordingly the defendant did not instruct S. on the proper handling of the gun if he were in the presence of others. Disobeying the defendant's instructions, S. went out shooting with four other boys including the plaintiff. All the boys except the plaintiff had firearms. While they were walking along in single G file, S., who was immediately behind the plaintiff, was carrying his gun, which was loaded and cocked, at an angle pointing towards the ground. The boy behind S., probably endeavouring to take S.'s gun, pulled the trigger. The gun fired and the plaintiff was shot in the right heel. In an action against the defendant for damages for negligence,

H **Held:** on the facts the defendant was liable in negligence in allowing S. (whom the court found to be a boy who was young for his age) to have the use of the gun because, though the defendant had ordered S. not to use the gun in the presence of other children, the order was one which the defendant could not possibly see was obeyed, and the defendant had not given S. instructions how to handle the gun when other persons were present.

I *Donaldson v. McNiven* ([1952] 2 All E.R. 691) distinguished.

[As to the liability of a parent where a child causes injury to another person by the use of a dangerous thing, see 21 HALSBURY'S LAWS (3rd Edn.) 150, para. 335; and for cases on the subject, see 36 DIGEST (Repl.) 81, 438, 82, 443.]

Case referred to:

Donaldson v. McNiven, [1952] 2 All E.R. 691; 36 Digest (Repl.) 82, 443.

Action.

The plaintiff, an infant suing through his mother as next friend, claimed

damages against the defendant for personal injuries sustained through the negligent discharge of a .410 gun by the defendant's son, who was then twelve years old. The facts are stated in the judgment. A

Fenton Atkinson, Q.C., and *S. R. Baker* for the plaintiff.
G. Heilpern for the defendant.

LORD PARKER, C.J.: In this action an infant, Harold James Newton, B by his mother as next friend, is suing the father of another boy who, on Apr. 18, 1957, shot the infant plaintiff in the right leg. The defendant's son, Stuart, was twelve years of age in April, 1957. In about February, 1957, Stuart had bought a .410 gun out of his savings. He bought it from an uncle with the full approval and permission of the defendant. Thereafter on two occasions the defendant instructed him in the use of the gun, and the boy himself went out on occasions—he thinks about twice a week—to shoot rats, pigeons, rabbits C and the like on the defendant's farm. The defendant took the view that Stuart was a careful and obedient boy and he gave Stuart instructions that he was not to go with the gun off the farm. One reason for that was that he had not got a licence and so long as he was on the defendant's farm he did not require one. The defendant told Stuart that, when on the farm, he should not use his D gun when other children were present. For that the defendant gave the very sensible reason that, when boys of that age get together, they may be larking and anything can happen with a gun.

On Apr. 18, 1957, Stuart was approached by two other boys, Harrison, who was two years older, and the son of a neighbouring farmer, and another child of fourteen, called Plant, to go shooting. He arranged to meet them in a wood, E but on the way there his elder brother stopped him and reminded him of the defendant's instructions. On that occasion Stuart withstood temptation and went back home, but a little later Harrison and Plant called for him and he succumbed to the temptation and went out with them taking his gun. They met two other boys, the infant plaintiff and another boy called Antrobus. They eventually lunched with Harrison's father at his farm and after lunch the five F boys went off to see what they could get. They went into a place called Clay Pits Woods. They first went to the pit, which was full of water and which they thought to contain water fowl, and they stood on the bank two feet apart ready to shoot anything that got up. Harrison also had a .410 gun, Plant had an air rifle, Antrobus had an air pistol, and the only one who had no firearm at all was the infant plaintiff. After a while they gave up at the pit and turned G to go through the wood in single file. Plant led the way. He was followed by Harrison, then by the infant plaintiff, then by the defendant's son, Stuart, and, last, by Antrobus. They had only gone about three yards when Antrobus (who was older than Stuart, he being also about fourteen) came up behind and tried to slip his arm under Stuart's arm in order to take the gun. At that time Stuart was carrying the gun under his right armpit in his right hand, with the gun H pointing at an angle towards the ground, but it was loaded and it was cocked. What Antrobus was trying to do was uncertain. He may have been trying to take the gun out of Stuart's hand; probably he wanted to have a try with it. At any rate, Antrobus got his left hand on the trigger and pulled it and it went off. It shot the infant plaintiff, who was about two yards ahead, in the right heel. I

In those circumstances, it was submitted on behalf of the plaintiff, first, that a father exercising reasonable care ought not to allow a child of twelve to have a .410 gun, which can be a very lethal weapon. Alternatively it was said that, if he was to be allowed to have a .410 gun, then he must either be supervised when using it or must be given very strict or very careful instructions as to its use. With regard to the first way in which the matter was put, the defendant said:

"I see nothing wrong in allowing a boy of twelve—certainly my boy of

A twelve—to have a .410 gun. All the farmers around who have small children allow their children to have guns.”

He did not specify the age of the children of those farmers around who have guns, but clearly, as this case shows, boys of fourteen, at any rate, are allowed by their fathers to go out with guns. The defendant further said that he gave his son the instructions to which I have already referred, and his case is that the son went out in disobedience to those instructions and that, accordingly, he, having done the best that he could to supervise his son, is under no liability in the matter.

B The question of liability must depend on the exact facts of every case. Negligence is a failure to use reasonable care in all the circumstances. I have seen the defendant's son; he is now fourteen years old. I take the view that now he is young for his age, and at twelve he must have been a very young, immature boy. C I am not saying anything against him; he was probably exercising the best care that he knew. Moreover, in this case there is evidence, as I have said, of neighbouring farmers who had small children and allowed their children to use guns. Accordingly the defendant must have realised the enormous temptation for any boy to go out and join the other boys in shooting. True, he gave instructions that his son was not to do so, but they were instructions which the defendant D could not possibly see were always obeyed, and, as this case shows, the son eventually succumbed to the temptation of going out with others.

In those circumstances, I take the view that in the exercise of reasonable care the defendant either ought to have prevented his son from having the gun at all or, if he had the gun, the defendant ought to have realised that his son would sooner or later go out with others and, accordingly, he should have given him E very careful instructions as to the use of the weapon if others were present. I find that the defendant never instructed his son as to the way to handle the weapon when others were present and, in particular, if he was walking with others in single file, for the very good reason that the defendant had forbidden the son to go out with others. At the time of the accident the son was obeying F the defendant's instructions which were that, when the gun was loaded and cocked, it should be either pointed towards the ground or pointed up in the air. What the defendant had never told the son was that, if he was walking in single file, he was not only to point the gun to the ground or up in the air but he should also uncock it at least, if not open the barrel. In those circumstances, it seems to me that, as I have said, the defendant either ought to have forbidden the use of the gun at all or else have ensured that, if the son succumbed to temptation G and went out, he would not be a danger to others.

It has been pressed on me very strongly that this case is really on all fours with *Donaldson v. McNiven* (1), a decision of the Court of Appeal. In that case a father allowed a boy, thirteen years of age, and living in the populous district of Liverpool, to have an air rifle, and he put the boy on his honour never to use the air rifle except in the cellar of the house. There again, the boy succumbed H in time to temptation and took the air rifle out into an alley way and an accident occurred in which another child had his eye put out. In that case it was held, affirming the decision of the trial judge, PEARSON, J., that there was no evidence of any lack of supervision by the defendant of his son's activities as would constitute negligence on the defendant's part. But the first thing I would observe is that each case must depend on its exact facts. In that case the I defendant's son was thirteen years old; for all that is known he was a very mature boy of thirteen. Secondly, the weapon in question was an air rifle which, though a dangerous instrument, is, I think, nothing like as lethal as a .410 gun. Finally, the point was never taken in that case that it was, in itself, negligent on the part of the father to allow the thirteen years old son to have an air rifle at all. It is true that in the course of the leading judgment LORD GODDARD, C.J., who was presiding, said this (2):

(1) [1952] 2 All E.R. 691.

(2) [1952] 2 All E.R. at p. 691.

"It might have been contended, but it was not, that it was negligent of him [the defendant] to let his son have the air-gun at all, but that was not the case which was made at the trial, and, therefore, PEARSON, J., dealt with the matter on the footing that it was not negligent or wrong for the defendant to permit his son to have possession of the gun . . . If there was nothing wrong in the defendant allowing his son to have an air-gun (and I am far from saying there was anything wrong), I cannot see that he could do more than extract a promise from his son never to use the air-gun in the street."

The parenthesis of LORD GODDARD, which, of course, is quite rightly relied on, is purely obiter and in relation to the facts of that case.

I think that the present case, on its facts, is quite different, and I hold that there was a failure on the part of the defendant to use reasonable care to prevent his son using a gun at all, or alternatively, if the son was to be allowed to use a gun, not to instruct him as to its use if the boy succumbed to temptation and went out with others. Finally, I should add that the point was taken that the action of Antrobus was, in all the circumstances, novus actus interveniens which broke the chain of causation, but counsel for the defendant pointed out at the end of the case (having regard to the defendant's very frank evidence that the instruction which he had given to his son not to go out with others was because he realised that boys would lark about) that this was just the sort of thing that might then happen. Accordingly, I find in this case that liability is made out.

As regards damages, according to the surgeons the injury is nothing like as serious as it might have been. The plaintiff had the whole of his Achilles tendon in his right foot shot away. There were a number of what are called toilet operations. About fifty shots were extracted and a lot of tissue, and he also had at least two skin-grafting operations. He went back to school and finished his schooling. He is now an apprentice motor mechanic, and it is quite clear that his injuries will in no way affect his earning capacity. He has had a great deal of pain, but now he walks with no limp at all. He can get up on tip-toe, and all that can be said is that he does not run as well as he might otherwise have run. He is left with a very bad scar, which clearly will not affect him as he is a very normal boy, quite unaffected by what he has been through. The only real loss which he suffered is that he will always have to be careful not to play games which may cause a severe knock on that part of his foot, as it may break the skin and cause trouble. I would award him the sum of £550 by the way of damages.

Judgment for the plaintiff.

Solicitors: *Henry Greenhall & Co.*, Warrington (for the plaintiff); *Joseph Keogh*, Northwich (for the defendant).

[Reported by M. DENISE CHORLTON, *Barrister-at-Law.*]

- A MITCHELL AND ANOTHER (INSPECTORS OF TAXES) v. ROSS.
MITCHELL AND ANOTHER (INSPECTORS OF TAXES) v.
HIRTENSTEIN.
- B MITCHELL AND ANOTHER (INSPECTORS OF TAXES) v.
MARSHALL.
- TAYLOR-GOOPY (INSPECTOR OF TAXES) v. TARNESBY.
TAYLOR-GOOPY AND ANOTHER (INSPECTORS OF TAXES)
v. DREW.

[CHANCERY DIVISION (Upjohn, J.), May 5, 6, 7, 8, July 21, 1959.]

- C *Income Tax—Deductions in computing profits—Expenses—Medical specialist in private practice—Holder of part-time hospital appointments as consultant—Office assessable under Sch. E—Expenses not deductible under Sch. E—Whether deductible as expenses of profession under Sch. D—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), s. 122 (Sch. D, para. 1, proviso), s. 156 (Sch. E).*

- D Five consultants held part-time appointments at hospitals or teaching hospitals within the National Health Service. The consultants engaged also in private practice and some also undertook lecturing to students and nurses or work as locum tenens in respect of National Health Service appointments. In assessing the income of the consultants for income tax purposes deduction of their expenses in connexion with National Health Service appointments, or domiciliary visits within that service, and of expenses incurred as locum tenens in connexion with National Health Service appointments was allowed only within the limits of the Rules applicable to Sch. E, which were stricter than those applicable to Sch. D. On appeal the consultants contended that the allowances of expenses were governed by the rules applicable under Sch. D.

- F **Held:** (i) a part-time specialist, who was a consultant at a hospital and took part in providing specialist services within the National Health Service Act, 1946, was, when providing those services, carrying out a public function and was the holder of an office (indeed, of a public office) for the purposes of the Income Tax Act, 1952, s. 156 (Sch. E, para. 1), and the proviso to para. 1 of Sch. D, s. 122 of that Act (see p. 348, letter D, post); such a consultant was, therefore, assessable for income tax purposes under Sch. E in respect of the profits of the office (see p. 349, letter C, post).

- G Dictum of DENNING, L.J., in *Razzel v. Snowball* ([1954] 3 All E.R. at p. 432) considered.

Davies v. Braithwaite ([1931] All E.R. Rep. 792) distinguished.

- H (ii) expenses of such a consultant, attendant on the exercise of his office, if allowable at all, were allowable only under the Rules applicable to Sch. E, and, in so far as they were not deductible in computing profits, were not allowable under Sch. D as expenses incurred in carrying on the consultant's profession.

- I (iii) expenses of domiciliary visits within the National Health Service and expenses incurred in acting as locum tenens in relation to a National Health Service appointment were expenses whose allowance for tax purposes was governed as stated at (ii) above.

Per CURIAM: a specialist or consultant who holds a part-time appointment within the National Health Service, when attending private patients, is exercising his profession and is taxable under Sch. D (see p. 349, letter C, post).

Appeals allowed.

[As to the position of consultants and specialists in relation to the hospital

authority and as to the liability of the hospital authority for their acts, see 26 **A**
HALSBURY'S LAWS (3rd Edn.) 19, 20, para. 27.

As to what constitutes an office within Sch. E, s. 156 of the Income Tax Act, 1952, as amended by s. 10 of the Finance Act, 1956, see 20 **HALSBURY'S LAWS** (3rd Edn.) 306, para. 563; and as to expenses incurred for the purposes of a profession, see *ibid.*, 166-170, paras. 286-292; and for cases on the subjects, see 28 **DIGEST** 85, 484-489 and *ibid.*, 42-45, 215-226 and 46, 47, 233-236.

For the Income Tax Act, 1918, Sch. D, Case II and Sch. E, see 12 **HALSBURY'S STATUTES** (2nd Edn.) 153-155, 176. For s. 18 of the Finance Act, 1922, see *ibid.*, 234. For s. 123 (Sch. D, Case II) and s. 156 (Sch. E) of the Income Tax Act, 1952, see 31 **HALSBURY'S STATUTES** (2nd Edn.) 116, 149.] **B**

Cases referred to:

Davies v. Braithwaite, [1931] All E.R. Rep. 792; [1931] 2 K.B. 628; 100 **C**
 L.J.K.B. 619; 145 L.T. 693; 18 Tax Cas. 198; Digest Supp.

Fry v. Salisbury House Estate, Ltd., [1930] All E.R. Rep. 539; [1930] A.C. 432;
 99 L.J.K.B. 403; 143 L.T. 77; 15 Tax Cas. 266; Digest Supp.

Great Western Ry. Co. v. Bater, [1922] 2 A.C. 1; 91 L.J.K.B. 472; 127 L.T. 170;
 8 Tax Cas. 231; 28 Digest 85, 486.

Household v. Grimshaw, [1953] 2 All E.R. 12; 34 Tax Cas. 366; [1953] 1 W.L.R.
 710; 3rd Digest Supp. **D**

Hughes v. Bank of New Zealand, [1938] 1 All E.R. 778; [1938] A.C. 366;
 107 L.J.K.B. 306; 158 L.T. 463; 21 Tax Cas. 472; Digest Supp.

McMillan v. Guest, [1942] 1 All E.R. 606; [1942] A.C. 561; 111 L.J.K.B.
 398; 167 L.T. 329; 24 Tax Cas. 190; 2nd Digest Supp. **E**

Razzel v. Snowball, [1954] 3 All E.R. 429; 119 J.P. 23; [1954] 1 W.L.R.
 1382; 3rd Digest Supp.

Cases Stated.

The first appellant taxpayer appealed to the Special Commissioners of Income Tax against assessments to income tax as follows: for 1951-52 under Sch. E **F**
 £3,024; for 1952-53 under Sch. E £3,276 and under Sch. D £1,500; for 1953-54 under Sch. E £3,385 and under Sch. D £1,000; and for 1954-55 under Sch. D £1,000. The grounds of appeal were that, in computing the profits or gains under Sch. E for the relevant accounting periods, the taxpayer's remuneration as a consultant radiologist under the Birmingham Regional Hospital Board and payments made to him in respect of domiciliary visits had been included contrary **G**
 to law and that the assessments should be reduced accordingly; and that the assessments under Sch. D, being estimated, should be reduced in accordance with the taxpayer's accounts of the profits or gains for the relevant accounting periods.

The first taxpayer contended: (i) that his activities as a consultant radiologist constituted the carrying on of a profession and that the entirety of the profits and gains arising from those activities was therefore assessable to income tax **H**
 under Case II of Sch. D and not otherwise; (ii) that his part-time appointments were not offices or employments within the meaning of Sch. E; (iii) that, if any such part-time appointment was an office or employment within the meaning of Sch. E, the tenure thereof was an incident in the course of the carrying on of his profession as a consultant radiologist and any remuneration therefrom constituted a receipt of that profession to be included in computing the profits or gains thereof under Sch. D; and, accordingly, (iv) that the assessments under Sch. E should be reduced accordingly and the assessments under Sch. D should be adjusted to correspond with the figures shown in the taxpayer's accounts; in the alternative (v) that, if the assessments under Sch. E were in principle well **I**
 founded, the outgoings shown in the taxpayer's accounts were allowable deductions in computing his profits or gains assessable under Sch. D in so far as they were not allowable as expenses under Sch. E; and, in any event, (vi) that any profits or gains arising to the taxpayer in respect of domiciliary visits were proper to be

A regarded as profits or gains of his profession assessable under Sch. D and not as emoluments of offices or employments assessable under Sch. E.

The Crown contended: (i) that the taxpayer's remuneration as consultant radiologist under the Birmingham Regional Hospital Board was properly to be included in the assessments made on him under Sch. E; (ii) that the payments made to the taxpayer by the board in respect of his part-time appointment as a consultant radiologist under the National Health Service Act, 1946, constituted remuneration received by the taxpayer in respect of an office or employment of profit within the meaning of Sch. E; (iii) that the taxpayer exercised a profession or vocation in respect of which he was assessable under Case II of Sch. D only in so far as he carried on a private practice as consultant radiologist outside the National Health Service; (iv) that, in computing the taxpayer's profits under Sch. E in respect of his part-time appointment, only such expenses as were allowable under that schedule and the rules applicable thereto were deductible and that, in computing the taxpayer's profits or gains under Case II of Sch. D in respect of his private practice, only such expenses as were allowable under that schedule and Case and the rules applicable thereto were deductible and the outgoings shown in the taxpayer's accounts fell to be dealt with accordingly; (v) that the payments made to the taxpayer under the National Health Service scheme in respect of domiciliary consultations in the course of his part-time appointment were properly to be regarded as emoluments of an office or employment assessable under Sch. E and not as profits or gains assessable under Sch. D.

The commissioners found that each of the taxpayer's part-time appointments as consultant radiologist to certain hospitals under the Birmingham Regional Hospital Board was an office or post and the remuneration derived therefrom together with the fees received in respect of domiciliary consultations carried out in connexion therewith was the profit of an office within the meaning of Sch. E to the Income Tax Act, 1918 (as amended by s. 18 of the Finance Act, 1922), and s. 156 of the Income Tax Act, 1952. They also found that at all material times the taxpayer exercised the profession of consultant radiologist, his part-time hospital appointments being a necessary part of the exercise of that profession by him and merely incidental thereto, notwithstanding that a great deal of his time was thereby taken up. They held that on the authorities an individual might have an engagement or hold a post in the same line as his profession at large, but that the contract governing such engagement or post might nevertheless be nothing but an incident in the conduct of his professional career. In such case the profits or gains arising therefrom fell to be assessed as part of his professional earnings under Sch. D. On this principle they held that the remuneration received by the taxpayer from his part-time hospital appointments fell to be assessed under Case II of Sch. D as part of the profits or gains of his profession, and so also did the fees received in respect of his domiciliary consultations. The Crown appealed by way of Case Stated to the High Court.

H The contentions of the parties and the decisions of the commissioners in the other four cases were substantially the same, except that the fourth and fifth taxpayers in their final contentions submitted that any profits or gains arising to them in respect of locum tenens work, as well as domiciliary visits, were proper to be regarded as profits or gains of their profession assessable under Sch. D and not as emoluments of offices or employments assessable under Sch. E; that I the Crown contended that these payments, made in the course of the part-time appointments, were properly to be regarded as emoluments of an office or employment assessable under Sch. E and not as profits or gains assessable under Sch. D, and that the commissioners found that the remuneration received by the two taxpayers in respect of their temporary appointments to act as locum tenens was in each case the profit of an office within the meaning of Sch. E to the Income Tax Act, 1918 (as amended by s. 18 of the Finance Act, 1922), and s. 156 of the Income Tax Act, 1952; but that the two taxpayers' temporary appointments to act as locum tenens were a necessary part of the exercise of their profession

and merely incidental thereto, notwithstanding that a great deal of their time was taken up by them and the part-time appointments. The commissioners held also that the fees received by the taxpayers in respect of their appointments as locum tenens fell to be assessed under Case II of Sch. D as part of the profits or gains of their profession, like the remuneration of their part-time appointments and the fees for domiciliary consultations. The Crown appealed to the High Court by way of Case Stated in each of these cases also.

R. O. Wilberforce, Q.C., and A. S. Orr for the Crown.

Heyworth Talbot, Q.C., and J. L. Creese for the taxpayers.

Cur. adv. vult.

July 21. **UPJOHN, J.**, read the following judgment: I have before me five appeals from the Special Commissioners of Income Tax and they raise questions of general importance to medical specialists, namely, whether the expenses incurred by them in rendering services to patients under the National Health Service Act, 1946 (which I shall call "the Act"), ought to be deducted in computing income under Sch. D or Sch. E to the Income Tax Act, 1952. As is well known, owing to the difference in wording of the relevant rules for the assessment of tax, outgoings may be deductible as expenses for the purposes of Sch. D which would not be so deductible for the purposes of Sch. E.

The first and main appeal is in respect of Dr. Ross, the first taxpayer, who for the material years held a part-time appointment as a consultant radiologist to the Birmingham Regional Hospital Board. The second appeal is in respect of Dr. Hirtenstein, who also held a part-time appointment as a consultant ophthalmologist to the Birmingham Regional Hospital Board. He also undertook certain lecture work to nurses. The third appeal is in respect of Dr. Marshall, who held a part-time appointment as consultant pathologist to the Birmingham Regional Hospital Board. The fourth appeal is in respect of Dr. Tarnesby, who held two part-time appointments as a psychiatrist, one with the North West Metropolitan Regional Hospital Board and one as clinical assistant in the Department of Psychological Medicine of the West London Hospital, a teaching hospital. He also undertook work as a locum tenens in respect of national health appointments. The fifth and last appeal is in respect of Mr. Drew, who held three appointments as a consultant thoracic surgeon: (i) with the Westminster Hospital, a teaching hospital, (ii) with the South West Metropolitan Regional Hospital Board and (iii) as chief assistant at the Brompton Hospital for Diseases of the Chest. He also undertook certain locum tenens work in respect of national health appointments and also lectured to medical students. All these gentlemen also had private patients.

The main question which I have to determine is whether, in accepting such appointments, the profits or gains arising from such appointments are profits or gains arising from an "office or employment". The facts, the relevant statutory provisions, forms of contract and general terms of service are so fully set out in the first and main case that I shall content myself with the barest outline of facts before turning to the law.

As set out in the short title, the Act is

"An Act to provide for the establishment of a comprehensive health service for England and Wales, and for purposes connected therewith."

By s. 3 (1) of the Act, it was provided that:—

"As from the appointed day, it shall be the duty of the Minister to provide throughout England and Wales, to such extent as he considers necessary to meet all reasonable requirements, accommodation and services of the following descriptions, that is to say:—(a) hospital accommodation; (b) medical, nursing and other services required at or for the purposes of hospitals; (c) the services of specialists, whether at a hospital, a health centre provided under Part 3 of this Act or a clinic or, if necessary on medical

A grounds, at the home of the patient; and any accommodation and services provided under this section are in this Act referred to as 'hospital and specialist services'."

The appointed day was July 5, 1948. I am concerned with para. (c), the services of specialists.

B The Minister in fact carries out his duties in the main by delegation to regional hospital boards, who in turn may delegate certain of them to hospital management committees, but not those relating to the appointment and dismissal of specialists. In the case of teaching hospitals, there is a separate board of governors for each such hospital to govern and control its activities. I shall use the word "board" to designate a regional hospital board or a board of governors of a teaching hospital indifferently.

C Before the Act came into operation the specialist, or consultant as he was frequently called, was one who was appointed to the staff of a hospital as a physician or surgeon or some similar post. He practised in his own specialised field on cases normally sent to him by general practitioners. He would normally have private patients and his appointment to the staff of the hospital was almost invariably honorary and part-time.

D When the Act came into operation all that was changed. A specialist may, if he so desires, continue to practise exclusively on private patients, but, if he desires to participate in services to the public to be rendered under the Act, he must take an appointment with and become a member of the staff of a board. He becomes an officer of the board, but the use of that word in the relevant statutes and statutory instruments has not been relied on as throwing much light on the problem that I have to decide. He may take a whole-time or part-time appointment. In either case he is remunerated for his services as may be agreed between the board and the specialist, subject to regulations made by the Minister of Health. The large majority of specialists take part-time appointments. In that event, the specialist agrees to work a certain number of sessions or notional half-days per week. All these matters are provided for in the contract which the board and the consultant must enter into. Such contract by reference to a document referred to in para. 23 of Dr. Ross's Case Stated as "the terms of service" provides for retirement of the specialist at the age of sixty-five (subject to extension), for an appeal to the Minister if the specialist considers his appointment is being unfairly terminated by the board, for annual leave, for reimbursement of travelling expenses, subsistence allowance, and for many other incidental matters. A specialist may take part-time appointments with more than one board but his total maximum remuneration must not exceed that payable for nine sessions a week.

G It naturally follows from the nature of the professional status of a specialist that his work is subject to no control or direction as to how he should carry out his work in the sense of prescribing particular treatment in relation to a particular patient. That appears to be so even in the case of those who are on the lowest rung of the specialist ladder. (See, e.g., the case of Dr. Tarnesby, para. 4 (4) and (5) of his Case Stated.)

H The general organisation of the work, i.e., the particular hospital or hospitals within the jurisdiction of a board to be visited by each specialist and the particular hours per week to be spent at each, will probably be stated in the contract, but in practice these arrangements may be varied very informally between the consultants concerned without reference to the board. (See e.g., the first taxpayer's Case Stated, para. 4 (8).) Generally speaking, all these matters and actual days and hours of attendance, as one would expect, are normally left to arrangements to be made between the particular specialists themselves to suit their mutual convenience and that of the hospital or hospitals concerned.

I I do not propose to read any of the contracts in these five cases, as they are all annexed to the Cases Stated. Some of them vary slightly in form from the others,

but nothing turns on the precise terms of the contracts in question. That is all I propose to say on the main issue, but there are certain subsidiary points with which I shall deal later. A

I turn then to the law. It is necessary to look at the history of the relevant legislation. By virtue of s. 1 of and Sch. E to the Income Tax Act, 1918, re-enacting similar legislation in the Income Tax Act, 1842, tax was chargeable under Sch. E in respect of every "public office or employment of profit". Rule 6 of Sch. E set out a long list of public offices and employments of profit, ending with a comprehensive sub-cl. (k), B

"all other public offices, or employments of profit which are of a public nature."

It was clear that the office or employment to fall within Sch. E had to be public, and it was so held by the House of Lords in *Great Western Ry. Co. v. Bater* (1), a decision on the corresponding rule in the Income Tax Act, 1842. In that case it was decided that a clerk in the employment of the Great Western Railway was not the holder of a public office or employment within Sch. E. C

Employment which did not fall within Sch. E was taxed under para. (1) (a) (ii) of Sch. D as a profit or gain arising from any trade, profession, employment or vocation. The law was altered after *Great Western Ry. Co. v. Bater* (1) by s. 18 (1) of the Finance Act, 1922, which provided (omitting immaterial words) that D

"Such profits or gains arising or accruing to any person from an office, employment or pension as are, under the Income Tax Act, 1918, chargeable to income tax under Sch. D . . . shall cease to be chargeable under that schedule and shall be chargeable to tax under Sch. E and the rules applicable to that schedule shall apply accordingly subject to the provisions of this Act." E

So in the result the law now is that all offices and employments for profits, whether public or private, fall within Sch. E. The relevant law is now re-enacted to the same effect by the Income Tax Act, 1952 (see proviso to para. 1 of s. 122 and paras. 1 and 2 of s. 156). F

There is but little authority on the meaning of the word "office". It was considered in *Great Western Ry. Co. v. Bater* (1) and again in *McMillan v. Guest* (2). In that case it was decided that a director of a private company incorporated in England holds a public office within the United Kingdom. LORD ATKIN said this (3): G

"On the first point there was no dispute. There is no statutory definition of office. Without adopting the sentence as a complete definition one may treat the following expression of ROWLATT, J., in *Great Western Ry. Co. v. Bater* (4) . . . as a generally sufficient statement of the meaning of the word: ' . . . an office or employment which was a subsisting, permanent, substantive position, which had an existence independent of the person who filled it and which went on and was filled in succession by successive holders . . . '. This statement was adopted by LORD ATKINSON in his judgment in the same case in the House of Lords (5). There can be no doubt that the director of a company holds such an office as is described." H

LORD WRIGHT said this (6):

"The word 'office' is of indefinite content. Its various meanings cover four columns of the NEW ENGLISH DICTIONARY, but I take as the most relevant for purposes of this case the following: 'A position or place to which I

(1) [1922] 2 A.C. 1.

(2) [1942] 1 All E.R. 606; [1942] A.C. 561.

(3) [1942] 1 All E.R. at p. 607; [1942] A.C. at p. 564.

(4) [1920] 3 K.B. at p. 274.

(5) [1922] 2 A.C. at p. 28.

(6) [1942] 1 All E.R. at p. 608; [1942] A.C. at p. 566.

A certain duties are attached, especially one of a more or less public character'. This, I think, roughly corresponds with such approaches to a definition as have been attempted in the authorities, in particular *Great Western Ry. Co. v. Bater* (7), where the legal construction of these words, which had been in Sch. E since 1803 (Stat. (1803) 43 Geo. 3, c. 122, s. 175), was discussed. It was there held that the position of a clerk in a railway company was not an office or employment of profit of a public nature within Sch. E . . . LORD WRENBURY was content so to hold without attempting to define what type of office or employment would satisfy the language of the schedule. LORD SUMNER . . . said that to hold otherwise would be an abuse of language. To hold that the director of a company such as A. Wander, Ltd. (though it is what is called a private company), does not have an office within the meaning of the schedule would equally, in my opinion, be an abuse of language. Everyone, I think, would say that as director he held an office in the company. The word 'employment', in my opinion, has to be construed with and takes its colour from the word 'office'.

D "If I may adopt the words of LORD GREENE, M.R., it is too late to say that the director of a company like this does not hold an office within Sch. E. I do not attempt what their Lordships did not attempt in *Bater's* case (7), i.e., an exact definition of these words. They are deliberately, I imagine, left vague. Though their true construction is a matter of law, they are to be applied in the facts of the particular case according to the ordinary use of language and the dictates of common sense, with due regard to the requirement that there must be some degree of permanence and publicity in the office."

E On the question of employment a large number of authorities were cited to me. Many tests have been laid down to determine whether the relation of master and servant exists such as the degree of control exercised by the master, and so on. The relationship between a specialist and a board is so very special, F however, that many of these cases, dealing either with entirely different types of engagements (to use a neutral word) or with the pre-Act relationship between hospitals and specialists, form no safe guide. The real question to be answered is this. Does a specialist who holds a part-time national health appointment (a) occupy an office, or (b) undertake an employment, or (c) does he merely render services in the course of the exercise or practice of his profession?

G In support of the last view, it was urged that a specialist may have private patients; he may have one or more National Health Service part-time appointments; he may lecture to students or nurses; he may go as a locum tenens to some medical post; these are all ways in which the specialist practises his profession and they are only incidents of it. The case, it is said, is analogous to *Davies v. Braithwaite* (8). It was there held that Miss Lilian Braithwaite who H accepted many engagements on the stage, films and the B.B.C., was only exercising her talents as an actress, and that each of these engagements could not be considered an employment, but merely an engagement in exercising a profession. The true nature of the relationship between a board and a specialist was considered in the Court of Appeal in *Razzel v. Snowball* (9). That case decided that the Minister of Health was responsible for the negligence of a specialist, for I it was the duty of the Minister under s. 3 (1) (c) of the National Health Service Act, 1946, to provide treatment by means of specialists and not merely to provide the specialist. I will not read s. 3 (1) of the National Health Service Act again. DENNING, L.J., said this (10):

"Counsel for the plaintiff pressed us with some observations in the cases concerning consultants. He said that the defendant was a part-time

(7) [1922] 2 A.C. 1.
(9) [1954] 3 All E.R. 429.

(8) [1931] All E.R. Rep. 792; [1931] 2 K.B. 628.
(10) [1954] 3 All E.R. at p. 432.

consultant, and that a consultant was in a different position from the staff of the hospital. I think that counsel for the defendant gave the correct answer when he said that, whatever may have been the position of a consultant in former times, nowadays, since the National Health Service Act, 1946, the term 'consultant' does not denote a particular relationship between a doctor and a hospital. It is simply a title denoting his place in the hierarchy of the hospital staff. He is a senior member of the staff, and is just as much a member of the staff as the house surgeon is. Whether he is called specialist or consultant makes no difference. He, like the rest of the staff, is merely carrying out the duties of the Minister and is entitled to the protection of s. 21 (1) of the Limitation Act, 1939."

A specialist or consultant in carrying out his duties under a part-time appointment with a board is therefore not merely rendering services as a private though professionally skilled and qualified individual to a private citizen, but he is the instrument of the Minister to carry out part of the national scheme

"... to provide for the establishment of a comprehensive health service for England and Wales ..."

I quote again the short title to the Act. It seems to me that he is thus carrying out necessarily a public function (see *McMillan v. Guest* (11)), and in my judgment such a specialist is properly described as the holder of a public office. So far I agree with the conclusion of the Special Commissioners and, indeed, go further in holding that the office is public. The commissioners, however, then decided that, though the appointment constituted the holding of an office, nevertheless the taxpayer was assessable to tax under Sch. D. Counsel for the taxpayers has candidly conceded that he can find no argument to support this conclusion of law. It is indeed clear that in reaching that conclusion the commissioners have misunderstood the effect of *Davies v. Braithwaite* (12) and my own later decision in *Household v. Grimshaw* (13). Those decisions, while helpful in reaching a conclusion whether there is on the one hand an office or employment or on the other an exercise of a profession, have no bearing on the tax position once it is found that the activity in question is an office or employment. Apart from the point of counsel for the taxpayers, which I shall mention in a moment, it is not in dispute that, if a person holds an office or employment, he must be assessed to tax under Sch. E in respect of his earnings arising therefrom; there is no option about it.

Counsel's point, however, is this. There is a finding in each Case (as amended) to this effect (I take the first taxpayer's Case for convenience):

"We also find that at all material times [the first taxpayer] exercised the profession of consultant radiologist, his part-time hospital appointments being a necessary part of the exercise of that profession by him and merely incidental thereto, notwithstanding that a great deal of his time was thereby taken up. We do not seek to describe the profession of consultant radiologist in general."

That phraseology is not very happy, but I think that the parties are agreed that it means this, that the first taxpayer, to establish himself as a specialist, found it necessary as a practical matter to take a hospital appointment; it was a necessary incident of his profession. No doubt this would be for a number of reasons: first and most important, it was the best way of practising and improving his particular skills; secondly, it would provide a salary to live on; thirdly, it would bring him into contact with general practitioners who would in due course no doubt send him their private patients; fourthly, it is only by taking an appointment that hospital services could be made available to the specialist's private patients; there may well be other reasons.

(11) [1942] 1 All E.R. 606; [1942] A.C. 561.

(12) [1931] All E.R. Rep. 792; [1931] 2 K.B. 628.

(13) [1953] 2 All E.R. 12.

A Founding himself on this, counsel for the taxpayers submits that all the first taxpayer's expenses, whether incurred in the course of exercising his office under the National Health Service Act or otherwise, are all part of carrying on the profession of a consultant radiologist. Therefore, any expenses incurred in the course of exercising the office which would not be allowable under Sch. E but would be allowable under Sch. D may be brought into account as part of the general exercise of his profession of a consultant radiologist.

Counsel for the taxpayers poses the question: Is the first taxpayer carrying on one profession or two? The question is a narrow one and without the slightest importance except for the purpose of income tax. In a general sense, of course, the first taxpayer is carrying on the profession of a radiologist whether he is performing his national health functions or attending to private patients. It is all part of his vocation as a medical adviser. In my judgment, however, the argument ought not to succeed. When carrying out his national health duties, the first taxpayer is performing the duties of an office and he is taxed under Sch. E. When attending private patients he is exercising his profession and is taxed under Sch. D. Each schedule and the rules thereunder contain, in the words of LORD ATKIN in *Fry v. Salisbury House Estate, Ltd.* (14):

D "... definite codes applying exclusively to their respective defined subject-matters ..."

Once the conclusion is reached that the national health appointment is the holding and exercise of an office (and that is the vital decision), the expenses attendant thereon must be taxed under the Rules applicable to Sch. E and in my judgment under no other schedule. The fact that the exercise of that office may truly be described as an incident of the profession of radiologist cannot alter that position. Counsel for the taxpayers relied on *Hughes v. Bank of New Zealand* (15). The Bank of New Zealand had certain tax-exempt securities, exempt as to some by virtue of s. 46 of the Income Tax Act, 1918, and as to others by virtue of the Rules applicable to Sch. C, which were purchased out of floating capital. It was held that the expenses of making those investments were allowable as a deduction in computing tax liability. That was decided unanimously in all courts. LORD WRIGHT, M.R., pointed out that there was only one indivisible trade and the expenses in question were properly allowable as deductions in computing income tax liability. The exempting provisions exempted certain interest from tax, but there was nothing in those provisions which precluded the company from claiming the expenses as allowable deductions. That seems to me a very different case and does not lay down any principle which assists me in this case. This point fails.

I turn then to the supplementary questions. First as to domiciliary visits. In addition to the performance of the ordinary duties, the specialist may if, but only if, he so desires undertake domiciliary visits. That is, he undertakes at such times and within such area as he may prescribe in his contract to visit patients whom a general practitioner does not desire to be treated in hospital at their homes. Such visits are arranged directly between the general practitioner and the specialist concerned. The specialist takes his own apparatus to the patient's house, e.g., X-ray apparatus, examines him, develops the film, usually in hospital, and then reports to the general practitioner concerned. For this service he receives a fee of four guineas for each domiciliary visit (with a maximum of two hundred visits in each year) and two guineas for the use of his apparatus, but once only per patient.

That a specialist holding a national health appointment might as part of his duties carry out domiciliary visits is clearly contemplated in s. 3 (1) (c) of the Act. It seems to me clear that in making those visits the specialist is

(14) [1930] All E.R. Rep. at p. 552; [1930] A.C. at p. 457.

(15) [1938] 1 All E.R. 778; [1938] A.C. 366.

exercising part of his duties under the Act, i.e., the visits are all part of the exercise of the public office which he holds under the Act. In my judgment it is no point of distinction that the specialist need not contract to make domiciliary visits, nor that the visits are arranged directly between the specialist and the general practitioner, nor that the specialist uses his own apparatus for which incidentally he is paid by the state. Accordingly the expenses attendant thereon must be deducted in computing income under the Rules applicable to Sch. E.

Finally I turn to the question of expenses attendant on the work of a locum tenens in respect of a national health appointment. The phrase is so well understood in connexion with the medical profession that I need not explain it. The case of the fifth taxpayer shows how informal are the arrangements made for this type of work. It was said that the fourth taxpayer and the fifth taxpayer, in carrying out such work, were merely undertaking engagements in the same way that Miss Lilian Braithwaite did. I disagree. The phrase "locum tenens" is in fact a most apt and appropriate expression to describe the work. The specialist in doing such work is in fact holding the post of another. He is for the time being exercising the functions and holding the public office of another. How can his expenses of doing so properly be allowed on some different basis from that of its real holder of the office, in whose shoes he temporarily stands? In performing this work he is exercising a public office and his expenses must be taxed under the Rules applicable to Sch. E.

Both the second taxpayer and the fifth taxpayer received fees and no doubt incurred expenses in lecturing, but it seemed to me that the facts relating to these activities were quite insufficiently explored before the Special Commissioners to enable me to decide whether such work was undertaken as part of the specialist's public office under the Act or as part of his general practice. Counsel for the Crown did not press this point or ask me to send the cases back for further findings. Therefore, I say nothing about this aspect of the matter, it was not argued before me and it must be left to some future case to resolve this problem. The decision of the commissioners that expenses in connexion with lecturing are deductible under Sch. D will therefore stand for the relevant years of assessment.

Both the fourth taxpayer and the fifth taxpayer undertook domiciliary work, not only in the area of the regional board with which they respectively had contracts, but in other areas. Here again, the facts were insufficiently found and counsel for the Crown asked me to deal only with the straightforward case of the first taxpayer so far as the expenses of domiciliary visits are concerned. Therefore, again I decide nothing about domiciliary visits to outside areas. Accordingly, the decision of the commissioners that the expenses in connexion with domiciliary visits to outside areas are deductible under Sch. D will stand for the relevant years of assessment.

Subject to that, I allow the appeal in each case. These five cases must be remitted to the Special Commissioners to assess each taxpayer under Sch. E in respect of his earnings arising from appointments under the Act, and the taxpayer in each case must pay the costs of the Crown.

Appeals allowed.

Solicitors: *Solicitor of Inland Revenue; Hempsons* (for the taxpayers).

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

A

INLAND REVENUE COMMISSIONERS v. COLCO DEALINGS, LTD.

[CHANCERY DIVISION (Vaisey, J.), June 25, 26, 29, 30, July 24, 1959.]

B

Income Tax—Exemption—Removal of exemption—A person entitled under any enactment to an exemption—Application to resident in Eire—Dividend stripping—Finance (No. 2) Act, 1955 (4 & 5 Eliz. 2 c. 17), s. 4 (2).

Statute—Operation—Effect to be given to plain words notwithstanding international treaty.

C

C., Ltd., a company registered and resident in Eire and not resident in the United Kingdom, bought the whole of the ordinary issued share capital of two English companies. On Oct. 31, 1957, and on Nov. 1, 1957, C., Ltd. received dividends thereon which were wholly paid out of profits made by the companies before acquisition by C., Ltd. The dividends were paid less United Kingdom income tax, and the company sought to recover the tax deducted under s. 349 of, and Part 1 of Sch. 18 to, the Income Tax Act, 1952, which set out the agreement for the avoidance of double taxation in the case of the Republic of Ireland. The Crown claimed that exemption under those provisions was inapplicable to these dividends, because the exemption was removed in cases of dividend stripping by s. 4 (2)* of the Finance (No. 2) Act, 1955, which applied to "a person entitled under any enactment to an exemption from income tax" and C., Ltd. was a person so entitled.

D

E

Held: the words "a person entitled under any enactment to an exemption from income tax" in s. 4 (2) of the Finance (No. 2) Act, 1955, were unambiguous and effect must be given to the provisions of the section even if they were contrary to international treaty or arrangement; therefore, as the words included residents in Eire, the company was not entitled to recover the tax deducted.

Appeal allowed.

F

[As to legislation concerning dividend stripping, see 20 HALSBURY'S LAWS (3rd Edn.) 201, para. 356; and as to the removal of tax exemption in cases of dividend stripping, see *ibid.*, p. 602, para. 1177.

As to relief against double taxation with the Republic of Ireland, see 20 HALSBURY'S LAWS (3rd Edn.) 461, para. 866, et seq.

G

As to the duty to follow the plain meaning of statutes, see 31 HALSBURY'S LAWS (2nd Edn.) 498, para. 636.

For the Income Tax Act, 1952, s. 349, Sch. 18, Pt. 1, see 31 HALSBURY'S STATUTES (2nd Edn.) 336, 544; and for the Finance (No. 2) Act, 1955, s. 4 (2), see 35 HALSBURY'S STATUTES (2nd Edn.) 294.]

Cases referred to:

H

A.-G. v. H.R.H. Prince Ernest Augustus of Hanover, [1957] 1 All E.R. 49; [1957] A.C. 436; [1957] 2 W.L.R. 1; 3rd Digest Supp.

Metropolitan Board of Works v. London & North Western Ry. Co., (1880), 14 Ch.D. 521; *affd.* C.A., (1881), 17 Ch.D. 246; 50 L.J.Ch. 409; 44 L.T. 270; 41 Digest 44, 321.

I

* By s. 4 (2) of the Finance (No. 2) Act, 1955, it is provided: "Where a person entitled under any enactment to an exemption from income tax which extends to dividends on shares becomes entitled to receive a dividend on a holding of shares of any class to which this section applies, being shares sold or issued to him or otherwise acquired by him after the said Oct. 26 [1955] and not more than six years before the date on which the dividend becomes payable, and the dividend is to any extent paid out of profits accumulated before the date on which the shares were so acquired, then, if those shares . . . amount to ten per cent. or more of the issued shares of that class, the exemption shall, to an extent proportionate to the said extent to which the dividend is paid out of profits accumulated before the date on which the shares were acquired, not apply to the dividend . . ."

Republic of Italy v. Hambros Bank, Ltd. & Gregory, [1950] 1 All E.R. 430; A
[1950] Ch. 314; 2nd Digest Supp.

River Wear Comrs. v. Adamson, (1876), 1 Q.B.D. 546; *affd.* H.L., (1877),
2 App. Cas. 743; 47 L.J.Q.B. 193; 37 L.T. 543; 42 J.P. 244; 41 Digest
974, 8643.

Washer v. Elliott, (1876), 1 C.P.D. 169; 45 L.J.Q.B. 144; 34 L.T. 56; 42
Digest 674, 859. B

Case Stated.

The respondent taxpayer company appealed against a decision of the Special Commissioners of Income Tax refusing to grant exemption from United Kingdom income tax in respect of certain dividends received by the company from English companies. The company was at all times resident in Eire and not in the United Kingdom and it claimed exemption from British tax under s. 349 of and para. 1 (a) of the first agreement set out in Part 1 of Sch. 18 to the Income Tax Act, 1952. The refusal was based on s. 4 (2) of the Finance (No. 2) Act, 1955, and the question for the commissioners' decision was whether the company was "a person entitled under any enactment to an exemption from income tax" within the meaning of that enactment, or did not come within such words because it was a resident of Eire. C D

The company was incorporated in Eire on May 29, 1957, and at all material times had been resident there and not in the United Kingdom. On Oct. 31, 1957, it bought from Matrim Finance, Ltd. one thousand ordinary shares of £1 each, fully paid, in Carpets & Textiles (Wholesale), Ltd., being the whole of that company's issued share capital, and also two thousand ordinary shares of £1 each, fully paid, in Afco Agencies, Ltd. (since become known as A. F. Finance, Ltd.), the whole of that company's issued share capital. On Nov. 1, 1957, it received from the first of these companies a gross dividend of £174,500 from which United Kingdom income tax of £74,162 10s. had been deducted, being an interim dividend of £174 10s. per share subject to deduction of income tax, and from the second company a gross dividend of £104,000 from which United Kingdom income tax of £44,200 had been deducted, being an interim dividend of £52 per share subject to deduction of income tax. Both dividends were wholly paid out of profits accumulated before the date on which the taxpayer company acquired the shares. The two companies were incorporated in 1950 and 1951 respectively under the Companies Act, 1948, and had been throughout resident in the United Kingdom. The shares were shares of a class to which s. 4 of the Finance (No. 2) Act, 1955, applied, as defined in s. 4 (8) (c). E F G

It was admitted by counsel for the Crown at the hearing before the commissioners that repayments of income tax at the full standard rate had been made by the Crown to Irish residents between 1945 and 1948 on dividends from which income tax had been deducted when payment was made by companies resident in the United Kingdom which had received double taxation relief. It was not contended by counsel for the company that the company would be liable to pay income tax in respect of the dividends. H

The company contended that the wide words of s. 4 (2) of the Finance (No. 2) Act, 1955, should be limited and controlled on well-known principles so as to exclude residents of Eire who were by treaty excluded from the ambit of British income tax. The Crown contended that s. 4 (2) applied to the company notwithstanding that it was a resident of Eire, and that it was not entitled to the exemption. The commissioners held that the words "a person entitled under any enactment to an exemption", defining persons subject to the provision in s. 4 (2) of the Act of 1955, must be given a limited construction and should exclude Eire residents on the basis of two principles of construction, that if possible the construction should not have the effect of imposing the will of Parliament on persons not within the jurisdiction and that it should not involve a breach of a treaty with another country (in the particular case the treaty of April, 1926, I

A with the Government of Eire which afforded absolute exemption from British tax to residents of Eire who were not residents of the United Kingdom) unless so explicit as to allow of no other interpretation. They therefore held that s. 4 (2) of the Finance (No. 2) Act, 1955, had no application to the company and that it was entitled to repayment of the tax deducted from the dividends. The Crown appealed by way of Case Stated.

B *The Attorney-General (Sir Reginald Manningham-Buller, Q.C.), E. Blanshard Stamp and A. S. Orr for the Crown.*

J. G. Foster, Q.C., and P. Shelbourne for the company.

Cur. adv. vult.

C July 24. VAISEY, J., read the following judgment: This is an appeal from a decision of the Special Commissioners dated Feb. 25, 1959. That decision was in favour of the taxpayer, the respondent company, Colco Dealings, Ltd., which was incorporated in the Republic of Ireland on May 29, 1957, and has at all material times been deemed to be resident in the republic and not resident in the United Kingdom. The appellant here is the Crown. The facts are not in dispute. The case itself involves considerable sums of money, and other cases which may be governed by my decision involve (as I understand) even larger sums.

D The appeal was argued before me at great length, and I thought that it was desirable that a full record of the proceedings should be made and preserved for future reference. I was accordingly, at my request, supplied with a transcript of the whole of what was said during the hearing. That transcript is now before me, and has materially helped me in the preparation of this judgment, enabling me to express it with far less prolixity than would otherwise have been possible.

E The question is quite short, and may be quite shortly stated. It is: Whether in s. 4 (2) of the Finance (No. 2) Act, 1955, the words " a person entitled under any enactment to an exemption from income tax " include and apply to persons resident in the Republic of Ireland and not in the United Kingdom to whom exemption from tax was granted by the various sections re-enacted by s. 349 of the Income Tax Act, 1952. The Special Commissioners agreed that the words quoted were wide enough and appropriate to cover Irish residents entitled to exemption, such as the taxpayer company, but they went on to say that the

F " very wideness and generality " of the words gave rise to the conclusion that they must be limited in their application. They answered the question which they had formulated in the negative.

G A great deal of the hearing was occupied in dealing with what I may call the " wideness and generality " argument. Nearly forty cases were cited in support of it. Thus, in *River Wear Comrs. v. Adamson* (1), it was held that a provision that " any damage " done by any vessel subjected the owner to liability must be controlled by the principle that an owner is not responsible for damage due to no fault of his own. In *Washer v. Elliott* (2), the expression " all courts " was held to be limited to courts possessed of a certain jurisdiction. In *Metropolitan Board of Works v. London & North Western Ry. Co.* (3), " any person " was held to mean

H only any person entitled to the benefit of a particular Act. It would be easy to supply other examples. For instance, if it were said that " everybody in the 1870's wore elastic-sided boots ", no one would suppose that the whole of humanity was intended, but only a class of wearers of boots. I confess that the argument based on alleged wideness or generality seems to me to be totally ill-founded. Persons " entitled to statutory exemption from tax " form a very limited and

(1) (1876), 1 Q.B.D. 546.

(2) (1876), 1 C.P.D. 169.

(3) (1880), 14 Ch.D. 521.

perfectly well-defined class of the community; and I should have described the words in question as highly narrow and particular, and not in the least degree either wide or general. A

My duty in the present case seems to me to be to construe the relevant words of s. 4 (2) of the Finance (No. 2) Act, 1955, as they stand, and not to put a gloss on them for a purely extraneous reason. The words are expressly narrow and particular—the reverse of wide and general—and as they stand are absolutely unambiguous. It is in my view a cardinal principle of interpretation that the words of a statute must be taken to mean what they say, so that their meaning must be ascertained with no regard to any ulterior consequences of so interpreting them. No better exposition of this principle is known to me than the speech of VISCOUNT SIMONDS in *A.-G. v. H.R.H. Prince Ernest Augustus of Hanover* (4). I need not recapitulate the facts of that case, in which my own judgment had been reversed by the Court of Appeal and was wholly disapproved of in the House of Lords. From that speech I quote the following sentence (5): B C

“I reject . . . the argument in favour of restricting the meaning of the enacting words so far as it is based on any consideration other than that of the words of the statute itself.” D

It seems to me that, if s. 4 (2) of the Finance (No. 2) Act, 1955, does any violence to or interferes with the arrangements made between this country and the Republic of Ireland and embodied in the treaty mentioned in the Special Case, the matter cannot be cured by a process of interpretation which seems to me to be illicit. If there is anything to be put right, it must be done either by diplomatic means or by legislation: compare *Republic of Italy v. Hambros Bank, Ltd. & Gregory* (6). In this case, the treaty has been incorporated in and is part of the statute law, and, if it has thereby lost its superior status and falls to be construed in its context along with the rest of that law, it has obviously, I should have thought, been qualified by the plain terms of s. 4 (2). E

It cannot be disputed that the words “entitled under any enactment” include residents in Ireland; nor may it be denied that the exemption to which they are entitled is statutory. The Special Commissioners enunciate the principle on which they base their decision in favour of the company by appealing to international comity, while admitting that, if the relevant words are so explicit as to allow for no other interpretation, the words must have their proper force. Now it seems to me that the words here are in fact explicit beyond any question at all, and it seems to me that I am bound to construe them exactly as they stand without any more regard to ulterior consequences and extraneous considerations that what was held to be proper in *A.-G. v. H.R.H. Prince Ernest Augustus of Hanover* (7). F G

The statement of the Special Commissioners that this country has in effect relinquished jurisdiction in matters of income tax over residents of Ireland who are not also residents of the United Kingdom is to my mind a very questionable statement, but it is not, I think, a matter on which I should here express any definite opinion. H

I do not regard this as altogether an easy case, and the principles which govern it are, I think, expressed with accuracy in MAXWELL ON INTERPRETATION OF STATUTES (10th Edn.) (1953) at p. 148, as follows: I

“Under the same general presumption that the legislature does not intend to exceed its jurisdiction, every statute is to be so interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of

(4) [1957] 1 All E.R. 49; [1957] A.C. 436.

(5) [1957] 1 All E.R. at p. 54; [1957] A.C. at p. 462.

(6) [1950] 1 All E.R. 430; [1950] Ch. 314.

(7) [1957] 1 All E.R. 49; [1957] A.C. 436.

- A nations, or with the established rules of international law. If, therefore, it designs to effectuate any such object, it must express its intention with irresistible clearness to induce a court to believe that it entertained it, for if any other construction is possible, it would be adopted to avoid imputing such an intention to the legislature. All general terms must be narrowed in construction to avoid it. But if the statute is unambiguous, its provisions must be followed, even if they are contrary to international law."
- B

In that passage which I have just read, the expressions "as far as its language admits", "irresistible clearness" and "if any other construction is possible" are all-important, and should be emphasised in the present case.

- C I will assume, but certainly not decide, that there has, as alleged, been an infraction or breach of the treaty, but I do not see that I can repair it by applying an inadmissible canon of construction. Adopting the concluding words of the quotation from MAXWELL, I hold that, as the statute is unambiguous, its provisions must be followed even if they are contrary to international law—or, I may add, any international treaty or arrangements.

- D Towards the end of the hearing a point was made on behalf of the Crown that the confirmation of the treaty involved the proposition that its terms were precarious and liable to be varied by future legislation; and, as a corollary, that it had been varied by the Finance (No. 2) Act, 1955. I do not base my decision on that, and the fact that counsel for the company had, as he complained, no opportunity of dealing with that particular point is irrelevant.

- E The plain object of s. 4 (2) of the Act of 1955 was to prevent what is colloquially called "dividend stripping", and, if the decision of the Special Commissioners stands, residents in Ireland can do what their fellow taxpayers in this country are prohibited from doing. If that is the law, so be it, but the consequence is not one which commends itself to me on general principles of justice and fairness.
- F If Parliament had intended to exclude residents in Ireland from the restrictions imposed by s. 4 (2), nothing would have been easier than to insert a few plain and simple words to give effect to it. That was a consideration which had great weight with the House of Lords in *A.-G. v. H.R.H. Prince Ernest Augustus of Hanover* (8).

- G I think that the decision of the Special Commissioners was erroneous, and should be reversed; and the figures re-adjusted accordingly.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *R. M. Bull & Co.* (for the company).

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

HINTON (INSPECTOR OF TAXES) v. MADEN & IRELAND, LTD.

[HOUSE OF LORDS (Lord Reid, Lord Tucker, Lord Keith of Avonholm, Lord Denning and Lord Jenkins), June 23, 24, 25, July 16, 1959.]

Income Tax—Allowance—Investment allowance—“Plant”—Knives and lasts used in manufacture of shoes replaced every three years or less—Capital or income expenditure—Deduction against profits allowed under Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), s. 137 (d)—Finance Act, 1954 (2 & 3 Eliz. 2 c. 44), s. 16 (1), (3) (c).

The taxpayers were shoe manufacturers who in the course of making shoes used a large number of knives and lasts. The knives did not form part of the machine (a press) with which they were used and the average life of a sole knife was three years, and of an upper knife one year. Each knife cost about £1. The lasts similarly were not part of the machine with which they were used and as many as thirty-six thousand pairs of lasts were required to make twelve hundred dozen pairs of shoes a week. The life of each last was about three years although some might be used for four or five years, and the cost of the lasts was about £1 2s. per pair. The taxpayers charged all expenditure on new knives and lasts to capital and deduction against profits was allowed by the Crown under s. 137 (d) of the Income Tax Act, 1952, at the rate of one-sixth of the total cost in the six succeeding half-yearly accounts. This deduction against profits was accepted by the Crown as a practicable and just estimate of the sum expended “for the supply, repairs or alterations of any implements, utensils or articles employed, for the purposes of the [taxpayers’] trade” within the Income Tax Act, 1952, s. 137 (d). In addition to this deduction from their profits, the taxpayers claimed an investment allowance under the Finance Act, 1954, s. 16, equal to one-fifth of their expenditure on knives and lasts, on the ground that the expenditure was “capital expenditure on new assets” within s. 16 (1)* and “expenditure on new . . . plant” within s. 16 (3) (c).

Held (LORD KEITH OF AVONHOLM and LORD DENNING dissenting): the taxpayers were entitled to the investment allowance under s. 16 (3) (c) because

(a) the expenditure on knives and lasts was capital expenditure on new assets within s. 16 (1) of the Act of 1954, and

(b) (LORD KEITH OF AVONHOLM and LORD DENNING concurring) the knives and lasts were “plant” within the meaning of s. 16 (3) (c), for they had the requisite degree of durability to be regarded as appliances kept for permanent use in carrying on the business and were not stock-in-trade made for sale.

Dictum of LINDLEY, L.J., in *Yarmouth v. France* ((1887), 19 Q.B.D. at p. 658) applied.

Appeal dismissed.

[As to relief for capital expenditure, see 20 HALSBURY’S LAWS (3rd Edn.) 481, para. 916; and for cases on the subject, see 28 DIGEST 47-49, 242-252.

For the Income Tax Act, 1952, s. 137, see 31 HALSBURY’S STATUTES (2nd Edn.) 134.

For the Finance Act, 1954, s. 16, see 34 HALSBURY’S STATUTES (2nd Edn.) 291.]

Cases referred to:

Charente S.S. Co., Ltd. v. Wilmot, [1942] 1 All E.R. 85; [1942] 1 K.B. 210; 111 L.J.K.B. 211; 166 L.T. 232; 24 Tax Cas. 97; 2nd Digest Supp.

Hyam v. Inland Revenue Comrs., (1929), 14 Tax Cas. 479; 1929 S.C. (Ct. of Sess.) 384; Digest Supp.

* The relevant terms of s. 16 are printed at p. 359, letters D and E, post.

- A *Inland Revenue Comrs. v. Great Wigston Gas Co.*, (1946), 176 L.T. 97; 29 Tax Cas. 197; 2nd Digest Supp.
- Lyons (J.) & Co., Ltd. v. A.-G.*, [1944] 1 All E.R. 477; [1944] Ch. 281; 113 L.J.Ch. 196; 170 L.T. 348; 2nd Digest Supp.
- Yarmouth v. France*, (1887), 19 Q.B.D. 647; 57 L.J.Q.B. 7; 34 Digest 225, 1884.

B Appeal.

Appeal by the Crown from an order of the Court of Appeal (LORD EVERSHED, M.R., SELLERS and PEARCE, L.JJ.), dated Oct. 9, 1958, reversing an order of VAISEY, J., dated Feb. 28, 1958, allowing an appeal by the Crown by way of Case Stated under the Income Tax Act, 1952, s. 64, and reversing a determination of the Commissioners for the Special Purposes of the Income Tax Acts. The facts are set out in the opinion of LORD REID.

Viscount Bledisloe, Q.C., and *A. S. Orr* for the Crown.

Heyworth Talbot, Q.C., and *G. B. Graham* for the respondents.

Their Lordships took time for consideration.

July 16. The following opinions were read.

- D LORD REID: My Lords, the respondents are shoe and slipper manufacturers. They were assessed to income tax for the years 1955-56 in respect of profits of £8,290 less capital allowances of £4,836. The question in this case is whether the capital allowances should be increased to £5,148 because of expenditure which the respondents maintain qualified for investment allowance under s. 16 of the Finance Act, 1954. The Special Commissioners decided in favour of the respondents. Their decision was reversed by VAISEY, J., but restored by the Court of Appeal.

- E The respondents' method of manufacture is described in the Case Stated by the commissioners. There are at least nine stages in the manufacture of a shoe, each performed by a different machine in conjunction with the knives and lasts which are the subject of this appeal. The first stage is cutting out from large pieces of different kinds of leather pieces of the correct shapes for the uppers, soles and other parts of the shoes. In the course of the argument, it appeared that the description of this stage in the Case is somewhat misleading and no objection was taken to our being given further information about it. Pieces of the correct shape are cut out by pressing a knife on to the leather.
- F The machine which does this is a press; the lower part of it is a flat table on which the sheet of leather is laid. Each piece is cut out by a single knife; in the case of an upper, the cutting edge is heart shaped, in the case of a sole, the cutting edge is the shape of the sole. The cutting edge is the lower part of a ring of metal of the same shape. A number of these knives are arranged by hand on the sheet of leather so that as little as possible of the leather shall be wasted. Then the upper part of the machine is pressed down on them and the leather is thus cut. The knives are not parts of the machine; each knife is a separate tool or implement designed to be used in conjunction with the machine. It is stated in the Case that as many as fourteen different knives may be used in producing the pieces of leather to be made up into one shoe. As different knives are required for right and left shoes and each size and type of shoe may require a different set of knives, it is obvious that the respondents must have available a very large assortment of knives. It appears that each knife costs about £1. Two types of machine are used; one costs over £400 and the other over £1,000. In most of the further stages of manufacture lasts are used. These cost about £1 2s. per pair. For the earlier stages making lasts are used, and for the later stages finishing lasts. These lasts, too, are not parts of the machines. For each process a last with the pieces of leather which go to make the shoe is fed into the appropriate machine. Again, not only are different lasts necessary for right and left shoes and for different sizes, but different types of shoes require different

lasts. It is stated in the Case that every change of fashion involves a change of last. It appears that about twelve thousand pairs of making lasts and twenty-four thousand pairs of finishing lasts are required for a production of twelve hundred dozen pairs of shoes a week. The life of each last is about three years, though some may be used for four or five years; it is not stated whether they mostly wear out or become obsolete through change of fashion. The life of the sole knives is about the same but upper knives have a life of about a year only. A

The facts set out in the Case with regard to the respondents' expenditure in buying knives and lasts and the way in which that expenditure has been treated for income tax purposes are as follows: B

"4. Owing to the large number of lasts and knives employed in the respondent's business no physical stocktaking at the half yearly dates to which its accounts are made up was possible. The respondents therefore charged all expenditure on new knives and lasts to capital and charged against profits one-quarter of the total cost in the four succeeding half yearly accounts, on the view that an average life of two years for the combined total expenditure on knives and lasts was a fair estimate. The actual expenditure on new knives and lasts and the amount so charged against profits in the two half years' accounts ending respectively on Apr. 3 and Oct. 2, 1954, forming the basis of the material year 1955-56 are set out in exhibit 3 under the headings of the five manufacturing units of respondent's business. Thus the figure of £8,022 5s. appearing in the balance sheet at Oct. 2, 1954 (exhibit 2B), is the balance after crediting total additions in the half year of £1,856 8s. 5d. and after debiting to profit and loss account a sum of £3,542 19s. 1d., being the writing off at twenty-five per cent. of expenditure on knives and lasts in the preceding four half years. C

"5. The expenditure on knives and lasts during the basis year and the six years immediately preceding the basis year was as follows:— D

Half year to	March, 1948	£2,075	
" "	September, 1948	£1,451	
" "	March, 1949	£3,706	
" "	September, 1949	£3,868	
" "	March, 1950	£4,659	
" "	September, 1950	£1,151	
" "	March, 1951	£3,527	
" "	September, 1951	£1,026	
" "	March, 1952	£5,195	
" "	October, 1952	£1,404	
" "	March, 1953	£5,131	
" "	October, 1953	£3,476	
" "	April, 1954	£4,160	
" "	October, 1954	£1,856	

No dissection of the figures of expenditure between knives and lasts had been attempted by the respondent and we were satisfied that such a dissection, if not actually impossible, was not reasonably practicable. F

"6. The Revenue had taken the view that for income tax purposes the respondent's estimate of the life of knives and lasts was too conservative, but had agreed that an average life of three years instead of two years was reasonable. The respondent had accepted the Revenue's contention for income tax purposes, and in the result a sum equal to one-sixth of the total expenditure on knives and lasts has been, for a number of years, allowed as a deduction in the following six half years, as such accounts came into the computation of the respondent's profits for income tax purposes. This deduction was regarded by the Revenue as the nearest practicable and just estimate of the sum expended by the respondent 'for the supply, repairs G

H

I

A or alteration of any implements, utensils or articles employed for the purposes of the respondent's trade,' within the meaning of s. 137 (d), Income Tax Act, 1952. It was common ground between the parties in this appeal that the amount so allowed for income tax purposes was not the sum 'actually expended' since (i) it related to expenditure incurred in the preceding six half yearly periods and (ii) it was the result of a 'straight line writing down' on the basis of the Revenue's contention of an estimated three years' life. For the reasons hereinafter set out in para. 10 below (1), we do not consider that either the method adopted by the respondent in making up its accounts, or the variation of that method adopted by the Revenue and accepted by the respondent for income tax purposes, affects the issue on which we were called upon to give our determination."

C In addition to this deduction from their profits, the respondents claim an investment allowance equal to one-fifth of their expenditure on knives and lasts under the provisions of s. 16 of the Finance Act, 1954. The relevant provisions of that section are:

D "(1) In the cases provided for by this section, an allowance (in this Act referred to as an 'investment allowance') shall be made in respect of capital expenditure on new assets incurred after Apr. 6, 1954 . . .

E "(3) An investment allowance equal to one-fifth of the expenditure shall be made instead of an initial allowance under Chapter II of the said Part 10 in respect of expenditure on the provision of new machinery or plant, and any provision of the Income Tax Acts applicable to initial allowances under that Chapter, so far as it is applicable in relation to allowances for new assets, shall apply also to investment allowances under this subsection, except that— . . . (c) where the expenditure on new machinery or plant is allowed to be deducted in computing profits or gains for the purposes of income tax, it shall nevertheless be treated as capital expenditure for the purposes of this subsection, if it would be so treated for the purposes of the said Chapter II but for the deduction: . . ."

H Under sub-s. (1), an investment allowance can only be made in respect of capital expenditure on new assets. It is not disputed that these knives and lasts were new assets; the word "new" is used in contrast to second-hand. The contention of the Crown is that the cost of acquiring these assets was not capital expenditure. Subsection (3) contains a further limitation; the new assets must be new machinery or plant. It is not said that the knives and lasts are machinery or parts of machinery. The Crown say that they are plant and that is denied by the respondents. According to the contentions set out in the Case, both these points were taken by the respondents before the commissioners. But, in their decision, the commissioners do not even mention the question whether this was capital expenditure. They only deal with the question whether the knives and lasts are plant. They say:

"(ii) We found as a fact on the evidence that the knives and lasts were machinery or plant within the meaning of the said section, and we held that the [respondents] were entitled to the investment allowance claimed."

I We do not know whether they thought that the expenditure being capital expenditure was so clear as not to require special mention or whether they omitted to mention it owing to some oversight. But, before reaching their decision, I think that they must have decided in their own minds that this was capital expenditure; I find it difficult to suppose that they could have entirely overlooked the leading requirement of the section after the point had been argued. It is unfortunate that we do not have the commissioners' reasons for deciding that this was capital expenditure. It is not argued that this expression

(1) The relevant parts of para. 10 are set out at p. 365, letters G and H, post.

is used in the Act as a term of art with some technical meaning, and I accept the position that this expression "capital expenditure" must be considered as an ordinary expression in untechnical English. So treating it, my first inquiry would be: What would a reasonable business man understand by the expression and would he regard this expenditure as capital expenditure or not? On that question, the decision of the commissioners would be most important. But we must do our best to interpret these words without expert assistance.

I am certainly not going to attempt a definition of capital expenditure on the one hand or of revenue expenditure on the other. Like most ordinary English words or expressions they are probably incapable of exact definition, and I must look at the whole circumstances and determine as a matter of construction into which class this expenditure falls. As the first step, I would ask what is the practical difference between treating an item of expenditure as capital or as revenue expenditure. I claim no expert knowledge of accountancy or of business methods, and the only practical difference that occurs to me—and none other was suggested in argument—is that, if you treat a sum as capital expenditure, you do not write it all off in one year or set it all against the income of one year, whereas if you treat it as revenue expenditure the whole of it is set off against the revenue of the year when it is expended. If the money has been expended on stock-in-trade and the thing bought is still there at the end of the year, you carry forward the value of the stock-in-trade at the end of the year. But these knives and lasts were not stock-in-trade, and I do not know how their value at the end of the year could be carried forward in a profit and loss account if they are plant and the cost of them has been treated as revenue expenditure.

I would suppose that accounts are intended to have as close a relation as is reasonably practicable to reality. If you buy plant which still has a substantial value at the end of the year, I would suppose that that value ought to be reflected somewhere in the accounts. If the cost is treated as capital expenditure, there seems to be no difficulty in writing off that cost year by year as the plant wears out or becomes obsolete, but if the cost is treated as revenue expenditure I do not know what item in the next year's accounts would reflect the continuing value of the plant. I do not suggest that this distinction is, or should be, an inflexible rule. There may, for all I know, be good reasons for not following it in particular cases. But, in the absence of any indication of any speciality in this case, I am inclined to approach this case in that way. If that is a correct approach, then the salient facts in this case are that, on the average, these implements have a life of several years, that their cost has been treated by the respondents as capital expenditure to be written off in two years, and that the Revenue has acted on the view that their average life is three years and, in allowing deduction for income tax purposes, has spread the expenditure in each year over a period of three years.

The case is complicated by the fact that deductions in respect of this expenditure have been made under s. 137 (d) of the Income Tax Act, 1952. This is a provision which, primarily at least, applies to revenue expenditure, and it would appear to be applicable to this expenditure because these knives and lasts were, I think, implements or articles supplied for the purposes of the respondents' trade. But I do not think that this is at all conclusive, for three reasons. First, it is not at all clear that this provision was intended only to be available in the case of revenue expenditure. Secondly, s. 16 (3) (c) of the Finance Act, 1954, appears to recognise at least the possibility of this provision being used in the case of capital expenditure. And, thirdly, on one reading of s. 137 (d) of the Income Tax Act, 1952, its provisions were not correctly followed in making deductions in respect of this expenditure. I take these three points in turn. At first sight, s. 137 (f) may appear to prohibit deductions under this section in respect of capital expenditure, for it prohibits any deduction in respect of "any sum employed or intended to be employed as capital in, such trade". But "any

A sum employed as capital" may mean new capital put into the business, and is not a very happy equivalent of "any capital expenditure", and I think that it is legitimate to look at the history of this provision. Similarly worded provisions were included in the old r. 3, (2), which goes back at least as far as 1842. Before 1878 there was nothing in the Income Tax Acts corresponding to the modern wear and tear allowance or annual allowance in respect of capital expenditure; and, unless r. 3 applied when there was capital expenditure to replace worn out machinery or plant, there was no way of getting any deduction for income tax purposes in respect of such expenditure. It is not disputed that, in fact, it was the custom to allow deductions under r. 3 in respect of capital expenditure; an example given was the allowance of such a deduction in respect of expenditure in replacing worn out railway engines by new ones. I find it hard to believe that such a custom could have existed if r. 3 clearly excluded all capital expenditure. Moreover, it is not disputed that this custom continued after 1878 notwithstanding the fact that thereafter capital expenditure could be the subject of an appropriate wear and tear allowance. Indeed, it is noteworthy that in the recent case of *Inland Revenue Comrs. v. Great Wigston Gas Co.* (3), it was still said that there was an option to receive deductions under r. 3 or a wear and tear allowance. Of course, the taxpayer could not have both.

Then I take s. 16 (3) (c) of the Finance Act, 1954. It was not disputed, and I think that it is clear, that this provision deals with cases where there has been capital expenditure qualifying for an investment allowance but, nevertheless, deductions have been allowed in respect of it under s. 137 (d) of the Income Tax Act, 1952. This appears to me to be a statutory recognition of the practice of allowing deductions under s. 137 (d) in respect of capital expenditure, and to entitle the respondents to an investment allowance if this was capital expenditure on plant, notwithstanding the fact that they have already received deductions under s. 137 (d). The result of getting an investment allowance is that the taxpayer gets by means of allowances or deductions more than one hundred per cent. of such capital expenditure as qualifies under s. 16. In the normal case he gets investment allowance in addition to the usual allowances in respect of capital expenditure. It appears to me that the meaning and effect of sub-s. (3) (c) is to entitle and enable him to get more than one hundred per cent. if he receives deductions under s. 137 (d) instead of the usual allowances.

My third reason is, I think, less important. Section 137 (d) prohibits the deduction of any sum expended for the purposes mentioned "beyond the sum actually expended for those purposes." If this means actually expended during the accounting year, then the method adopted in this case was not in accord with the provisions of the section, because the sums deducted were arrived at by taking into account expenditure in three consecutive years—in effect, by writing off each year's expenditure over a period of three years, which is an appropriate method for capital expenditure. I do not in the least criticise this procedure. It was convenient, it could not cause loss to the Revenue, and it was unlikely to cause loss to the taxpayer. But it does emphasise the fact that neither party saw fit to treat this expenditure in the way in which revenue expenditure is normally treated, and it appears to me to go far to remove any presumption that expenditure in respect of which s. 137 (d) has been applied is revenue expenditure.

I There appears to be no clear authority on this matter. The authority most strongly founded on by the Crown was the opinion of LORD PRESIDENT CLYDE in *Hyam v. Inland Revenue Comrs.* (4). There, shop fittings were scrapped and new fittings were purchased and a claim for a deduction under r. 3 of the Rules applicable to Cases I and II of Sch. D was disallowed. Before the rule was

(2) Rule 3 of the Rules applicable to Cases I and II of Sch. D to the Income Tax Act, 1918.

(3) (1946), 29 Tax Cas. 197.

(4) (1929), 14 Tax Cas. 479.

amended in 1927, deduction was prohibited "beyond the sum usually expended for those purposes according to an average of three years preceding the year of assessment", and the Lord President really based his opinion on the fact that expenditure of this kind was not a usual expense recurring annually. It had been admitted that the shop fittings were "implements, utensils or articles" within the meaning of the rule, but the Lord President doubted this. The passage founded on is (5):

"The propriety, and the practice, of charging the cost of supplying 'implements, utensils, or articles employed for the purposes of the trade' to revenue must vary according to the character of the trade, and—partly perhaps—according to the financial circumstances of the trader. Trading implements, utensils, and similar articles—taking these descriptions in their ordinary connotation—have to be supplied, repaired and altered from time to time, in order to enable the trade to be carried on and profits to be earned; and in many businesses, expenditure on these things is a usual incident of their conduct and properly recurs in every year, or at least in most ordinary years, as a debt against revenue account. Take the case of a hotel or restaurant business—much table-furniture, linen, crockery, pots and pans have to be provided, and the supply of such things is a usual incident of the trade. Accordingly I think that, in a business of the kind supposed, the costs of such supply are a proper charge against revenue in the books, and a proper deduction from gross profits in terms of sub-head (d) of r. 3 for purposes of income tax. But, since such relatively permanent things as shop fittings must be taken to form a species of the genus 'implements, utensils, or articles employed for the purposes of the trade', it is plain that there are some kinds of 'implements, utensils or articles' the supply of which is not a usual incident (one year with another) of the conduct of the business, and in respect of which there is no sum which can be said to be 'usually expended'."

As there is no longer any reference in s. 137 to sums usually expended, the Lord President's precise ground of judgment is no longer applicable, but this is a decision that certain expenditure (apparently capital expenditure) which does not recur annually should not be allowed as a deduction under this provision. But I cannot regard this reasoning as a satisfactory criterion of whether expenditure is, or is not, capital expenditure. Let me suppose that a large business has twenty machines each of which lasts twenty years, and that it buys a new one annually to replace one worn out. And let me suppose a small business with only one such machine; it buys a new one once in twenty years. It may be that it is proper for the large business to save a lot of calculation by treating its annual purchase as revenue expenditure and claiming under s. 137, whereas that would not be proper for the small business. But it would seem to me odd, and, indeed, absurd, that the Revenue should be able to say that the buying of a new machine by the large business is not capital expenditure and carries no investment allowance, whereas the buying of a similar machine by the small business is capital expenditure carrying a right to an investment allowance. I cannot accept the view that the regularity with which a particular type of expense recurs in a particular business throws much or any light on whether it is really capital or revenue expenditure. On the material available, I am of opinion that the respondents have made out their case that this expenditure was capital expenditure, and I turn to consider whether the knives and lasts were plant within the meaning of the section.

It is not disputed that plant is also used in the Act as an ordinary English word. It is not altogether an easy word to construe; it may have a more or less extensive meaning according to its context. As a general statement of its meaning, I would adopt the words of LINDLEY, L.J., in *Yarmouth v. France* (6):

A “ . . . in its ordinary sense, it includes whatever apparatus is used by a business man for carrying on his business,—not his stock-in-trade which he buys or makes for sale; but all goods and chattels, fixed or movable, live or dead, which he keeps for permanent employment in his business . . . ”

I would also refer to the judgment of UTHWATT, J., in *J. Lyons & Co., Ltd. v. A.-G.* (7):

B “ I do not think that the use throughout s. 24 of the Act of the word ‘ plant ’ as part of the phrase ‘ plant or machinery ’, and ‘ machinery and plant ’, has the effect of confining the meaning of the word to such plant as is used for mechanical operations or processes. Next, I find it unnecessary, for the purposes of a decision in this case, to enter upon the question whether
C any particular limitation should be placed on the general sense borne by the word by reason that the Act in which it appears is a rating Act. I propose to assume that no such limitation should be placed . . . Confining my attention to trade plant, I am content to accept the general description in *Yarmouth v. France* (8), that ‘ plant ’ includes whatever apparatus or instruments are used by a business man in carrying on his business. The term does not include stock-in-trade, nor does it include the place in which the business is carried
D on. Whether any particular article more properly falls within ‘ plant ’ as thus understood, or in some other category, depends on all the circumstances of the case.”

Subject to one point, I have no doubt that these knives and lasts are plant in the ordinary sense of the word. It is true that they are numerous, small and cheap. But one trader may have to use a few large articles while another may have to use a large number of small articles, and I see no good ground for distinguishing between them as regards investment allowance. The one point is the durability of these articles. When LINDLEY, L.J., used the phrase “ permanent employment in his business ”, he was using it in contrast to stock-in-trade which comes and goes, and I do not think that he meant that only very long-
E lasting articles should be regarded as plant. But the word does, I think, connote some degree of durability, and I would find it difficult to include articles which are quickly consumed or worn out in the course of a few operations. There may well be many borderline cases, but these articles have an average life of three years and, if their cost can fairly be called capital expenditure, I cannot refuse to them the description of “ plant ” unless the Act discloses some special reason
F for doing so. The word “ investment ” may indicate a rather longer duration than what might be sufficient in other cases. But it seems to me that machinery could not be disqualified for investment allowance because it only had a life of three years, and I see no reason why a stricter test as to durability should be applied to plant than to machinery when the Act appears to treat them on an equal footing.

G
H I am, therefore, of opinion that the respondents are entitled to investment allowance and that this appeal should be dismissed.

I LORD TUCKER: My Lords, it is common ground that in order to justify the investment allowance claimed by the respondents, it was necessary for them to prove (i) that the knives and lasts used in their business constituted machinery or plant for the purposes of s. 16 (3) of the Finance Act, 1954, and (ii) that the expenditure incurred in the purchase thereof was of a capital nature.

The Special Commissioners, in allowing the respondents’ appeal, expressly found that the knives and lasts were machinery or plant, and must inferentially have held the expenditure to have been of a capital nature. VAISEY, J., in allowing the Crown’s appeal, held that the knives and lasts were not machinery or plant, so that the second question did not arise. The Court of Appeal agreed

(7) [1944] 1 All E.R. 477 at p. 479; [1944] Ch. 281 at p. 286.

(8) (1887), 19 Q.B.D. 647.

with the finding of the Special Commissioners on the basis that the knives and lasts were plant and held the expenditure to be of a capital nature. A

I understand that all your Lordships agree with the first finding of the Court of Appeal. I am of the same opinion, for the reasons which have been stated by my noble and learned friend, LORD REID, and do not desire to add anything thereto.

The second question, on which your Lordships are, I understand, divided in opinion is, I think, much more difficult. In this connexion s. 330 of the Income Tax Act, 1952, requires consideration in relation to s. 16 (3) of the Finance Act, 1954. Section 330 (1) of the former Act is, so far as material, as follows: B

“References in this Part of this Act (9) to capital expenditure and capital sums—(a) in relation to the person incurring the expenditure or paying the sums, do not include any expenditure or sum which is allowed to be deducted in computing, for the purposes of income tax, the profits or gains of a trade, profession, office, employment or vocation carried on or held by him.” C

Section 16 (3) of the Finance Act, 1954, has already been set out (10) in the opinion of my noble and learned friend, LORD REID, and I need not repeat it. The facts material for this part of the case are to be found in paras. 4-6 of the Case Stated and have also already been set out (11). D

The joint effect of s. 330 of the Income Tax Act, 1952, and s. 16 (3) of the Finance Act, 1954, is, I think, to remove the disqualification for inclusion in capital expenditure attaching to sums which have been allowed by way of deduction for income tax in computing the profits or gains of a trade, etc. This leaves the expenditure in question to be judged free from any consideration of how it has been, or should be, dealt with under s. 137 of the Income Tax Act, 1952. The fact that under that section it has been allowed as a deduction is not to prejudice it in qualifying for treatment as capital expenditure for the purposes of s. 16 of the Finance Act, 1954. E

My Lords, there is, as previously stated, no express finding by the Special Commissioners, but the contrary view was urged by the Crown in the first of their contentions set out in para. 8 of the Case Stated and it is, I think, implicit in their decision that they must have regarded it as capital expenditure. The manner in which the taxpayer keeps his accounts is, of course, often quite irrelevant to the question how a particular item should be treated for tax purposes, but when we find, as in this case, that both the taxpayer and the Inland Revenue authorities have treated this expenditure in the manner set out in paras. 4 and 6 of the Case Stated, viz., by crediting the expenditure to capital account in the balance sheet and writing it off over a period of years by debiting the profit and loss account, and when no evidence is called by the Crown to say that this is not in accordance with good accountancy practice, and bearing in mind the nature and average life of the assets in question, I am of opinion that the tacit assumption of the Special Commissioners that this was an expenditure of a capital nature was fully justified, and that the appeal should, accordingly, be dismissed. F . G H

LORD KEITH OF AVONHOLM: My Lords, the point in this appeal is a short one. It is whether certain knives and lasts used by the respondents (whom I shall call “the company”) in their trade of shoe and slipper manufacturers are machinery or plant, and whether the cost of providing them falls to be treated as capital expenditure. The statutory provisions in the context of which this question has to be considered have already been explained and I do not repeat them. In the Court of Appeal and in this House the question has been dissected and examined in two parts, the nature of the assets and whether they fall to be charged against capital or revenue. To some extent this separation is I

(9) I.e., Part 10, ss. 265-334.

(10) See p. 359, letters D and E, ante.

(11) See p. 358, ante.

- A inevitable, but I doubt whether it is helpful, for this reason. If, at the inception of the business, certain assets can properly be regarded as plant or machinery it would seem to be difficult to say that they cease to be plant or machinery when replaced or renewed. But it does not follow that the expenditure on their provision, if capital expenditure at the outset, is likewise capital expenditure on replacement. Little, if any, attention seems to have been given to the accountancy aspect of the case before the commissioners, apart from production of the company's accounts, nor do the Special Commissioners expressly deal with the matter. What has been called sound accounting and commercial practice has frequently been made the basis of decision by the courts, but the treatment by a company or individual of a particular item of expenditure in its accounts may not conform to such practice, and there are cases where the courts have found that it does not do so. In any case, as is well known, accounts for trading purposes do not necessarily correspond to accounts for income tax purposes. In this case, while the views of accountants might be interesting, I doubt whether they could be conclusive, for the matter must, I think, be determined on a consideration of the statutory provisions in relation to the nature of the operations carried on by the company.
- D We had a display of a sample of the knives and lasts and a demonstration of how they operated, without objection from counsel for the Crown or challenge of the accuracy of the demonstration. From this it seems that some error or misunderstanding must have crept into the findings of the commissioners. The knives and lasts would not seem to be attached to any machine so as to be "readily detachable". The machines perform the cutting, stretching, stitching and hammering functions which might be carried out by a cobbler by hand. They, in fact, are just mechanical cobblers, and the knives and lasts are the implements which they use, the knives being hollowed metal shapes with sharp cutting edges. It would be perfectly accurate to describe them as "implements" or "articles" employed for the purposes of the trade within the meaning of s. 137 (d) of the Income Tax Act, 1952. That may not dispose of the question whether they are "machinery or plant" within the meaning of s. 279 of the same Act or s. 16 (3) of the Finance Act, 1954. The view of the commissioners was that, on a proper construction of these sections, the words "machinery or plant" were to be given their ordinary meaning. They say (12):

- G "So directing ourselves, we did not doubt that there might be trades employing knives and lasts in circumstances which would make it inappropriate to describe them as machinery or plant. But in the case before us we thought we should give weight to the facts (i) that the knives and lasts performed an indispensable function in the process of manufacture, (ii) that in performing that function they were used (and could only be used) in conjunction with machines, which themselves could perform no useful function in the said process unless used in conjunction with the lasts and knives, and (iii) that (as was not disputed) the said machines themselves were machinery or plant within the meaning of the relevant sections."
- H

- I They, accordingly, found as a fact on the evidence that the knives and lasts were machinery or plant within the meaning of the sections. They seem to have considered, although they did not think it necessary to decide the fact, that the knives and lasts might also be "implements, utensils or articles" within s. 137 (d). Even allowing for some error in the commissioners' findings as to the way in which the knives and lasts functioned, I should not be prepared to say that the reasons which moved the commissioners to find that they were "machinery or plant" were not equally applicable to knives and lasts functioning as described to your Lordships. They would, I think, quite properly be described as among the plant to be provided for a similar business set up for the first time and their

replacements must, I think, continue to be plant. At the same time they are, A
I consider, implements or articles "employed for the purposes of the trade",
expenditure on which, in the course of trade, can properly be chargeable as a
deduction in computing profits and gains, and that, in my opinion, is of some
importance in considering whether the money spent in replacing them is capital
or revenue expenditure.

I have come to the view that, in this case, the expenditure on replacement B
should properly be treated as revenue expenditure. More upper knives are
required than sole knives, and we are told that the average life of an upper
knife is twelve months. The limit of life for sole knives and lasts would appear,
with possible exceptions, to average three years. The company itself in its own
accounts treated its whole stock of knives and lasts as having a life of only
two years and wrote off the total cost in two years. In my opinion, it is quite C
unreal to regard constantly recurring expenditure on such articles, having so
short a life, as capital expenditure. It can hardly be said to be expenditure on
assets of an enduring nature. This, to my mind, is a typical case of the type
referred to by LORD PRESIDENT CLYDE in *Hyam v. Inland Revenue Comrs.* (13),
where he said:

"The propriety, and the practice, of charging the cost of supplying D
'implements, utensils, or articles employed for the purposes of the trade'
to revenue must vary according to the character of the trade, and—partly
perhaps—according to the financial circumstances of the trader. Trading
implements, utensils, and similar articles—taking these descriptions in their
ordinary connotation—have to be supplied, repaired and altered from time
to time, in order to enable the trade to be carried on and profits to be earned;
and in many businesses, expenditure on these things is a usual incident of
their conduct and properly recurs in every year, or at least in most ordinary
years, as a debt against revenue account. Take the case of a hotel or
restaurant business—much table-furniture, linen, crockery, pots and pans
have to be provided, and the supply of such things is a usual incident of
the trade. Accordingly I think that, in a business of the kind supposed, the
costs of such supply are a proper charge against revenue in the books, and a
proper deduction from gross profits in terms of sub-head (d) of r. 3 for
purposes of income tax." E

LORD SANDS, in the same case, took the test of considering whether the expend- G
iture was (14) "extraordinary in relation to the ordinary expenditure of the
year". It is impossible to say here that the expenditure is "extraordinary" on
any view. It is just part of the ordinary expenditure incurred year after year
and required for earning the profits of the business. To this may be added that
the cost of the individual knives and lasts may be reckoned in shillings rather
than in pounds. No doubt they have to be bought in quantity running annually
into some thousands of pounds. But, strictly speaking, it is each knife or last H
that has to be considered (see *Charente S.S. Co., Ltd. v. Wilmot* (15)), and it is
somewhat fantastic to regard the expenditure of some shillings on a knife or
last as capital expenditure or to suppose that, when a large quantity has to be
bought at one time, the multiplication of what would be a revenue expense
results in a capital expenditure. For the same reasons I find difficulty in suppos- I
ing that Parliament intended the machinery of initial, or investment, allowances
and annual allowances to be applied to such articles. The detailed and some-
what complex procedure prescribed by s. 281 and s. 282 of the Income Tax Act,
1952, would seem quite inappropriate to such a case.

It is equally unreal to look at the matter from the purely annual point of view.
The year is, no doubt, a convenient period and in some cases a statutory period

(13) (1929), 14 Tax Cas. at p. 486. (14) (1929), 14 Tax Cas. at p. 488.

(15) [1942] 1 All E.R. 85; [1942] 1 K.B. 210.

- A for the making up of accounts, but there is no reason in principle why expenditure exhausted in a year should alone be treated as revenue expenditure. There must be many occasions on which it is prudent and sound commercial policy to lay in supplies of things, other than raw material of manufacture, used in a manufacturing process in quantities sufficient to last for longer than a year and other cases where expenditure on single items which are going to endure for perhaps
- B many years is accepted and properly accepted as revenue expenditure. Expenditure on all consumable or quickly expendable things used in industry would seem naturally to be chargeable against revenue. Nor is it always necessary to stop there. Repairs to premises or machinery may last for many years and, so long as these do not fall to be classed as improvements, are, so far as I am aware, always a charge against revenue, as is recognised indeed in s. 137 (d) of the
- C Income Tax Act, 1952. Replacements generally may be said, I think, to fall into this category, and that is what the knives and lasts are here. The company has in reality charged them against revenue. Initially charging them against capital it writes them off in two years. It may be said it charges half of them against revenue in the first year and the other half against revenue in the second year. The company and the Revenue have reached an agreement on the amounts
- D to be allowed as a renewals charge each year. But that does not, in my opinion, affect the question. It is merely a working compromise, or formula, to determine, for the purposes of s. 137 (d), the actual sum expended on these renewals in any year. For my part, I can see no reason why the whole sum expended in any year should not have been allowed although not exhausted in that particular year, just as I understand would be done in the case of repairs of premises, or
- E machinery. I feel at some loss because the commissioners have not dealt with the accounting aspect of the matter but, on the evidence before your Lordships, I consider that the expenditure here falls to be treated as revenue expenditure. I would allow the appeal.

LORD DENNING: My Lords, in order to understand this case, it is as

- F well to have in mind the way in which a cobbler makes shoes. He cuts the leather with a knife, then shapes it round a last (which is, of course, a wooden model of a foot), and then hammers in the tacks. In this case, instead of a cobbler working by hand, you must envisage a series of machines which are, in effect, mechanical cobblers, each doing a part of the work. One mechanical cobbler is given a knife and leather. It presses down the knife and cuts the leather into the required
- G shapes. Another mechanical cobbler is given a wooden last with the leather shaped round it. It hammers down the tacks. And so forth.

- These machines are undoubtedly plant. They are plant used by the manufacturers in the factory. Each of the machines—each mechanical cobbler—is part of the plant. The knives and lasts, too, are part of the plant. When the respondents buy new machines, with the knives and lasts to go with them, they
- H undoubtedly incur capital expenditure on the provision of new plant. But what is the position when the knives and lasts fall to be renewed? The respondents use hundreds of knives and thousands of lasts. These have a short life. They are continually having to be renewed as they wear out or fashions change. Some knives have an average life of one year. Others three years. The lasts have an average life of three years. They are quite cheap. The knives cost
- I about £1 ls. each. The lasts cost about £1 2s. a pair. The respondents spend about £6,000 a year on renewing them, year in and year out. What is the nature of this expenditure? Is it “capital expenditure on the provision of new plant” so as to qualify for an investment allowance? The Special Commissioners said nothing in particular on this point. Nor did VAISEY, J. The Court of Appeal found it difficult. Your Lordships are, I believe, divided in opinion.

My Lords, I cannot think that this £6,000 a year is the sort of expenditure which should qualify for an investment allowance. It is a running expense which is incurred, year in and year out, in the course of the ordinary conduct

of the business. The sum actually expended can clearly be deducted in computing the profits of the business; because it is a sum expended for the supply of "implements, utensils or articles employed, for the purposes of the trade" within s. 137 (d) of the Income Tax Act, 1952. So that the respondents can no doubt get one hundred per cent. allowance on account of it. But I do not see that they should get an additional twenty per cent. on the ground that it is capital expenditure. Test it this way: If this £6,000 a year were capital expenditure, the respondents would be entitled, not only to an investment allowance on this expenditure, but also to an annual allowance for wear and tear. But, in order to get the annual allowance, each knife and each last would have to be treated as a separate item. Its value would have to be written down each year on a percentage basis, gradually getting less from year to year during its life: see s. 281 of the Act of 1952; or, alternatively, its value would have to be written down uniformly on a straight-line basis spread over its estimated life; but this would only be allowed if the commissioners were satisfied that proper records would be kept about it: see s. 282 of the Act of 1952. Neither of those methods could, in practice, be applied to these knives and lasts. They are too numerous, too small, too cheap and too often renewed. Test it another way: Suppose that the respondents made these knives and lasts themselves. They might well have a workshop for the purpose and employ men to do the work. The cost of wages and materials would clearly be revenue expenditure which could be deducted in computing the profits of the business. There could be no suggestion that it was capital expenditure. Why should it be different because they buy them instead of making them? Test it finally by taking some simple instances. Suppose a haulage firm has a fleet of lorries. The initial cost of the fleet is clearly capital expenditure. But the cost of renewing the tyres is revenue expenditure. Or take a hotel business. The initial cost of crockery, pots and pans and so forth is capital expenditure. But breakages run at a uniform level. The cost of replacements is revenue expenditure. Suppose a firm of builders has a carpenter's shop fitted with woodworking machines but also hand saws and chisels for the men to use. The initial cost of the machines and the tools is capital expenditure. The machines have a long life and the cost of renewing them is a capital expenditure. But the tools have a short life and the cost of renewing them is revenue expenditure.

I do not think that much guidance is to be obtained from the way the accounts were kept in the past. Accepting that the actual cost in each year of the knives and lasts is a revenue expense and can properly be deducted from the profits for the year, nevertheless it might well be convenient to even it out by averaging the cost over the last three years. Alternatively, if the cost was to be regarded as capital expenditure, it might well be convenient to make an annual allowance on the basis of a "straight-line writing down" on an estimated three years' life. The only thing that is, perhaps, significant is that there was never any claim made for an initial allowance.

My Lords, I am of opinion that the expenditure of the respondents on renewing knives and lasts was not a capital expenditure so as to qualify for an investment allowance, and I would allow the appeal.

LORD JENKINS: My Lords, I agree with my noble and learned friends, LORD REID and LORD TUCKER, in their conclusion that the respondent company (hereinafter called "the company") is entitled under s. 16 (3) of the Finance Act, 1954, to an investment allowance in respect of its expenditure on knives and lasts during the period relevant to its assessment to income tax for the year 1955-56. In order to make good its claim to this allowance, the company had to show that the expenditure in question was "capital expenditure on new assets" within s. 16 (1), and also that it was "expenditure on the provision of new machinery or plant" within s. 16 (3). The knives and lasts were clearly new assets (see s. 16 (10) which defines "new" in relation to machinery and plant as meaning "unused and

A not second-hand”), and clearly also were not “machinery”. Two questions, therefore, arise in this appeal, viz.: (i) Whether the knives and lasts were “plant”; and (ii) If so, whether the expenditure on the provision of them was capital expenditure.

B I have no doubt that the knives and lasts were “plant”. On this point I am, for the present purpose, content to accept as a sufficient statement of the ordinary meaning of the expression “plant” the words of LINDLEY, L.J., in *Yarmouth v. France* (16):

C “There is no definition of plant in the Act [the Employers’ Liability Act, 1880]: but, in its ordinary sense, it includes whatever apparatus is used by a business man for carrying on his business,—not his stock-in-trade which he buys or makes for sale; but all goods and chattels, fixed or movable, live or dead, which he keeps for permanent employment in his business . . .”

D The reference to “permanent employment” in the business demands some degree of durability. This, I think, is satisfied in the present case by the life of three years attributed to making and finishing lasts, sometimes extended to four or five years in the case of the latter, and to sole knives. The upper knives are given a life of only twelve months, but the intention no doubt is to keep and use them for so long as they are serviceable, and I cannot regard the circumstance that they wear out in that relatively short period as investing them with so transitory a character as to take them out of the category of plant to which they would otherwise belong.

E The second question (viz., whether the expenditure on the provision of the lasts and knives was capital expenditure) presents more difficulty, but, broadly speaking, I think that, subject to the requisite degree of permanence, an appliance which satisfies LINDLEY, L.J.’s definition of plant is well on its way to attaining the status of a capital asset, the cost of providing which may be properly regarded as capital expenditure. Counsel in his argument for the company submitted that all expenditure on the acquisition of assets to be retained by a manufacturer for use again and again in his manufacturing operations is capital expenditure; and that this holds good whether the assets in question are acquired by way of addition to or in replacement of existing stocks. It will be seen that the definition of “capital assets” implicit in counsel’s submission is closely akin to LINDLEY, L.J.’s definition of “plant”. Both postulate that the assets in question should possess some degree of permanence. LINDLEY, L.J., speaks of goods and chattels kept by the business man for permanent employment in his business, while counsel for the company speaks of assets retained by a manufacturer for use again and again in his manufacturing operations. But neither of them attempts to define the degree of permanence required, and indeed it would, as I think, be impossible to do so. I accept counsel’s submission, not as embodying a hard and fast rule of universal application, but as providing, so far as it goes, a reasonably adequate guide to the solution in the present case of the question whether the expenditure on the assets here concerned, that is to say, the knives and lasts, was capital expenditure for the purposes of s. 16.

I The company does not deal in knives and lasts. It acquires knives and lasts for retention and use as part of its means of manufacturing shoes and slippers. In point of function, the knives and lasts resemble the machines in conjunction with which they are used, in the sense that they are not themselves a subject of the company’s trade but are kept and used until such time as they become unserviceable or obsolete, and by their use contribute to the production of the shoes and

slippers in which the company does trade. So far, therefore, they may be said to be assets producing income as distinct from assets representing income, and, to that extent at least, to be of a capital nature. The machines in conjunction with which the knives and lasts are used are admittedly capital assets. For the present purpose, I see no ground for distinguishing the former from the latter in this respect apart from the small cost and relatively short life of the knives and lasts as compared with the machines. As to the cost, if the knives and lasts had an unlimited life, the fact that they cost only a matter of £1 each would not, so far as I can see, afford any ground for denying them the character of capital assets. As to length of life, if each knife or last was worn out by one day's work it would lack the element of permanence which is undoubtedly essential to the conception of a capital asset. The knives and lasts worn out by each day's work would, on this supposition, have no better claim to rank as capital than would be possessed by the coal consumed daily in firing the boilers in a factory where the machines were worked by steam. On the other hand, I repeat that, if each knife or last endured for ever, I can see no ground for holding that it would not be a capital asset.

The case, therefore, appears to me to turn in the end on the question of permanence, which is largely a question of degree. I think the element of permanence looms larger in the conception of a capital asset than it does in the conception of plant. Nevertheless, I see no reason for holding that the average life of three years possessed by sole knives and making and finishing lasts is too short to justify their acceptance as capital assets. The average life of only twelve months possessed by upper knives seems to me to be near the line, but no attempt has been made to separate these knives and the other appliances, and I do not know whether it would have been practicable to do so. In point of function, there is no distinction, so far as I can see, between the upper knives and the rest. I would, therefore, give the upper knives the benefit of the doubt and, for the present purpose, treat them as possessing the requisite degree of longevity. This accords with the arrangements between the Revenue and the company referred to in para. 6 of the Case, which allowed all the knives and lasts an average life of three years. So far as the question is one of fact and degree, I think the Special Commissioners must be taken to have held by implication that the expenditure here in question was capital expenditure, and I see no sufficient reason for differing from that view.

I would, accordingly, dismiss this appeal.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Bracewell & Leaver* (for the respondents).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

A ATTORNEY-GENERAL (on the relation of THOMAS BROWNLEE PAISLEY) AND ANOTHER v. ST. IVES RURAL DISTRICT COUNCIL AND ANOTHER.

[QUEEN'S BENCH DIVISION (Salmon, J.), July 13, 14, 15, 24, 1959.]

B *Highway—Highway authority—Drains—Non-repair of drains used for agricultural land drainage—Maintenance of drains awarded to surveyor of highways under Inclosure Act of 1800—Whether county council under duty to maintain and repair drains in rural district for which rural district council formerly liable as successors of highway board—Local Government Act, 1929 (19 Geo. 5 c. 17), s. 30 (1), proviso.*

C *Land Drainage—Repair of drains—Maintenance of drains subject to an inclosure award of 1803—Failure to keep drains in fit and proper condition—Non-feasance—Breach of statutory duty—Drains only incidentally affecting small part of highway—Whether rural district council liable to be sued for failure to maintain and repair drains.*

D By an award made in 1803 commissioners, appointed under an Inclosure Act of 1800 relating to the parish of Holywell in the county of Huntingdon, ordered that certain drains in the parish should thereafter be maintained and kept in repair to specified breadths and depths by the surveyor of the parish highways, out of a rate levied by him on all occupiers of lands within the parish. Two of the drains passed through land which was occupied and farmed by P. The duties of the surveyor of parish highways were subsequently transferred by the Highway Act, 1862, s. 11, to the highway board for the district in which the drains lay, and the duties of the highway board were transferred by the Local Government Act, 1894, to the rural district council for the parish of Holywell. It was undisputed that between 1894 and the passing of the Local Government Act, 1929, the duty to maintain and repair the drains lay on the rural district council. No work had been done on the two drains since 1947 and they were choked, overgrown and silted; partly as a result of the non-repair of the drains, P.'s land was seriously flooded from time to time. In an action brought by the Attorney-General at the relation of P. and also by P. suing personally, both plaintiffs claimed a declaration that either the first defendants, the rural district council, or the second defendants, Huntingdon County Council, were bound in law to maintain and keep in repair the drains. P. also claimed damages. By the Local Government Act, 1929, s. 30 (1)*, the county council was made the highway authority for all rural districts in the county and as such had "all such functions under the Highway Acts, 1835 to 1885" as were exercisable by rural district councils as successors to highway boards, and rural district councils ceased to be highway authorities. By the proviso to s. 30 (1) it was enacted that "nothing in this section shall affect . . . any functions not being functions with respect to highways" which were exercisable by rural district councils as successors to surveyors of highways and highway boards.

H **Held:** (i) on the true construction of s. 30 (1) of the Local Government Act, 1929, the duty to maintain and repair the drains lay on the rural district council because, though the main part of sub-s. (1) was apt to transfer these duties to the county council (since "the Highway Acts, 1835 to 1885" included the Act of 1862), yet the functions of maintaining and repairing the drains were reserved by the proviso to s. 30 (1) to the district council since, on the facts, the drains were part of the land drainage as distinct from the road drainage system and accordingly their maintenance and repair were not functions with respect to highways within the meaning of s. 30 (1) (see p. 374, letter I, and p. 376, letter D, post).

* For the terms of s. 30 (1) of the Local Government Act, 1929, see p. 374, letters C and D, post.

(ii) the rural district council were liable to be sued for their failure to maintain and repair the drains because the immunity from liability for non-feasance which applied to a highway authority should not be extended to the district council (see p. 376, letter E, to p. 377, letter B, post).

(iii) P. was entitled to sue personally for a declaration and for damages since the Inclosure Act and award were made for the benefit of persons in whose favour the inclosures were made, viz., the persons through whose land the drains passed, and neither the Act nor the award imposed a penalty for non-compliance with the duty to maintain and repair the drains.

Dicta of ATKIN, L.J., in *Phillips v. Britannia Hygienic Laundry Co.* ([1923] 2 K.B. at p. 841) and A. L. SMITH, L.J., in *Groves v. Lord Wimborne* ([1898] 2 Q.B. at p. 407) applied.

[As to the transfer of authority relating to highways in rural districts by statute, see 19 HALSBURY'S LAWS (3rd Edn.) 8, para. 2; as to the duties of county councils as highway authority in rural districts, see *ibid.*, 24, para. 27; as to liability for non-repair of a highway, see *ibid.*, 149, 150, paras. 227, 228.

For the Local Government Act, 1929, s. 30 (1), see 14 HALSBURY'S STATUTES (2nd Edn.) 270.]

Cases referred to:

Cutler v. Wandsworth Stadium, Ltd., [1949] 1 All E.R. 544; [1949] A.C. 398; [1949] L.J.R. 824; 2nd Digest Supp.

Gibraltar Sanitary Comrs. v. Orfila, (1890), 15 App. Cas. 400; 59 L.J.P.C. 95; 63 L.T. 58; 13 Digest (Repl.) 319, 1270.

Groves v. Lord Wimborne, [1898] 2 Q.B. 402; 67 L.J.Q.B. 862; 79 L.T. 284; 42 Digest 759, 1858.

Phillips v. Britannia Hygienic Laundry Co., [1923] 2 K.B. 832; 93 L.J.K.B. 5; 129 L.T. 777; 42 Digest 870, 197.

Swain v. Southern Ry. Co., [1939] 2 All E.R. 794; [1939] 2 K.B. 560; 108 L.J.K.B. 827; 160 L.T. 606; Digest Supp.

Young v. Davis, (1863), 2 H. & C. 197; 9 L.T. 145; 159 E.R. 82; 26 Digest 398, 1241.

Action.

In this action the plaintiffs, the Attorney-General suing at the relation of Thomas Brownlee Paisley and the said Thomas Brownlee Paisley suing personally, claimed against St. Ives Rural District Council, the first defendants, and Huntingdon County Council, the second defendants, a declaration that under an Inclosure Act of 1800, relating to the parish of Holywell with Needingworth (referred to hereafter as "the parish of Holywell"), in the county of Huntingdon, and an award made under that Act, the first defendants, alternatively, the second defendants, were now the authority bound in law to maintain and keep in repair certain drains within the parish of Holywell; the second plaintiff, Mr. Paisley, also claimed damages for injury caused to his land by reason of one or other of the defendants' breach of duty in failing to maintain and keep in repair the drains. The second plaintiff was the owner and occupier, and farmed land known as Manor Farm, Holywell, which was situated in the county of Huntingdon and within the rural district of St. Ives. Two drains, known as Parsons Drove and Heath Drain, ran adjacent to and passed through Manor Farm; the first drain ran from Stocks Bridge until it entered the River Ouse and the second drain ran southwards from Bath Hill Bridge until it joined the first drain. These drains were originally natural watercourses and were small tributaries of the Great Ouse; they left the Great Ouse outside the parish of Holywell, joined together inside the parish and then flowed onward to the River Ouse. They were natural drains for the land on each side of them, and while only two or three feet wide and quite shallow at their source, they gradually broadened as they reached the parish of Holywell. By an Inclosure Act of 1800, relating to the

- A parish of Holywell, the commissioners therein designated were required to appoint a surveyor of the highways within the parish, and among other things, the commissioners were empowered to scour out and widen the ancient brooks, ditches and watercourses in the parish of Holywell and to set out new ditches, drains and watercourses in and through the lands and grounds thereby intended to be inclosed, of such breadth and depth and in such direction as the commissioners thought fit; and the commissioners were empowered, and the duty was imposed on them, to order and award by whom, at whose expense and at what time and in what manner the said brooks, ditches, drains and watercourses should thereafter be repaired, cleaned, scoured and maintained. By an award made in 1803 under the Inclosure Act of 1800, the commissioners ordered that Parsons Drove and Heath Drain, among other drains in the parish of Holywell, should be for ever thereafter maintained and kept in repair, to the respective breadths and depths specified in the award, by and at the expense of the surveyor of highways for the time being out of a rate to be levied by him on all occupiers of lands and grounds within the parish of Holywell. By the Highway Act, 1862, s. 11, these duties were transferred from the surveyor of highways to the highway board for the district in which the drains lay. The duties transferred to the highway board were in turn transferred to the first defendants, as the rural district council, under the Local Government Act, 1929, s. 25. No work had been done on the drains since 1947, and for years they had been seriously choked, overgrown and silted and were generally in a very bad condition. From time to time the second plaintiff's land had been seriously flooded partly as a result of the non-repair of the drains; this flooding had interfered with his farming and had caused him damage.

- While it was common ground that the duty to maintain and repair the drains lay on one or other of the defendants, the second defendants, the county council, contended that by virtue of the Local Government Act, 1929, s. 30 (1) and the proviso thereto, these duties lay on the first defendants, the rural district council, and had not been transferred to the second defendants since they were not functions under the Highway Acts, 1835 to 1885 within sub-s. (1) of s. 30, nor were they functions with respect to highways within the meaning of the proviso. Further, both defendants contended that failure to maintain and repair the drains was non-feasance and that the plaintiffs had no right of action in respect thereof. The question also arose whether the second plaintiff had the right to sue for damages for breach of any statutory duty to maintain and repair the drains that was imposed by the Inclosure Act of 1800 and the award.

Harold Williams, Q.C., and A. L. Figgis for the plaintiffs.

C. E. Scholefield, Q.C., and G. J. Ponsonby for the first defendants, the rural district council.

J. P. Widgery, Q.C., and Alan Fletcher for the second defendants, the county council.

Cur. adv. vult.

- July 24. SALMON, J., having stated the facts and the relief claimed by the plaintiffs, referred to the Inclosure Act of 1800 and to the commissioners' award made thereunder. HIS LORDSHIP then referred to the transfer, by s. 11 of the Highway Act, 1862, of duties relating to the drains in the parish of Holywell from the surveyor of highways to the highway board for the district in which they lay and continued, reading the following judgment: By s. 25 of the Local Government Act, 1894, the duties of the highway board were transferred to the first defendants (1), and the highway board was abolished. Section 25 (1) read as follows:

" . . . There shall be transferred to the district council of every rural district all the powers, duties, and liabilities of the rural sanitary authority

(1) I.e., the rural district council; hereinafter referred to as the "district council".

in the district, [and of any highway authority in the district, and highway boards shall cease to exist (2),] and rural district councils shall be the successors of the rural sanitary authority [and highway authority, and shall also have as respects highways all the powers, duties, and liabilities of an urban sanitary authority under s. 144 to s. 148 of the Public Health Act, 1875, and those sections shall apply in the case of a rural district and of the council thereof in like manner as in the case of an urban district and an urban authority." (2)]

I think that that is all I need read of that section.

It is not disputed that between the year 1894 and the date when the Local Government Act, 1929, came into operation the duty to maintain and repair the drains lay on the first defendants. A great deal in this case turns on the true construction of s. 30 (1) of the Local Government Act, 1929, which reads as follows:

"As from the appointed day, every county council shall be the highway authority as respects such part of the county as is for the time being comprised in any rural district and as respects the highways therein, and as such shall have all such functions under the Highway Acts, 1835 to 1885, as were exercisable by rural district councils who by virtue of the Local Government Act, 1894, became successors of highway boards, and rural district councils shall cease to be highway authorities: Provided that nothing in this section shall affect the functions of rural district councils under the Local Government Act, 1894, as respects rights of way and encroachments on roadside wastes, or any functions not being functions with respect to highways exercisable at the appointed day by rural district councils as successors to surveyors of highways or highway boards."

The first defendants, the district council, contend that on the true construction of this subsection their duty to maintain and repair the drains was transferred to the second defendants (3).

Counsel for the county council contends first that the main part of the subsection does not transfer the duties to which I have referred inasmuch as these duties are not functions under the Highway Acts, 1835 to 1885. Alternatively counsel contends that if the main part of the subsection looked at by itself would be apt to transfer these duties, they are expressly reserved to the district council by the proviso.

In my judgment the main part of s. 30 (1) does transfer these duties to the county council. The Highway Act, 1862, is one of the Acts included in the words "the Highway Acts, 1835 to 1885". Section 11 of the Highway Act, 1862, amongst other things provides that

"All such . . . duties, liabilities . . . as are vested in or attached to . . . any surveyor . . . of any parish forming part of the district, shall vest in and attach to the highway board."

One of the duties vested in and attached to the parish surveyor, and therefore one of his functions, was the duty or function of maintaining and repairing the drains in question. This duty or function was therefore transferred to the highway board by the Highway Act, 1862, and was exercisable by the district council as successors of the highway board under the Local Government Act, 1894. Accordingly but for the proviso, s. 30 would, in my judgment, clearly transfer the duties of maintaining and repairing the drains to the county council.

The second contention of counsel for the county council, namely, that the proviso reserves the duty to maintain and repair the drains to the district council, raises a point of some difficulty as well as of general importance. I

(2) The words between square brackets were repealed by the Statute Law Revision Act, 1908, and the Local Government Act, 1929, s. 137 and Sch. 12, Part 3.

(3) I.e., the county council.

A understand that this point has been very much of a live issue between county councils and rural district councils since the year 1929, but so far has never been litigated.

Counsel for the plaintiffs supports the part of counsel for the county council's argument relating to the construction of the proviso, although he dissociates himself from counsel's first contention, with which I have already dealt.

B Counsel for the county council contends that the whole proviso is of no effect and is inserted in the section only *ex abundanti cautela*. He says that its sole purpose is to make it plain that only functions with respect to highways under the Highway Acts, 1835 to 1885, exercisable by rural district councils as successors to the highway boards passed to the county councils and that all the rural district council's other functions, for example under the Public Health Acts, are left with the rural district councils. If this be the true construction of the proviso, then the first part of the proviso is otiose.

Counsel for the district council replies that on any view of the subsection the first part of the proviso is otiose. He says that the last part of the proviso refers merely to functions imposed under various Public Health and Local Government Acts—such functions, for example, as watering and scavenging the highways.

D I am unable to give such a narrow construction to the language of the proviso. It seems to me to contemplate that there were functions (for example, land drainage functions) exercisable by rural district councils as successors to the highway boards which were not functions with respect to highways and to enact that such functions should not pass to the county councils. In my view it is possible to see how the first part of the proviso may have been inserted having regard to the last words in the main part of the subsection, "and rural district councils shall cease to be highway authorities". Without the first part of the proviso it would perhaps have been possible to regard the duty imposed under s. 26 of the Local Government Act, 1894, to prevent the obstruction of highways, as part of the duties of a highway authority, and accordingly left in the air, since the rural district councils ceased to be the highway authorities and the duty was manifestly not transferred to county councils.

The second part of the proviso is, however, in the most general terms and cannot, in my judgment, properly be given the narrow construction for which counsel for the district council contends.

The second contention of counsel for the district council is that the duty to maintain and repair the drains is a function with respect to highways and is therefore not reserved to rural district councils under the proviso. This contention depends on the true construction of the somewhat loose words "any functions not being functions with respect to highways". By the awards, of which I understand there were about four thousand, made under various Inclosure Acts, the parish surveyors had certain functions cast on them, some admittedly with respect to highways, and some relating to drains and ditches draining a great deal of the land in rural districts. Accordingly the functions of the surveyors under these awards related mainly to highways but partly also to land drainage. It is possible that one of the reasons why these latter functions were imposed on the surveyors was because the highways at certain points might be affected by land drainage. There are, of course, road drains and gulleys whose main, if not whose only, function is to drain the highway. The repair of such drains and gulleys is, in my judgment, clearly a function with respect to highways. There are other drains and ditches whose function is solely to drain agricultural land and which cannot in any way affect highways. The repair of such drains and ditches is equally clearly not a function with respect to highways. Then there are drains and ditches that affect both agricultural land and highways. Whether or not the function of maintaining and repairing these drains and ditches can properly be described as a function with respect to highways depends, in my view, on the degree to which the drains can be truly regarded as land drainage or road drainage.

In my judgment the drains in question in this case are undoubtedly part of the land drainage scheme and their non-maintenance and disrepair can affect only incidentally a small section of the highway within the parish of Holywell. I agree with the contention of counsel for the county council that the true inference to be drawn in this case is that originally the duty to maintain and repair these drains was cast on the surveyor not because of their effect on the highways but because as they approached the parish of Holywell they increased in breadth and depth so that they became an important part of the land drainage in the parish and as such of general importance to the inhabitants. There were only four parish officers: the clerk, the constable, the overseer and the surveyor. The surveyor would appear to be the officer whose duties were most in line with the maintenance and repair of drains. I do not say that the fact that the non-repair of these drains might have had some effect on certain sections of the highway was not a minor reason for selecting him rather than any of the other officers of the parish. I have not lost sight of the fact that in adjacent parishes, where the two drains in question did not run alongside or across highways, the duty to maintain and repair them was cast on the riparian owners. I think that in those places the drains were so narrow and small that they could not be looked on as of any importance to the inhabitants of the parish generally but as of limited importance and that only to the riparian owners.

It follows that in my judgment the function of maintaining and repairing these drains in the parish of Holywell was not a function with respect to highways within the meaning of the proviso of s. 30 (1) of the Act of 1929, and accordingly was not transferred to the county council but was reserved to the district council.

The next point that falls for decision is whether or not the defendants are liable to be sued for their failure to maintain and repair the drains. The defendants contend that the failure to maintain and repair the drains is non-feasance and that accordingly the plaintiff has no right of action in respect thereof. Highway authorities are clearly not liable in damages for any negligent non-repair of a highway since the surveyor of highways was never personally liable for damages arising from mere omission to repair. No action at common law is or was maintainable against the parish for non-repair of the highways. The only remedy against the parish is by way of indictment. The Highway Act, 1835, merely enabled the parish to conduct its work through the surveyor. The duty to repair still remained and remains in the inhabitants at large. Accordingly no action for non-repair of the highway is maintainable against the surveyor or against his successors, the present highway authorities: *Young v. Davis* (4). This rule has long been established in our law, and no doubt has the soundest historical justification. It is, however, an archaic and anomalous survival into modern times. It would be difficult indeed to think of any sound reason why today highway authorities should enjoy this immunity. Nevertheless there can be no doubt that in law they do enjoy the immunity, and I must apply the law; but I am not obliged to extend it.

In the present case I am being asked to extend it to the maintenance and repair of the drains in question. If these drains were designed to drain the highway I should as at present advised feel myself bound, however reluctantly, to apply the rule. The situation is, however, very different. The only connexion, and to my mind a very tenuous one, between the rule and the facts of the present case is that formerly the duty to maintain and repair the drains lay on the highway authority. The immunity that the highway authorities enjoy for the non-repair of highways is not out of any special tenderness which the law feels for highway authorities as such, but merely because the duty of repairing the highway fell on them or was transferred to them as representatives of the inhabitants at large, and no action lay against the inhabitants at large; they could be proceeded

A against only by way of indictment (see *Swain v. Southern Ry. Co.* (5) per FINLAY, L.J.). In the present case the duty of repairing the drains was not originally on the inhabitants at large but was cast on the surveyor by the award made under the Inclosure Act of 1800. Neither the inhabitants at large nor the surveyor were liable, nor are their successors liable, to be indicted in respect of their failure to maintain and repair the drains. I can see no reason for extending the immunity from liability for non-feasance to the district council. *Gibraltar Sanitary Comrs. v. Orfila* (6), which is strongly relied on by the defendants, seems to me to turn almost exclusively on the construction of a local ordinance.

B The only other question which remains for decision is whether the breach of duty to maintain and repair the drains gives the plaintiff, Mr. Paisley, a personal right to sue, or whether an action can be brought only by Her Majesty's Attorney-General on the relation of Mr. Paisley. The point for decision really turns on whether it was the intention of the legislature to make the duty imposed one

C "which was owed to the party aggrieved as well as to the state, or was it a public duty only? That depends on the construction of the Act and the circumstances in which it was made and to which it relates."

D See *Phillips v. Britannia Hygienic Laundry Co.* (7) per ATKIN, L.J. In other words the court must

"... consider for whose benefit the Act was passed, whether it was passed in the interests of the public at large or in those of a particular class of persons."

E See *Groves v. Lord Wimborne* (8) per A. L. SMITH, L.J. In deciding this question one must look at the Act generally and consider, amongst other things, whether any penalty is provided for breach of the statutory duty. If a statutory duty is imposed and no remedy by way of penalty or otherwise is prescribed for its breach generally a right of civil action accrues to the person who is damnified by the breach. "For, if it were not so, the statute would be but a pious aspiration": see *Cutler v. Wandsworth Stadium, Ltd.* (9) per LORD SIMONDS.

F In the present case the Inclosure Act of 1800 and the award thereunder imposed no penalty or other sanction for non-compliance with the duty to maintain and repair the drains and I have come to the clear conclusion that the Act was passed and the award made for the benefit of the persons in favour of whom the inclosures were made, that is to say for the persons whose land is immediately adjacent to the drains and through whose land the drains pass. I am fortified in this conclusion by the last recital (10) to the Act.

G It follows in my judgment that the plaintiff, Mr. Paisley, is entitled against the first defendants to a declaration as prayed and to damages. The damages will be assessed by an official referee. In reaching his decision he will no doubt take into account, amongst other things, the extent to which the flooding of the plaintiff's land is attributable to the failure to repair the drains and maintain

(5) [1939] 2 All E.R. at p. 806; [1939] 2 K.B. at p. 575. (6) (1890), 15 App. Cas. 400.

(7) [1923] 2 K.B. at p. 841. (8) [1898] 2 Q.B. at p. 407.

(9) [1949] 1 All E.R. at p. 548; [1949] A.C. at p. 407.

I (10) The last recital reads: "And whereas the said open and common fields, meadows and lands belonging to the said several owners and proprietors, and intended to be inclosed as hereinafter mentioned, lie intermixed and dispersed, and the same, and also the said commons and commonable places, in their present situation, are incapable of any considerable improvement; and it would be advantageous to the several persons interested therein if the same were divided and inclosed in the manner hereinafter directed, which division and inclosure cannot be established without the aid of Parliament: . . ."

them in the breadth and depth specified in the award and to the actions (if any) which the plaintiff might reasonably have taken to mitigate his damage.

Judgment for the plaintiffs against the first defendants, the rural district council.

Solicitors: *Fisher, Dowson & Wasbrough*, agents for *Francis & Co.*, Cambridge (for the plaintiffs); *John J. McIntyre* (for the first defendants, the rural district council); *Sharpe, Pritchard & Co.*, agents for *A. Case Aylward*, Huntingdon (for the second defendants, the county council).

[Reported by WENDY SHOCKETT, *Barrister-at-Law.*]

SLEAFER *v.* LAMBETH METROPOLITAN BOROUGH COUNCIL.

[COURT OF APPEAL (MORRIS, ORMEROD, and WILLMER, L.JJ.), June 30, July 1, 2, 1959.]

Landlord and Tenant—Repair—Dwelling-house—Flat let on weekly tenancy by local authority—No obligation on landlords to repair expressed in tenancy—Landlord having right of entry to repair—Restriction on tenant's doing repairs—Duty on tenant to deliver up in tenantable repair—Whether obligation on landlord to repair implied.

A local authority let a flat to a tenant on a weekly tenancy under a written tenancy agreement, containing no express stipulation as to the liability to repair but the following conditions: “ (2) The tenant is required to reside in the dwelling which is to be used as a private dwelling only . . . (9) The tenant shall not do or allow to be done any decorative or other work to any part of the dwelling without consent in writing. Nails on no account are to be driven into the walls, floors, or any part of the dwelling . . . (11) The [landlords] shall be at liberty on production of a written authority under the hand of the town clerk or other authorised officer by [their] agents or workmen to enter the dwelling to inspect the state of repair and to execute repairs therein, or for any other purpose, at all reasonable times of the day . . . (15) The tenant shall deliver up the dwelling at the end of the tenancy together with all landlords’ fixtures in good and tenantable repair and condition (subject to fair wear and tear) and with all locks, keys and fastenings complete ”. In practice the repairs were done by the landlords. The front door of the flat became difficult to close through jamming against the weatherplate fixed inside the threshold and against the upright, and evidence was given that this was the subject of a complaint to the authority but it was not put right. When leaving the flat one evening, the tenant was pulling hard at the handle or knocker when it came away in his hand and he fell heavily against an iron balustrade opposite and was injured.

Held: the landlords were not liable to the tenant for damages in respect of his injury because—

(i) there was no duty on the landlords to do such a repair to the demised premises as this, viz., the repair to the door so as to ease its shutting, in the absence of contractual obligation to that effect, and

(ii) no term should be implied in the contract of tenancy, that is to say, (a) (per MORRIS and ORMEROD, L.JJ.) no term that the landlords would repair the demised premises of which the door formed part, since condition (9) of the tenancy agreement did not prohibit the tenant from doing work of repair but merely required him to obtain the landlord’s consent before he did it, and (b) (per WILLMER, L.J.) no term that the landlords would do this repair to the demised premises, viz., the repair of the door by easing its shutting.

A *Hart v. Windsor* ((1844), 12 M. & W. 68) and *Cockburn v. Smith* ([1924] 2 K.B. 119) applied; and dictum of SOMERVELL, L.J., in *Mint v. Good* ([1950] 2 All E.R. at p. 1162) explained.

QUAERE: whether, if there had been a breach of an implied contractual term to repair the premises, including the door, the damages claimed for the plaintiff's injuries would have been too remote (see p. 388, letter G, and p. 385, letter H, post).

B Appeal dismissed.

[As to a landlord's liability to repair demised premises, see 23 HALSBURY'S LAWS (3rd Edn.) 562, para. 1233; and for cases on the subject, see 31 DIGEST (Repl.) 342-349, 4741-4797.]

C Cases referred to:

Cockburn v. Smith, [1924] 2 K.B. 119; 93 L.J.K.B. 764; 131 L.T. 334; 31 Digest (Repl.) 104, 2484.

Dunster v. Hollis, [1918] 2 K.B. 795; 88 L.J.K.B. 331; 120 L.T. 109; 31 Digest (Repl.) 101, 2476.

Hargroves, Aronson & Co. v. Hartopp, [1905] 1 K.B. 472; 74 L.J.K.B. 233; 92 L.T. 414; 31 Digest (Repl.) 103, 2482.

D *Hart v. Windsor*, (1844), 12 M. & W. 68; 13 L.J.Ex. 129; 2 L.T.O.S. 440; 8 J.P. 233; 152 E.R. 1114; 31 Digest (Repl.) 133, 2716.

Huggett v. Miers, [1908] 2 K.B. 278; 77 L.J.K.B. 710; 99 L.T. 326; 31 Digest (Repl.) 102, 2477.

Lucy v. Bawden, [1914] 2 K.B. 318; 83 L.J.K.B. 523; 110 L.T. 580; 31 Digest (Repl.) 101, 2473.

E *Miller v. Hancock*, [1893] 2 Q.B. 177; 69 L.T. 214; 57 J.P. 758; 31 Digest (Repl.) 100, 2471.

Mint v. Good, [1950] 2 All E.R. 1159; [1951] 1 K.B. 517; 31 Digest (Repl.) 384, 5110.

Victoria Laundry (Windsor), Ltd. v. Newman Industries, Ltd., [1949] 1 All E.R. 997; [1949] 2 K.B. 528; 2nd Digest Supp.

F Appeal.

The tenant was the tenant of flat No. 5, Martin House, Wyvil Estate, belonging to the landlords, Lambeth Metropolitan Borough Council, and on Nov. 30, 1955, he had sustained an injury when the front door handle or knocker came off while he was pulling hard at it to close the door, which was jammed against a weather-plate fixed inside the threshold. He appealed against an order of GLYN-JONES, J., made on June 20, 1958, dismissing an action for damages brought by him against the landlords. The grounds of appeal were, inter alia (i) that the judge was wrong in holding that the landlords were not guilty of a breach of duty and ought to have found that there was such a breach of duty and that it was the cause of the tenant's accident; (ii) that, having found as facts (a) that the premises provided by the landlords and occupied by the tenant were defective, (b) that the landlords had notice of the defect, (c) that they failed to remedy it, and (d) that the defect was the cause of the injury to the tenant, the judge misdirected himself in holding that the landlords were not guilty of a breach of duty or under any liability to the tenant; (iii) that the judge was wrong in law in holding that, although under the agreement under which the tenant occupied the flat the landlords expressly reserved the right to enter and execute repairs and the tenant was prohibited from effecting them, there was no implied obligation on the landlords to effect repairs or any duty on them to do so; (iv) that the judge was wrong in law in failing to imply a term in the agreement that the landlords were under obligation to do repairs; and (v) that he ought to have held that, as the premises were provided by the landlords pursuant to their powers under the Housing Act, 1936, and they accordingly retained control for the purpose of repairs, there was a duty on them towards every person lawfully on the premises, including the tenant, to take reasonable care to prevent damage from want of repair at the premises.

F. W. Beney, Q.C., and D. G. A. Lowe for the tenant.

Stephen Chapman, Q.C., Peter Rawlinson, Q.C., and Graeme Williams for the landlords.

MORRIS, L.J.: On Nov. 30, 1955, Mr. Sleafer, the plaintiff, who was the tenant of a flat belonging to Lambeth Metropolitan Borough Council, the defendant landlords, had the misfortune to meet with rather an unusual accident which resulted in physical injury. He brought an action, by a writ dated July 26, 1957, claiming damages against his landlords. The case came before GLYN-JONES, J., who dismissed the claim. The tenant now appeals to this court.

Mr. Sleafer became tenant of the flat which he occupied in December, 1952. The flat was on the first floor of a block of flats which had then recently been erected for the landlords. There was an agreement in these terms:

"The council of the metropolitan borough of Lambeth, acting by their director of housing, hereby agree to let, and I Albert Edward Sleafer do hereby agree to take on a weekly tenancy, from Monday, Dec. 1, 1952, tenement No. 5 Martin House on the Wyvil Estate in the metropolitan borough of Lambeth, at a rent of [I need not read the rent] or such lesser sum as may be payable from time to time under or by virtue of the council's rebate scheme which is incorporated in this agreement, payable weekly in advance, and subject to the conditions of tenancy printed overleaf. The above rental includes 7s. 4d. per week hot water service charge."

That was dated Nov. 28, 1952. It was signed by the tenant. The document continues: "Tenants must read and shall be deemed to have read the conditions of tenancy."

We asked whether anything contained in the rent rebate scheme threw any light on the matter before us—that scheme being incorporated in the contract: we were told that nothing in that scheme was relevant for present purposes.

The general conditions of the contract of tenancy are numerous. The relevant conditions read:

"(2) The tenant is required to reside in the dwelling which is to be used as a private dwelling only. The tenant shall not use the dwelling as a shop or workshop or expose any goods or materials for sale, exchange or hire therein. No permanent notices may be exhibited on the premises . . .

"(5) The tenant shall repay to the council the cost of repairing any damage done to the dwelling or to the fixtures or fittings. The tenant shall not make any alterations to the internal arrangements or external appearance of the dwelling. The tenant must pay the cost of replacing any windows broken during his tenancy, and the cost of replacing keys lost . . .

"(7) The tenant shall give immediate notice to the director of housing or his representative of any stoppage in the soil, waste or drain pipes. The placing in w.c. of rags, cotton, bottle or anything likely to choke the drain is strictly prohibited. Any expense caused by infringement of this regulation will be charged against the tenant . . .

"(9) The tenant shall not do or allow to be done any decorative or other work to any part of the dwelling without consent in writing. Nails on no account are to be driven into the walls, floors, or any part of the dwelling . . .

"(11) The [landlords] shall be at liberty on production of a written authority under the hand of the town clerk or other authorised officer by [their] agents or workmen to enter the dwelling to inspect the state of repair and to execute repairs therein, or for any other purpose, at all reasonable hours of the day . . .

"(15) The tenant shall deliver up the dwelling at the end of the tenancy together with all landlords' fixtures in good and tenantable repair and condition (subject to fair wear and tear) and with all locks, keys and fastenings complete."

It may be said, I think with justification, that the conditions as drawn do not very clearly explain how the matter of doing repairs stands between landlords

A and tenant. The evidence before the learned judge showed that, in practice, the repairs were done by the landlords. Mr. Marrin, a rent collector employed by the landlords, was asked:

“Supposing the tenant made a complaint of something being in disrepair, was it your business to make a note of that? A.—Yes. Q.—Was it the practice of the council to do all repairs that were thought to be necessary? A.—Within certain limits.”

He went on to explain that in the case of such items as broken windows there would be a special position.

The tenant went into occupation and remained in occupation. In the early part of 1955, he had occasion to do some decorative work himself, viz., decoration of the external door and casement frames. Miss Williams, the housing superintendent, noticed that the work had been done and informed her superior in these terms:

“Mr. Sleafer, the tenant of this flat, has decorated the external door and casement frames. This has been done to match existing colours, and quite nicely. If you consider that no further action should be taken, perhaps you will write an appropriate letter to forestall any more fancy ideas.”

The director of housing thought it was proper to write to the tenant on Feb. 19 in these terms:

“My attention has been drawn to the fact that you have painted the external woodwork of the above flat. I must draw your attention to the conditions of agreement, in which it states that tenants must not carry out decorations. If you require to carry out further decorations, it will be necessary for you to apply for permission. You will appreciate that this is necessary in order to maintain a good standard of decorations on the estate.”

When the tenant painted his front door, it was necessary for him to remove what is called the postal plate. That is a fitting affixed to the outside of the door having one part that can be pushed inwards to admit of the passage of letters so that they may be delivered to the flat. On the outside there is a knocker in the form of a handle. Photographs of the door were before the learned judge and have been before us, and it does seem that the reasonable and appropriate method of pulling the front door to when outside would be to take hold of the knocker and to use it to close the door. That postal plate is affixed on the outside of the door by two bolts which go through the door, and it would be possible, if anyone did not adjust the postal plate properly, to leave it so that the handle was not securely held in the rings or the lugs which are on the outside. A suggestion was put to the tenant that he had not replaced the postal plate effectively but the learned judge said in his judgment that the tenant had stated that the postal plate was not in fact loose.

What disturbed the tenant was that his front door used to jam so that it became very difficult to close. It caught at the bottom part and it caught against the upright. It was said that the door was defective because it had dropped a little so as to cause it to bind on the threshold or the weather plate fixed inside the threshold. The tenant said that he complained about this matter. He said that on one occasion, when a representative of the landlords came to deal with a lock, he complained to that representative, who took a hammer and dealt with the weather plate. Thereafter the door was somewhat better, but apparently the trouble recurred: the door jammed not only against the weather plate but against the upright part. The tenant's wife said that a further complaint was made to the landlords. It was said that a complaint was made to somebody who called for the rent and also at the rent collecting office. The landlords said that no complaint was made.

On Nov. 30, 1955, the tenant was in his flat in the evening and he had a visitor with him. They left the flat at about half-past nine. The tenant tried to close

the front door, but it jammed and he had to pull it quite hard two or three times. A
It still did not close and he pulled somewhat harder, and most unfortunately
the handle or knocker came away in his hand. Although there was a suggestion
at one stage of the case that the knocker itself was cracked, it does appear now
that the knocker or handle came away because one of the rings which held it
broke; the ring broke because more than usual force had to be applied. Because
the tenant was pulling hard and because the knocker came away in his hand, he B
was caused to go backwards. The result was that he fell rather heavily against
an iron balustrade that was opposite his front door on the first floor of the premises.
He suffered injuries, though they were not very apparent at first. Later on,
when the rent collector called, he noticed that the knocker of the door was missing.
There was evidence that the tenant's wife was asked for an explanation
and said that possibly a postman or possibly some reveller had pulled the knocker C
off. She denied having said this.

Later on, a letter of complaint was written on behalf of the tenant. It was
dated Apr. 20, 1956, and was addressed to the housing manager. After referring
to the tenancy it stated:

"It appears that when attempting to close the front door of his premises D
from the outside, [the tenant] was obstructed by a faulty door stop, and
whilst pulling at the knocker which was cracked, the knocker came away
from the door causing him to fall backwards against some iron railings, there-
by suffering injury. It would seem to me that you are liable in law for this
injury, therefore I await to have your comments on the matter."

The landlords denied responsibility for the occurrence.

There was a conflict of evidence whether any notice was given to the landlords E
of the defective condition of the door. The learned judge, while accepting that
the witnesses called on behalf of the landlords, who denied that any notice was
given, were truthful people, yet decided that either owing to faulty recollection
or for some other reason they were in error: he decided that notice had been
given to the landlords. The learned judge, therefore, came to these conclusions: F
First, that the door was defective in the way which I have described, viz., that
it closed only with difficulty. It was not suggested that the door would not close
at all, but that it only closed after overcoming the resistance caused by quite
considerable jamming. Secondly, the learned judge decided that the defects to
the door had been made known by the tenant or his wife to the landlords some
time before Nov. 30, 1955. He decided that it was quite reasonable to try to G
close the door by using the knocker or handle. He decided that the tenant had
suffered his injuries in the way that he described, viz., because the knocker came
off and so caused him to fall backwards.

The landlords on this appeal served a notice saying that they would, if neces-
sary, contend that the learned judge's finding in favour of the tenant that notice
of the alleged defect in the door was communicated to the landlords was against H
the weight of evidence. Second leading counsel for the landlords was prepared to
argue that point and to deal with the evidence in regard to it, but we intimated
that we thought that it would be convenient in the first place to deal with the
legal issues that arise, and, as a result, we have not investigated that separate
matter raised by the landlords.

Counsel for the tenant submitted that there was to be implied in the contract I
of tenancy a term which would make the landlords liable. In his reply, he
somewhat modified the term that he originally submitted should be implied. He
first submitted that, if a part of the demised premises or access thereto, the use of
which was necessary for the tenant, could not reasonably be used by him unless
it was kept in repair, and if the right to repair it was solely in the landlords, then
there was an implied contractual term that it could be repaired by the landlords
provided they knew, or had adequate notice, of the necessity for such repair.
Counsel somewhat simplified that contention, for he submitted that, on the facts

A of this case, it was to be implied that the landlords should make the premises in all respects reasonably fit for human habitation. If there was an implied term to that effect, it would be necessary for counsel for the tenant to assert that, if a door jammed and could only be closed with difficulty, the house was not reasonably fit for human habitation. Counsel for the tenant further submitted that, apart from the implication of a term, in all the circumstances, there was a duty

B in the landlords to effect repairs.

It is common ground that there is no question of the application of any statutory provisions. Counsel for the tenant in his interesting argument cited a number of cases dealing with the obligations that may lie on landlords in certain circumstances. He began by referring to *Miller v. Hancock* (1) and later made a submission as to the extent to which that case still survived. He referred us to such cases as *Hargroves, Aronson & Co. v. Hartopp* (2), *Huggett v. Miers* (3), *Lucy v. Bawden* (4), *Dunster v. Hollis* (5), and *Cockburn v. Smith* (6) and to several other cases.

If a landlord lets a flat and retains the staircase which gives access to it, questions may arise as to the obligations cast on the landlord. If a landlord lets a flat and retains possession of the premises above the flat, questions may arise

D as to his obligations if rainwater is allowed to go into the flat. But it seems to me that such questions do not arise in the present case. In the present case, the door was clearly a part of the demised premises.

In regard to the general law concerning premises let on lease, we were referred by counsel for the landlords to several cases, including *Hart v. Windsor* (7). In his judgment in that case, PARKE, B., said (8):

E “It appears, therefore, to us to be clear upon the old authorities, that there is no implied warranty on a lease of a house, or of land, that it is, or shall be, reasonably fit for habitation or cultivation. The implied contract relates only to the estate, not to the condition of the property.”

In *Cockburn v. Smith* (9) BANKES, L.J., said this:

F “I want to make it plain at the outset that this is not a letting of the whole house where, without an express covenant or a statutory obligation to repair, the landlords would clearly be under no liability to repair any part of the demised premises whether the required repairs were structural or internal and whether they had or had not notice of the want of repair.”

The submission of counsel for the tenant depends, however, on the actual

G conditions in this contract. He referred to cl. 9 and cl. 15 in particular, though he relied on other clauses as well, notably cl. 2. Clause 2, I think, is primarily designed to ensure that a person may not take a flat at a time when there is a housing shortage unless he is personally genuinely desirous of occupying it.

Counsel for the tenant submitted that cl. 9 contained a prohibition against a tenant of the flat doing any decorative or other work in the flat. He read that

H clause in conjunction with cl. 15. He submitted that, because of the existence of those two clauses and because (as he submitted) cl. 9 prohibited a tenant from doing repairs, there was in the circumstances of this case—and he so limited the matter—an implied term that the landlords would make the flat in all respects reasonably fit for human habitation. It does not seem to me that cl. 9 does contain a prohibition against the tenant doing repairs. It seems to me that counsel

I for the landlords is correct when he submits that the real purpose of cl. 9 is to ensure that there will not be haphazard conditions in premises of this kind. For example, it might not be at all appropriate if a number of front doors were all painted in different colours which might make the appearance unsightly. It

(1) [1893] 2 Q.B. 177.

(3) [1908] 2 K.B. 278.

(5) [1918] 2 K.B. 795.

(7) (1844), 12 M. & W. 68.

(2) [1905] 1 K.B. 472.

(4) [1914] 2 K.B. 318.

(6) [1924] 2 K.B. 119.

(8) (1844), 12 M. & W. at p. 86.

(9) [1924] 2 K.B. at p. 128.

would be unfortunate also if the work was badly done and if defects were obscured and covered up. I read cl. 9 as being designed to keep control over the work done by a tenant and not as being a prohibition. I have no doubt that in fact, and in practice, the landlords intended to do the necessary repairs, but the question arises whether they had obliged themselves to do such repairs. I can find nothing in these conditions which shows that they had obligated themselves to do repairs.

The question then arises whether it is necessary in order to give this contract business efficacy to imply the term for which counsel for the tenant contended. In my view, it is certainly not necessary. If it had been desired to have any such term, it could have been made the subject of an express term.

Counsel for the tenant relied strongly on something said by SOMERVELL, L.J., in this court in *Mint v. Good* (10). The question which there arose was in reference to liability for a nuisance on premises to a passer-by on the highway. There is no need to refer to the law on that subject, but what SOMERVELL, L.J., said in that case was said in reference to the circumstances under which a landlord, as opposed to an occupier, would be liable for nuisance. The point decided was that the principle that a landlord, who had expressly reserved the right to enter the demised premises and do repairs, was liable in nuisance for injuries caused by the defective state of the premises to a person passing along the highway on which they abutted, applied to cases where the landlord had impliedly reserved that right; and a term to that effect was normally to be implied in the contract of tenancy when the premises were let on a weekly tenancy. In stating his reasons for the conclusion to which I have referred, SOMERVELL, L.J., said this (11):

“It seems to me that the same principle must apply if a landlord has reserved to himself the right, whether he has done so impliedly or expressly. I cannot envisage any principle by which a landlord should be in one position in the case of an express reservation and in a different position in the case of an implied reservation. The question, therefore, here is whether, in the circumstances, a right to enter on and view the premises and do necessary repairs is to be implied. I would have said that there is no term which would be more easily and more necessarily implied by law in a tenancy of this kind than a right in the landlord to enter, to examine the premises, and to do necessary repairs. It must be in the contemplation of both parties to a weekly tenancy that the tenant will not be called on to do repairs, although the Rent Restrictions Acts have rather altered the position. Both sides must contemplate as the basis of the contract that the house will be kept in a reasonable and habitable condition by the landlord and not by the tenant, and, although the landlord does not bind himself to do so, both sides contemplate that he will have the right to enter and look after his property by doing repairs.”

Counsel for the tenant took comfort from those words because he said they support his submission that the landlord in a case of this kind had obligated himself to do repairs. He pointed particularly to the phrase “the basis of the contract” and submitted that SOMERVELL, L.J., was suggesting by the use of those words that it was the basis of the contract that the landlord would oblige himself to do the repairs. With every respect to counsel’s argument, I do not take that view of those words. I think that those words merely mean that the parties contemplated that in fact and in practice the landlord would do the repairs, but I think that SOMERVELL, L.J., was making it clear that there must be that expectation, although the landlord was not bound to do the repairs. The words “although the landlord does not bind himself to do so” seem to me to point irresistibly to that view of SOMERVELL, L.J.’s words. In the present case

(10) [1950] 2 All E.R. 1159; [1951] 1 K.B. 517.

(11) [1950] 2 All E.R. at p. 1162; [1951] 1 K.B. at p. 521.

A the landlords expected to do repairs but were rather careful to avoid in this weekly contract binding themselves to do them.

For these reasons, I have found it quite impossible to read into this contract the term for which Mr. Beney so powerfully contended. It is not, in my judgment, necessary to do so in order to give efficacy to this contract.

B Secondly, counsel for the tenant submitted that, independently of contract, there was a duty that arose in all the circumstances, one of which he submitted was that the landlords were given notice of certain defects. As I have said, the landlords wish to challenge the learned judge's finding of fact on that matter. I find it impossible to say that any duty can be formulated other than such as is to be found in the contractual position. Of course, the landlord must vis-à-vis his tenant commit any tort, but it seems to me that the obligations of the landlord must be found in the contract or in any additional term which necessarily must be implied in the contract.

C I ought to add that the point was taken by counsel for the landlords that, even if he were wrong in regard to the contractual obligations of the landlords, no damages could be claimed in this case, or no damages other than nominal damages, because the defect in the premises was not of such a nature as to make D it reasonably foreseeable that an injury of the kind the tenant suffered would result from the breach. I do not find it necessary to develop this point, because I do not think it necessary to decide it. We were referred to the very helpful statement of the law by ASQUITH, L.J., in *Victoria Laundry (Windsor), Ltd. v. Newman Industries, Ltd.* (12). ASQUITH, L.J., formulated the proposition in these terms:

E “In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach.”

Counsel for the landlords submitted that the loss here was not reasonably foreseeable. In answer to that point, counsel for the tenant referred to the sixth proposition of ASQUITH, L.J. (13):

F “Nor, finally, to make a particular loss recoverable, need it be proved that on a given state of knowledge the defendant could, as a reasonable man, foresee that a breach must necessarily result in that loss. It is enough if he could foresee it was likely so to result. It is enough, to borrow from the language of LORD DU PARCQ in the same case (14), if the loss (or some factor without which it would not have occurred) is a ‘serious possibility’ or a ‘real danger’. For short, we have used the word ‘liable’ to result. Possibly the colloquialism ‘on the cards’ indicates the shade of meaning with some approach to accuracy.”

G Had this point arisen for direct decision, counsel for the tenant would have submitted that it was “on the cards” that injury to the tenant might result H from a breach of the landlords’ suggested obligation. I do not find it necessary to decide that question.

For the reasons that I have given, I have reached the conclusion that the learned judge was correct in dismissing the action. It was a most unfortunate mischance and no one can fail to be sorry for the tenant; but I am not persuaded that liability in law attaches to the landlords.

I **ORMEROD, L.J.:** I agree that this appeal should be dismissed. It is not in issue that, so far as an ordinary tenancy is concerned where the question of repairs is not raised in the tenancy agreement, there is no obligation on the landlord to keep the premises in repair. In this case it is clear that the terms of the

(12) [1949] 1 All E.R. at p. 1002; [1949] 2 K.B. at p. 539.

(13) [1949] 1 All E.R. at p. 1003; [1949] 2 K.B. at p. 540.

(14) *Monarch Steamship Co., Ltd. v. A/B Karlshamns Oljefabriker*, [1949] 1 All E.R. at p. 19; [1949] A.C. at p. 233.

tenancy agreement contain no express provision by the landlords that they will do the repairs required, or, indeed, any repairs to the property in question. It is not for this court to comment on the form of this tenancy agreement, but it may be that it would be a useful thing from the point of view of the tenant if the position were put a little more clearly than in fact it is. A

The contention of the landlords is that they are under no obligation to repair and that the tenancy agreement contains no provision which obliges them either expressly or by implication to do any repairs. It has appeared in the course of the case that it would have been a very simple matter for the landlords to resolve all doubt by making it an express term of the contract that they were under no obligation to do any repairs, but that has not been done, and it is for this court to construe the agreement as it is. B

The submission of counsel for the tenant is that, although there is no express term here which would put the landlords under an obligation to do repairs, one should be implied by reason of the conditions of the tenancy which are contained in the agreement. It was argued, both in the court below and in this court, that it was a necessary implication of the terms of the tenancy that there should be at least an implied obligation on the landlords, not necessarily to do all repairs, but, as counsel for the tenant put it, in all respects to keep the premises reasonably fit for human habitation. C D

When this matter was argued before the learned judge, it was contended by counsel for the landlords that in no circumstances could a condition be implied that the landlords should be under an obligation to repair. The learned judge dealt with that in this way:

"Although I cannot follow counsel for the tenant in saying that the mere fact that the landlords have reserved the right to do repairs means that an obligation is imposed on them, I cannot agree with counsel for the landlords when he says that the absence of some express term in the tenancy, whether oral or in writing, means that a contractual duty on the landlords to do the repairs can never arise—in other words, that such term can never be implied. I am not sure that that is right; I am not prepared to say that circumstances may not arise in which a court could find itself impelled to imply such terms in a tenancy agreement." E F

Without having to decide that question, as at present advised, I should certainly agree with the learned judge. A tenancy agreement, like any other agreement, must be read as a whole, and it may very well be that in construing the agreement it is possible to imply an obligation on the landlords to do repairs, but the question for the learned judge and for this court to decide was whether such an obligation could be implied in this particular agreement. The learned judge went on: G

"I have examined as fully and as carefully as I can the circumstances of this case to see whether it would be right to imply such a term into this tenancy agreement, and I have come to the conclusion that it would be wrong. It is true that the landlords own and let a large number of dwellings; it is true that a tenant who takes a tenancy of any one of these dwellings of the landlords may justly say that he is aware that the landlords do in fact do the repairs, but I think that that amounts to no more than an expectation or hope on the part of the tenant that if the place needs repair the landlords will repair it." H I

It does appear from the evidence that the practice has been for the landlords to do the repairs, and it may very well be in the course of time that this particular fault in the front door of this flat will be remedied by the landlords, although in fact it had not been done before this unfortunate accident occurred.

Counsel for the tenant submits that, taking into account particularly condition 9 and conditions 11 and 15 of the terms of the tenancy, such an obligation to do

A the repairs on the part of the landlords should be implied. The one on which he relies particularly is condition 9, which provides:

“The tenant shall not do or allow to be done any decorative or other work to any part of the dwelling without consent in writing. Nails on no account are to be driven into the walls, floors, or any part of the dwelling . . .”

B Counsel for the tenant agreed that, if that condition were not included, he would not be able to ask this court to imply the term which he thinks should be implied, and he agrees, too, that he can only ask the court to imply this term if the effect of condition 9 is that it is a prohibition on the tenant not to do any repairs at all. For my part, I agree with my Lord that this condition does not import a prohibition on the tenant. It certainly is imposing a restriction in that it will not allow C him to do repairs without the consent of the landlords, but that is a very different thing from saying that the repairs shall not be done. I would have thought that the mere fact that the condition says that the repairs shall not be done without the consent of the landlords contemplated that, in certain circumstances, the tenant would be allowed to do repairs. I take the view, which has been taken by my Lord, that this clause does not amount to a prohibition but is merely a D restriction, and, if that be so, then I think that argument of counsel for the tenant fails.

In these circumstances, without going into the numerous authorities which have been cited by Mr. Beney in the very careful and detailed argument which he has submitted during the course of this case, I would say that on that point this appeal must fail and should be dismissed. The further point raised by E counsel for the tenant that there is a duty on the landlords apart from contract is one on which I would wish to add nothing to what has been said by my Lord. For my part, also I cannot see how in this case any duty can arise on the landlords independently of the duties, if any, which may be imposed on them by the terms of the tenancy. Therefore, I agree that the appeal should be dismissed.

F **WILLMER, L.J.:** I also have reached the conclusion that this appeal fails. The tenant's case is that the landlords, the Lambeth Borough Council, were in breach of their duty by failing to keep his front door in proper repair, as a result of which the accident occurred in the way described. The case is put forward both on the basis of breach of contract and as a tort. I think that it is quite impossible to say that the landlords are under any liability in tort, and for this reason. I G do not see how the tenant can show that the landlords owed him any duty except by invoking the contract whereby he became their tenant. No duty can be owed to all the world to keep anybody's front door in repair. In my opinion, if there is a duty in this particular case, it must arise as a matter of contract.

It is well established that, in the absence of agreement to the contrary, the law imposes no obligation on a landlord to keep the demised premises in repair. H I do not think that any help is to be derived from the numerous cases cited to us by counsel for the tenant, where the question at issue was as to the landlord's responsibility for non-repair of premises which he had retained and not demised. Here we are concerned with the non-repair of something which was demised. It is clear that the agreement between the tenant and the landlords contained no express stipulation with regard to liability for repair of the demised premises. I The question, therefore, arises whether any obligation can be implied on the part of the landlords to execute repairs and, in particular, repairs to this front door.

I can well understand the difficulty of the tenants of the Lambeth Borough Council if they feel in a state of bewilderment as to their rights and obligations when they have finished reading these conditions of tenancy. However, they are the conditions which the landlords have thought fit to impose on their tenants, and we must do our part in construing them. It is conceded on their behalf that the conditions must be construed *contra proferentes*. Counsel for the tenant has contended, particularly having regard to the express provisions of cl. 2, 5, 9 and

15, that an obligation is to be implied against the landlords to repair these premises at least to the extent of rendering them reasonably fit for human habitation. He suggests that, having regard to the provisions of this particular agreement, the same test should be applied here as would be applied under s. 2 (1) of the Housing Act, 1936, now s. 6 (1) of the Housing Act, 1957, if that were applicable. He concedes, however, that there must be some limitation to the implied obligation to do repairs, and that it is not every repair which would come within the duty of the landlords. Without wishing to express any concluded view, I have a great deal of sympathy for the general proposition put forward by counsel for the tenant. There is much to be said for the view that cl. 2 of the agreement, which requires the tenant to reside in the dwelling-house, does by implication require the landlords to do such repairs as may make it possible for the tenant to carry out that obligation. At least it seems to me that that is a possible view. But if that view be right, in my judgment the obligation would not extend to cover the type of repairs which we have to consider in this case. All that was wrong in this case was that the door was faulty, partly because one of its sides was binding at the bottom against the jamb, and partly because the weather-board at the foot of the door was binding on the floor underneath. As I understand it, it would be the simplest possible operation to put a door which is out of adjustment in that way into proper repair, and it could not be regarded as other than a very trivial repair.

Wherever the line is drawn, even assuming that counsel for the tenant is right in saying that some obligation on the part of the landlords to execute repairs must be implied, I should have thought that that line must be drawn well short of including responsibility for such a trivial repair as the unsticking of this door. Even assuming, therefore, that the argument of counsel for the tenant is well-founded, and that by implication there must be some obligation on the part of the landlords to execute repairs, I would not be prepared to accede to the proposition that such an obligation would include a repair such as is in question in this case.

In those circumstances, even assuming that the landlords had knowledge of the defects, as was alleged—and as to that I bear in mind that we did not hear the argument of second leading counsel for the landlords to the contrary—I find it impossible to say that any breach of contract has been proved against them.

I think it right that I should also add this. If I had found it possible to be satisfied that a breach of contract had been proved, I should have remained far from satisfied that the damages claimed in this case were the natural and probable consequence of any such breach of contract. I do not think that the accident sustained by the tenant was of a kind which could be regarded as reasonably foreseeable on the part of the landlords. Even if there had been a breach of contract, therefore, I should have found it difficult to come to the conclusion that the tenant's claim could be justified. In those circumstances, I find myself in agreement with my Lords that this appeal fails.

Appeal dismissed.

Solicitors: *Marcan & Dean* (for the tenant); *Pennington & Son* (for the landlords).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

A

WHYSALL v. WHYSALL (by his Guardian).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Phillimore, J.), July 20, 21, 31, 1959.]

Divorce—Insanity—Incurable unsoundness of mind—Incurability—Some prospect of partial recovery by paranoid schizophrenic—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 1 (1) (d).

B

In deciding whether a person is “incurably of unsound mind” within the meaning of that phrase in s. 1 (1) (d)* of the Matrimonial Causes Act, 1950, the test is whether by reason of his mental condition he is capable (according to the standard of a reasonable person) of managing himself and his affairs and, if not, whether he can hope to be restored to a state in which he will be able to do so (see p. 397, letter E, post).

C

Randall v. Randall ([1938] 4 All E.R. 696) considered.

On May 5, 1952, the husband entered a mental hospital pursuant to a reception order made on the certificate of a registered medical practitioner that the husband was a person of unsound mind and a proper person to be detained under care and treatment. He was a paranoid schizophrenic. He remained thereafter at the hospital and at the time of the hearing still was of unsound mind and under care and treatment. The husband had undergone electro-convulsive treatment without any lasting improvement of his condition but recently had shown much improvement as a result of treatment with drugs. The evidence of three medical witnesses showed that, though there was no prospect (according to present medical knowledge) of full clinical recovery, there was possibility of some degree of social recovery. It was even possible that the husband might be able to be discharged from hospital in about six months, if suitable living conditions could be found for him; but if he were discharged he would still have to continue taking drugs to maintain his recovery. His was a chronic case and there was no hope of more than a partial recovery such as would enable him to live a life where he had the benefit of sympathetic supervision and care. His wife having presented a petition in February, 1958, for a divorce on the ground that he was incurably of unsound mind within s. 1 (1) (d)* of the Matrimonial Causes Act, 1950,

D

E

F

G

Held: on the evidence there was no prospect of the husband's returning to a really normal life where he could manage himself and his affairs and, applying the test stated at letter B above, the wife had established that the husband was incurably of unsound mind within s. 1 (1) (d) of the Matrimonial Causes Act, 1950.

H

[**Editorial Note.** The Lunacy Act, 1890, is prospectively repealed, on a day to be appointed, by the Mental Health Act, 1959, ss. 1, 149 (2) and Sch. 8, Part 1.

As to divorce for insanity and incurable unsoundness of mind, see 12 HALSBURY'S LAWS (3rd Edn.) 278-280, paras. 536-539; and for cases on the subject, see 27 DIGEST (Repl.) 282, 2260-2264; 368, 369, 3048, 3049, 3057-3059, and 3rd DIGEST Supp.

I

For the Lunacy Act, 1890, s. 90, s. 116, see 17 HALSBURY'S STATUTES (2nd Edn.) 1100, 1108; and for the Mental Treatment Act, 1930, s. 20, see *ibid.*, 1241.

* The relevant terms of s. 1 (1) of the Matrimonial Causes Act, 1950, are as follows:—

“Subject to the provisions of the next following section, a petition for divorce may be presented to the court . . . on the ground that the respondent . . .—(d) is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition . . .”

The relevant terms of s. 1 (1) of the Divorce (Insanity and Desertion) Act, 1958, which amends s. 1 (2) of the Act of 1950 but does not directly alter s. 1 (1), are printed at p. 393, letter F, post.

For the Matrimonial Causes Act, 1950, s. 1 (1) (d), see 29 HALSBURY'S STATUTES (2nd Edn.) 390; and for the Divorce (Insanity and Desertion) Act, 1958, s. 1, see 38 HALSBURY'S STATUTES (2nd Edn.) 484.] A

Cases referred to:

Lock v. Lock, [1958] 3 All E.R. 472; [1958] 1 W.L.R. 1248; 3rd Digest Supp.

Martin's Trusts, Re, Land, Building, Investment & Cottage Improvement Co. v. Martin, Re Martin, (1887), 34 Ch.D. 618; 56 L.J.Ch. 229, 695; 56 B L.T. 241; 33 Digest 126, 14.

Randall v. Randall, [1938] 4 All E.R. 696; [1939] P. 131; 108 L.J.P. 49; 160 L.T. 133; 27 Digest (Repl.) 368, 3049.

Smith v. Smith (otherwise Hand), [1940] 2 All E.R. 595; [1940] P. 179; 109 L.J.P. 81; 163 L.T. 340; 27 Digest (Repl.) 282, 2260.

Issue.

By petition dated Feb. 3, 1958, and presented at the Nottingham District Registry the petitioner, Winifred Whysall, petitioned for dissolution of her marriage, solemnised on Dec. 23, 1939, to the respondent, named Major Charles Henry Whysall, on the ground (Matrimonial Causes Act, 1950, s. 1 (1) (d)) that he was incurably of unsound mind and had been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition and on the ground (Matrimonial Causes Act, 1950, s. 1 (1) (c)) of cruelty. The husband by his answer dated Oct. 9, 1958, denied that he was incurably of unsound mind and that he had been continuously under care and treatment as alleged, and denied cruelty. On July 13, 1959, the district registrar referred the petition for trial in London and directed an issue to be tried, viz., whether the wife was entitled to a divorce under s. 1 (1) (d) of the Matrimonial Causes Act, 1950. There was no dispute at the hearing that the husband was of unsound mind or that he had been undergoing treatment for it for more than five years immediately preceding the presentation of the petition. The question was, therefore, whether the wife discharged the burden of showing that the husband was "incurably of unsound mind". The facts appear in the judgment. D

In addition to the cases mentioned in the judgment the cases noted below were cited in argument*. E

R. J. A. Temple, Q.C., and *T. R. Heald* for the wife.

R. F. G. Ormrod, Q.C., and *K. R. Bagnall* for the Official Solicitor, as guardian ad litem for the husband. F

Cur. adv. vult. G

July 31. PHILLIMORE, J., read the following judgment: The marriage took place on Dec. 23, 1939, when the wife was twenty-six and the husband twenty-four, so that they are now nearly forty-six and forty-four respectively. There are four children of the marriage: Peter, now eighteen, John, now seventeen, Ivan, now fourteen, and Hilary, born on June 29, 1950, now nine. On May 5, 1952, nearly two years after the birth of Hilary, Mr. Whysall entered the Pastures Hospital, Mickleover, in the county of Derby, having been certified insane. He has been there ever since. The wife herself is also now in that hospital as a voluntary patient, although she has not been there very long; indeed she entered hospital after she filed her petition. I am told that she is quite fit to give instructions to her solicitors and counsel. H

The husband filed his answer on Oct. 10, 1958, by the Official Solicitor, as his guardian ad litem, and by it denies that he is incurably of unsound mind; he also denies cruelty. As a result of a hearing before the district registrar at Nottingham on July 13, 1959 (1), I am asked to try as an issue the question whether the wife is entitled to a divorce on the grounds that the husband is I

* *Swettenham v. Swettenham*, [1938] 3 All E.R. 183; [1938] P. 218; *Safford v. Safford*, [1944] 1 All E.R. 704; *Mayor of Camden v. I.R. Comrs.*, [1914] 1 K.B. 641.

(1) The registrar on counsel's application ordered the petition to be tried in London.

A incurably of unsound mind and has been continuously under care and treatment for five years. If I decide against the wife on this issue the charge of cruelty would have to be tried hereafter.

Counsel for the wife has put forward her evidence in the shape of an affidavit sworn on July 6, 1959. He also called Dr. Pentreath, the medical superintendent of the Pastures Hospital, and Dr. Desmond Curran, the senior psychiatrist at St. George's Hospital, who saw the husband in London on Jan. 5, 1959. Counsel for the husband has called Dr. Blair, the consulting psychiatrist at St. Bernard's Hospital, who conducts a clinic at Ashford Hospital and also at St. Mary's Hospital in London. This doctor saw the husband on Mar. 11, 1959. My task has been greatly facilitated by the fact that the three experts called are virtually in agreement. Inevitably, there is some slight difference in emphasis in their evidence, but on the broad question of the husband's state of health and prospects of recovery, or cure, they are substantially agreed.

The facts, which I regard as indisputable in the light of the evidence, are as follows. The husband, who is a coal miner, entered the Pastures Hospital on May 5, 1952, a reception order having been made by a justice of the peace. The particulars attached to the order recorded inter alia that his existing attack was of a duration of a "few weeks", and that he had threatened to kill sundry people, including his wife. He was, on entry into hospital, unquestionably a paranoid schizophrenic—and that is still his state. He has suffered from delusions, the most consistent during recent months being that one of the male nurses is hypnotising him. In addition he suffers from hallucinations in the shape of voices, which—so he says—give him instructions. He has in the past connected these voices with his belief that his wife is unfaithful to him, but now seems to be very vague as to what they say. He has had many varieties of treatment, including E.C.T. (electro-convulsive treatment) and, since Oct. 9, 1954, doses of the new drug chlor-promazine (the trade name of which is Largactil), which drug has proved of great value in the treatment of schizophrenia. Unfortunately, he has displayed an allergy to large doses of this drug, with the result that at the present time he is being treated with small doses of this and of two other drugs (2), each being administered three times daily. In the past, treatment has from time to time resulted in a great improvement in his mental state, but in each case he has suffered a relapse. The most recent treatment—namely, the combination of three drugs, including Largactil—is at the present time showing excellent results, so much so that on Friday, July 17, 1959, when Dr. Pentreath visited him, he found him much improved. Thus, although he still insisted that he was being hypnotised and was hearing the voices, he said that he did not bother about them so much. Dr. Pentreath concluded that although he had still very little insight into his condition—the doctor used the word "negligible"—the husband was better than for a very long time and that if his improvement could be maintained to the extent that he became free of the symptoms I have referred to, it was even possible to visualise his discharge at Christmas provided suitable conditions could be found for him to live outside the hospital.

It is material to remember that Dr. Curran saw the husband on Jan. 31, 1959, and Dr. Blair on Mar. 11, 1959, before the present improvement began.

Having suffered from and having received treatment for this disease for over five years, the husband is to be regarded as a chronic case and until a few years ago no form of recovery could have been hoped for. The drug Largactil has, however, effected an astonishing change in cases of schizophrenia, with the result that even in chronic cases a remarkable degree of recovery has occurred and has been maintained. This degree of recovery has varied from what the doctors describe as clinical recovery to the lesser improvement, which they term social recovery, or, still further down the scale, semi-social recovery,

(2) I.e., Stemetil and Phenergen.

which they also designate as "much improved". As I understand the term A
 "clinical recovery", it means that the patient can be discharged from hospital, there being no persisting clinical signs of the disease and the patient being apparently capable of resuming the normal life which he or she enjoyed before the onset of the disease. A semi-social recovery at the lower end of the scale may permit the discharge of the patient—the symptoms of the disease such as delusions and hallucinations having been suppressed—but the degree of recovery B
 being less, the patient is unfit to resume a normal life and may require at the least the care and help of a good friend or relative to enable him or her to live outside an institution. There are, of course, many degrees of recovery between the full clinical recovery at the top of the scale and the semi-social recovery or the condition "much improved" at the foot of the scale. Social recovery is, as I understand the phrase, a sort of half-way mark. C

Dr. Blair, who has conducted a special study covering 132 cases of women who have suffered from schizophrenia for over five years (and can thus be termed "chronic cases"), told me that as a result of this new drug 8.3 per cent. had made a full clinical recovery and 25.8 per cent. what he terms a social recovery, and added that so far as he is able to ascertain these cases had maintained improvement. In particular, he spoke of a woman who had spent over fifteen years in hospital as a schizophrenic and who, having made a clinical recovery, had been able to return to her husband and her home; this woman has maintained her recovery for over two years. He said, however, that the degree of recovery in the case of men was less satisfactory than in that of women. All the doctors agreed that whatever degree of recovery, whether clinical or semi-social or any intervening degree, the chronic schizophrenic must continue D
 to take doses of the drug Largactil at fixed times to provide against relapse. Thus, no degree of recovery is at present envisaged in these cases which does not involve treatment, albeit in the shape of self-treatment, with Largactil. E

In the present case there is no dispute that the husband is, at the present time, of unsound mind or that he has been in this state and undergoing treatment for it for over five years immediately preceding the presentation of his wife's petition; but before she can obtain the relief which she seeks under s. 1 (1) (d) of the Matrimonial Causes Act, 1950, she must discharge the onus of proving that the husband's unsoundness of mind is incurable. The doctors are agreed that in the light of the history of this case there is no prospect in the light of present medical knowledge of a full clinical recovery, but all agreed that it is impossible to rule out the possibility of some degree of social recovery which G
 may make it possible to discharge this man from hospital, perhaps as early as Christmas of this year, if suitable conditions of living can be found for him.

On this evidence, counsel for the husband contends that the wife has failed to discharge the burden of proving that the husband's condition is incurable. He urges that if the degree of recovery enables this man to be discharged and to live a reasonably normal life (which he asserts is possible on the evidence), H
 he cannot be regarded as of unsound mind, and that he ought to be regarded as cured, even though he may still require to take drugs to maintain his recovery. He points out that the phrase "incurably of unsound mind" is a term of art—one of those phrases which commend themselves to lawyers rather than to anyone else—and asks me to say what degree of infirmity or unsoundness of mind justifies the conclusion that a man or woman is in that mental state which I
 the law regards as a basis for dissolution of his or her marriage at the instance of the other spouse.

Counsel for the wife contends that even if the husband attains the degree of clinical recovery, he could never be regarded as cured, since he would still require to take drugs to maintain his recovery, and that on all the facts of this case I must find that the husband's present condition is incurable within the meaning of the statute.

- A My task would be comparatively easy if the doctors were prepared to assess the prospects of a "cure" or to assess the patient's state in terms of "curability" or "incurability", but those are not the terms in which they are prepared to give their evidence. The medical terms "clinical", "social" and "semi-social" recovery are terms which the doctors understand and which involve a practical criterion against which they can assess the mental state of a patient.
- B I am faced with the difficulty of reconciling the terms which they use with the terms used by Parliament—namely, "incurably of unsound mind". Moreover, I must bear in mind that the modern tendency is to discharge patients from hospital far more freely than in the past. A patient is often discharged where arrangements can be made for his care outside hospital and where further treatment is unlikely to improve his mental state, whom, nevertheless, few
- C people would describe as normal or cured.

- Section 1 (1) (d) of the Matrimonial Causes Act, 1950, on which this ground of relief now rests, re-enacts s. 2 of the Matrimonial Causes Act, 1937, which first created this ground of divorce in the shape of an amendment to s. 176 of the Supreme Court of Judicature (Consolidation) Act, 1925. Neither section has attempted to define the term "unsound mind" or the phrase "incurably
- D of unsound mind", although s. 1 (2) of the Act of 1950, in defining when a person of unsound mind shall be deemed to have been under care and treatment for five years, stipulates by paras. (a), (b) and (c) that it involves compulsory detention in a mental institution throughout the period of five years and accordingly involves certification. However, by para. (d), the requirement can also be satisfied if the patient was originally detained compulsorily as a result of
- E certification provided the balance of the five years was passed in an institution as a voluntary patient. This no doubt was a factor which induced SIR BOYD MERRIMAN, P., to say in *Randall v. Randall* (3) that unsoundness of mind must at least involve the status of voluntary patient.

- The emphasis on detention and consequently certification has been for all practical purposes removed by the provisions of s. 1 (1) of the Divorce (Insanity and Desertion) Act, 1958, by which a person is to be deemed to be under care and treatment for the purposes of s. 1 (1) (d) of the Act of 1950 at any time when he is
- F

"receiving treatment for mental illness . . . (a) as a resident in a hospital or other institution provided, approved, licensed, registered or exempted from registration by any Minister or other authority . . ."

- G It is said that the provisions of this Act make it all the more important to determine what degree of mental infirmity amounts to the unsoundness of mind required to satisfy s. 1 (1) (d) of the Act of 1950 and what is meant by the word "incurably". My duty is to give the words used by Parliament their ordinary and natural meaning in the context in which they are used, bearing in mind the purpose of the enactment in which they appear and any
- H other indication of intention disclosed by the wording of the statute. It is permissible to seek assistance from dictionaries and from the user of these same words by Parliament in other statutes.

- I have been referred by counsel to the Lunacy Act, 1890, which was a consolidating Act, whose scheme (as described by the authors of the article on LUNATICS in 21 HALSBURY'S LAWS (2nd Edn.) 274), is to divide persons of unsound
- I mind into two classes: (1) Persons of unsound mind so as to be incapable of managing themselves or their affairs, and (2) Persons of unsound mind so as to be incapable of managing their affairs though capable of managing themselves. Thus s. 90 (1) provides:

"The judge in lunacy may upon application by order direct an inquiry whether a person is of unsound mind and incapable of managing himself and his affairs."

Section 116 (1) (which describes the extent of the powers of management and administration by the judge in lunacy) applied them (4):

“(a) To lunatics so found by inquisition; (b) To lunatics not so found by inquisition for the protection or administration of whose property any order has been made before the commencement of this Act; (c) To every person lawfully detained as a lunatic though not so found by inquisition; (d) To every person not so detained and not found a lunatic by inquisition, with regard to whom it is proved to the satisfaction of the judge in lunacy that such person is through mental infirmity arising from disease or age incapable of managing his affairs; (e) To every person with regard to whom it is proved to the satisfaction of the judge in lunacy . . . that such person is of unsound mind and incapable of managing his affairs . . . (f) To every person with regard to whom the judge is satisfied . . . that such person is or has been a criminal lunatic and continues to be insane and in confinement.”

The succeeding provisions of the Act described all these person as lunatics; the term is thus employed to cover both those found to be incapable of managing themselves and their affairs and also those who from mental infirmity or unsoundness of mind are incapable of managing their affairs although presumably still capable of managing themselves.

Finally, s. 341 of the Act of 1890 defined “lunatic” as “an idiot or person of unsound mind.” The phrase “person of unsound mind” also appears in forms 1 and 8 in Sch. 2 to the Act where it is treated as synonymous with the term “lunatic”. It follows that the phrase “person of unsound mind” as used by Parliament in the Act of 1890 covers various grades of mental infirmity and in particular those whose mental unsoundness or infirmity renders them incapable of managing themselves and their affairs as well as those merely rendered unable to manage their affairs.

I was referred also to s. 20 of the Mental Treatment Act, 1930, passed, it should be remembered, only seven years before the phrase “incurably of unsound mind” was first made a ground for dissolution by the Matrimonial Causes Act, 1937. Section 20 (5) provides as follows:

“The word ‘lunatic’ (except in the following contexts, that is to say, in the phrase ‘criminal lunatic’, and in relation to persons detained as lunatics outside England) shall cease to be used in relation to any person of or alleged to be of unsound mind and there shall be substituted for that word wherever it occurs . . . the expression ‘person of unsound mind’, ‘person’, ‘patient’, ‘patient of unsound mind’ or ‘unsound mind’ or such other expression as the context may require.”

Here again Parliament is equating the term “lunatic” with the phrase “of unsound mind.”

Some assistance is also to be derived from the Trustee Act, 1850 (5), where by s. 2:

“The word ‘lunatic’ shall mean ‘any person who shall have been found to be a lunatic upon a commission of inquiry in the nature of a writ de lunatico inquirendo [that is to say, found by inquisition, and] The expression ‘person of unsound mind’ shall mean any person, not an

(4) Section 116 (1), like other enactments was amended by s. 20 (5) of the Mental Treatment Act, 1930, so as to substitute “person of unsound mind” for “lunatic”. The Act of 1930 also added a para. (g) in s. 116 (1) of the Act of 1890. The description “Broadmoor patient” in para. (f) was substituted for “criminal lunatic” by s. 62 (2) of the Criminal Justice Act, 1948. The Lunacy Act, 1890, is prospectively repealed by the Mental Health Act, 1959, which does not, however, amend s. 1 (1) of the Matrimonial Causes Act, 1950, though it amends s. 1 (2) (a) and (d).

(5) This Act was repealed by the Trustee Act, 1893 (repealed); see now the Trustee Act, 1925, which by s. 68 (15) adopted the definition of the word “lunatic” contained in the Settled Land Act, 1925, s. 117 (1) (xiii).

- A infant, who, not having been found to be a lunatic, shall be incapable from infirmity of mind to manage his own affairs."

These definitions were applied by COTTON, L.J., in *Re Martin's Trusts, Land, Building, Investment & Cottage Improvement Co. v. Martin, Re Martin* (6) where he held that a trustee was a person of unsound mind when, from continuing infirmity of mind, he was incapable of managing his affairs.

- B The Lunacy Regulation (Ireland) Act, 1871, by s. 2, defined a lunatic as
 "... any person found by inquisition idiot, lunatic, or of unsound mind, and incapable of managing himself or his affairs."

It will be observed that the word "or" is here used in contrast to the word "and" used in s. 90 of the Lunacy Act, 1890, a similar variation appearing

- C in the definition of the words "person of weak mind" in the Act of 1871.

It is curious to observe that s. 1 (1) (b) of the Divorce (Scotland) Act, 1938, in applying to Scotland the new grounds for divorce introduced in England by the Matrimonial Causes Act, 1937, used the phrase "is incurably insane". As to this I would refer to the view of SIR BOYD MERRIMAN, P., expressed in *Smith v. Smith (otherwise Hand)* (7), after reference to the OXFORD DICTIONARY,

- D that no distinction is to be drawn between the phrase "unsound mind" on the one hand and the word "insanity" on the other.

In using the phrase "of unsound mind" in 1937 and in 1950, Parliament must, I think, have intended to describe a mental state which, assuming that it was incurable, would justify a dissolution of the marriage tie. Although in the comparable law to govern the dissolution of marriages in Scotland the term
 E "insane" is used, it seems unlikely that it was really intended that the law should be different on either side of the border. In the context and bearing in mind the definitions afforded by the OXFORD DICTIONARY, it must, I think, have been intended to describe a state of mind variously called unsoundness of mind or insanity.

- F It is always dangerous to attempt to define a phrase such as the phrase "of unsound mind" used in s. 1 (1) (d) of the Act of 1950. As SIR BOYD MERRIMAN, P., pointed out in *Randall v. Randall* (8) there is a great risk that in attempting to define the words used by Parliament fresh difficulties will be created—the result may be to make confusion worse confounded. This view was followed by Mr. Commissioner LATEY, Q.C., in *Lock v. Lock* (9).

- G In the present case, however, I am pressed by counsel for the Official Solicitor to attempt to do so. He tells me that the Official Solicitor is greatly concerned at the number of cases where a party has been divorced on the ground that he or she is "incurably of unsound mind" and has thereafter, as a result of further treatment, left hospital fit to resume a normal married life. He points out that whereas the Matrimonial Causes Act, 1950, did at least link (10) the deterioration of the mental condition to past certification this test has been removed by the
 H Act of 1958. He also emphasised in referring to the previous statutes the very wide range of meaning which has been attributed by Parliament to the phrase "person of unsound mind". Finally, he said that in the light of the medical evidence in this case it is not practicable to determine whether the husband is curable of his unsoundness without first deciding what is meant by "unsound mind". Since the Official Solicitor in the exercise of his public duty is concerned
 I in almost all of these cases I have thought it my duty to attempt to state my opinion.

It is no doubt arguable that since the word "lunatic" and the phrase "person of unsound mind" have been used by Parliament to designate cases of so wide a range of mental infirmity the court in considering s. 1 (1) (d) ought to adopt

(6) (1887), 34 Ch.D. 618 at p. 622.

(7) [1940] 2 All E.R. at p. 596; [1940] P. at p. 181.

(8) [1938] 4 All E.R. at p. 701; [1939] P. at p. 137.

(9) [1958] 3 All E.R. 472.

(10) See s. 1 (2) (d) of the Act of 1950.

an equally broad view. If this argument be right, the categories covered by paras. (d) and (e) of s. 116 (1) of the Lunacy Act, 1890, are to be included. Is this right or ought the court to restrict the relief of dissolution to cases where a spouse is incapable of managing himself and his affairs ?

The cases covered by s. 116 (1) (d) include those who, endowed perhaps with great wealth or cursed by the complexity of their financial problems, may in their old age be unable to manage their affairs and yet, since they are still able to understand the extent of their property and the claims to which they ought to give effect, are capable of making a valid will or of giving a valid power of attorney. They may also be able, relieved of the burden of their affairs, to continue to live a normal life and indeed a normal married life. I cannot think that cases of this sort were contemplated by Parliament in enacting s. 1 (1) (d) of the Act of 1950. Nor do I suppose that the section was intended to apply to the individual who suffers from the sort of minor degree of unsoundness of mind which may produce eccentricities or harmless delusions.

It seems to me that the intention of Parliament was to enable one spouse to obtain a dissolution of the marriage when the mental incapacity of the other, despite five years' treatment, was such as to make it impossible for them to live a normal married life together and when there was no prospect of any improvement in mental health which would make it possible for them to do so in the future. The state of mind envisaged was accordingly a degree of unsoundness or incapacity of mind properly called insanity. If a practical test of the degree is required, I think it is to be found in the phrase used in s. 90 of the Lunacy Act, 1890—"incapable of managing himself and his affairs"—provided it is remembered that "affairs" include the problems of society and of married life and that the test of ability to manage affairs is that to be required of the reasonable man. The elderly gentleman who is no longer capable of dealing with the problems of a take-over bid is not in my judgment to be condemned on that account as "of unsound mind."

What effect is to be given to the word "incurably"? If a person may be discharged from hospital in a state in which he can resume married life, managing himself and his affairs, able to make a will and perhaps to enter into contracts or act as a trustee, does the fact that he will always have to take a regular dose of a drug to guard against any recurrence of the disease prevent it being said that he is cured? Counsel for the wife's argument would have a patient with this prospect labelled "incurable" even if the hospital were to discharge him as recovered, since, as he says, the prophylactic doses would not be necessary if he was cured.

Likewise, what is the degree of cure involved in a semi-social recovery or discharge with the finding "much improved"? I think that assistance is to be derived from the decision of SIR BOYD MERRIMAN, P., in *Randall v. Randall* (11). Unfortunately, the facts in that case are somewhat inadequately reported. Incidentally, the first sentence of the headnote (12) is clearly misleading. It is, however, clear that it was a borderline case, since it was at least doubtful whether the respondent was certifiable at the time of the hearing. The President, having stated that certification was not necessarily the test, went on to refer to the medical evidence. It was clear that the respondent would always suffer what were referred to figuratively as the "scars of the disease" and be subject to an irreducible minimum of unsoundness of mind so that at best he could hope to live in a small cottage with a small garden in circumstances where he would remain technically in detention and subject to recall to hospital. Here then was a patient for whom a sheltered life subject to supervision was the utmost that could be hoped for. In this case which the President held incurable the prospects were analogous to what the doctors described to me as a semi-social recovery.

- A In my judgment, the test to be applied to the word "incurably" is to be applied with common sense and with regard to the popular understanding of the term. In a sense, no doubt anyone who has suffered a severe disease, mental or physical, cannot be cured in that he cannot expect to enjoy a mind or body as robust or healthy as before. Nevertheless, we regard such a person as cured when he has left hospital and resumed a normal life. The mere fact that he may
- B have to take prophylactic measures to preserve his cure does not in ordinary language class him as an invalid. In the physical sphere injections in the case of a diabetic provide a parallel to the Largactil which the schizophrenic must always take even after he is discharged as clinically "recovered". There will always be borderline cases, such as cases where there is a real prospect of relapse at an early date, but if these cases are to be properly assessed and the interests
- C of the mentally afflicted are to be protected, a practical test must be found—a test which enables a doctor to say with some confidence on which side of the line the particular patient falls. If a man can hope to resume a normal married life and to manage himself and his affairs, no ordinary person would describe him as incurably of unsound mind or insane because he has to take a drug once a week or once a day. Equally, however, if in the light of medical knowledge
- D at the time of the inquiry it is said that the patient's mental state is such that the best can be hoped for is discharge to conditions where he will not be required to manage himself or his affairs but will live an artificial existence protected from the normal incidents and problems of life he will properly be termed incurable. A parallel in the physical sphere is the patient who can go home but will always be bedridden, whom we would term a permanent invalid.
- E I would conclude, therefore, that in deciding whether a person is "incurably of unsound mind" the test to be applied is whether by reason of his mental condition he is capable of managing himself and his affairs and, if not, whether he can hope to be restored to a state in which he will be able to do so. I would add to the above test the rider that the capacity to be required is that of a reasonable person.
- F I turn finally to consider the effect of the view I have formed on the facts of this case. As I have already stated, there is no dispute that the husband is at the present time of unsound mind. Is this state incurable bearing in mind that all the doctors deny the possibility of a clinical recovery and hold out the hope of a semi-social recovery as the best that can be expected? Dr. Blair's assessment was that the husband might hope for a grade lower than social
- G recovery, which he would term "much improved" or "semi-social recovery". The state of apathy typical of the disease would be likely to persist and possibly some hallucinations, but he should be able to earn his living and possibly manage some simple financial matters, though this would entirely depend on how he adapted himself. He would always have a scar in the personality so that his personality would never be quite the same as before. Dr. Curran was less
- H optimistic. He took the view that the husband would never be free from latent disease; although the present symptoms might be suppressed, others would be likely to appear. He would always show lack of emotional responsibility, be lacking in activity, and carry on without volition and with a lack of interest. In short, his opinion is that the husband will always suffer from an irreducible minimum of unsoundness of mind and that it is not likely that
- I he will be able to earn his own living. Dr. Pentreath, who has known the patient over the years and is really in the best position to judge, thought that even if the present improvement is continued so that the husband can be discharged he will still remain a withdrawn personality, lacking in volition and spontaneity; suffering from some residual scarring of the mind, he would probably always need some degree of personal supervision by kind friends or relatives—particularly in matters of money.

This man is a chronic case. It is clear that there is no hope of more than a partial recovery and that this can only enable him to live a life where he is

the subject of sympathetic supervision and care. I do not think that it can be said that there is any real prospect of his return to a normal life or normal married life where he would be able to manage himself and his affairs. He will be apathetic and lacking in volition and will perhaps be able to do the work of a labourer but unfit to deal with the simple problem of how to dispose of his wages. I do not think that Parliament intended to treat as cured a man whose optimum prospect of recovery is to be fit for this sort of half-life. I am satisfied, therefore, that I ought to hold that the wife has proved her case and that the husband is incurably of unsound mind.

[HIS LORDSHIP granted the wife a decree nisi on the ground specified in the Matrimonial Causes Act, 1950, s. 1 (1) (d).]

Decree nisi.

Solicitors: *P. A. Cook*, The Law Society, Nottingham (for the wife); *Official Solicitor*.

[*Reported by N. P. METCALFE, ESQ., Barrister-at-Law.*]

SOLE v. HENNING (VALUATION OFFICER).

[COURT OF APPEAL (Lord Evershed, M.R., Romer and Sellers, L.J.J.), July 17, 1959.]

Rates—Lands Tribunal—Appeal from decision of local valuation court—Onus of proof—Tribunal requiring to be satisfied as to something wrong in findings below—Lands Tribunal Rules, 1956 (S.I. 1956 No. 1734), r. 45 (4).

Rates—Assessment—Dwelling-house—Method of valuation—Interest on purchase price etc.—Valuation for Rating Act, 1953 (1 & 2 Eliz. 2 c. 42), s. 2 (2).

When considering an appeal against a decision of a local valuation court, the Lands Tribunal is entitled to say that it will not overturn the decision below unless it is satisfied by the appellant that there is something wrong as a matter of fact in its findings.

The purchase price of a dwelling-house is not the guide, or a particularly safe guide, in arriving at its gross value as defined in s. 2 (2) of the Valuation for Rating Act, 1953.

Peche v. Wilkins ((1959), 4 R.R.C. 49) followed.

Appeal dismissed.

[For the Valuation for Rating Act, 1953, s. 2 (2), see 33 HALSBURY'S STATUTES (2nd Edn.) 584.]

Cases referred to:

Ellerby v. March, [1954] 2 All E.R. 375; [1954] 2 Q.B. 357; 118 J.P. 382; [1954] 3 W.L.R. 53; 3rd Digest Supp.

Peche v. Wilkins, (1959), 4 R.R.C. 49.

Case Stated.

The appellant was the owner and occupier of a hereditament comprising a house, garage and premises, "Edolph", Charlwood, Surrey, and he appealed to the Lands Tribunal against a decision of a local valuation court of Southern Surrey Local Valuation Panel given on Nov. 20, 1957, reducing the assessment of the hereditament from £125 gross value, £101 rateable value, to £90 gross value, £72 rateable value. The appellant contended that the 1939 rental value should be deduced from the price he had paid for the premises by the application of interest rates subject to reduction factors to allow for the altered value of money. On July 4, 1958, the tribunal (JOHN WATSON, ESQ.) dismissed the appeal with costs, holding that the appellant had "failed to provide me with any grounds for interfering with the decision of the local valuation court". The appellant appealed by way of Case Stated to the Court of Appeal.

The appellant appeared in person.

J. R. Phillips for the respondent.

A **LORD EVERSHED, M.R.:** In this appeal the appellant ratepayer challenges the conclusion of the Lands Tribunal which affirmed an earlier decision of the local valuation court, fixing the figures to be applied for gross value and rateable value in respect of the ratepayer's premises, a house and garage known as "Edolph", Charlwood, in the county of Surrey. The brief history of the matter is that at first the local valuation officer attributed to these premises a gross value of £125, with an appropriate rateable value, but, when the matter came to trial before the local valuation court, those figures were reduced to £90 gross value, £72 rateable value. The local valuation officer has not since sought to justify any higher figure, but the ratepayer, who has put forward with clarity and moderation his complaints about the decision, says that the figure is still too high. He knows that, by the relevant statutory provision in s. 2 (2) of the Valuation for Rating Act, 1953, the rent which the hypothetical tenant is to be treated as being ready to pay is the one which he would have been expected to pay in June, 1939, on a tenancy of a kind there mentioned.

B The ratepayer has pointed out that this house is perhaps to some extent unsuited, or not well suited, to modern conditions. The pressure of modern circumstances includes such things as the proximity of Gatwick Airport and the new town. There is also the size of the house, which, if large, is to that extent never so attractive in days when the cost of repairs is great, the difficulty of getting staff is greater, and so forth. These are obviously very pertinent matters, and in arriving at the figure which Parliament has contemplated, one must form an estimate as best one can with the help of such assistance, expert and other, as one can get. In this case, from what his counsel told us, the valuation officer appears to be a gentleman of considerable local knowledge, and also some professional qualifications. At the end of its decision the Lands Tribunal expressed itself thus:

F "I know of no way of valuing this type of house except on the basis of the experience of someone who has valued houses of this kind in the neighbourhood—or, better still, has bought and sold and let them. There is in this case no material evidence of the 1939 value except the opinion of the valuation officer. The local valuation court, with its local knowledge, made a substantial reduction in the original figures and I am satisfied that they were correct in doing so. The valuation officer accepted that reduction and defended it; so far, he said, but no farther. The burden is on the ratepayer to prove that both are wrong and it is unfortunate, if he feels so strongly that that is the case, that he was unable to call any valid evidence of pre-war values, professional or otherwise. He has failed to provide me with any grounds for interfering with the decision of the local valuation court and the appeal must be dismissed."

G The ratepayer challenges first the basis of that paragraph. He accepts, as he must, that the Court of Appeal has no jurisdiction save in matters of law, but he says that this was a wrong approach, a misdirection of itself by the tribunal, and therefore an error in law. Further, he says, that the matter should have been treated as *res integra*, and it is not right to say that the tribunal performs its function by accepting the decision of the local valuation court, unless the appellant, in this case the ratepayer, has affirmatively satisfied the tribunal that the court was wrong. I think that way of putting it may be giving undue emphasis to the phrase, "the burden is on the ratepayer"; but none the less my view is that the tribunal in matters of this kind is entitled to say, and properly performs its function if it does say, "I am not going to overturn the decision of the court below unless I am satisfied by him who complains of it that there is something wrong as a matter of fact in that court's findings." It is quite true that before the tribunal there is a re-hearing of the evidence, but I do not think that there is anything in the paragraph quoted which disqualifies the conclusion based on it, and which, as a consequence, lets in, so to speak, the discussions about the

method of valuation which the ratepayer has also intimated to us in his observations. A

On those last matters, the ratepayer says: "It is all very well, but the local valuation officer has never bought and sold a house, and I, at any rate, bought this one"; and he based a calculation on the selling price. But I think that counsel for the valuation officer is justified in saying that, by virtue of the case in this court of *Peche v. Wilkins* (1), the selling price, for the reasons there stated, B is not the guide, or a particularly safe guide in arriving at the notional rent figure postulated by the Act of 1953.

Going back to the main point, I think that the way that I have tried to put it finds support also in the language of the Lands Tribunal Rules, 1956 (S.I. 1956 No. 1734), r. 45 (4) of which provides:

"On an appeal against the decision of a local valuation court, the tribunal shall give such directions with respect to the manner in which the hereditament in question is to be treated in the valuation list as appear to the tribunal to be necessary to give effect to the contention of the appellant if and so far as that contention appears to the tribunal to be well founded." C

That rule, or its earlier equivalent, and its effect, which is, I think, consistent with what I have stated, is further illustrated and illuminated by another decision of this court, *Ellerby v. March* (2). D

It comes therefore to this, that there is in my judgment no error of law, no misdirection in this vital last paragraph. From that it also follows, I think, that both the tribunal and the local valuation court were entitled on the evidence which was before them to find as a fact as the tribunal and the court did. If that is right, then we have no further say in the matter. No error of law is shown and, therefore, in so far as the question is one of fact, it has been determined, and determined conclusively. For those reasons I would dismiss the appeal. E

ROMER, L.J.: I quite agree. The only point which might be regarded as a point of law that the ratepayer sought to introduce before us was this question whether, in the circumstances of this case, the gross value should be ascertained by a calculation based on the purchase price which he paid for this property when he bought it. It was by means of such a calculation as that that the ratepayer arrived at the gross value of £65 which he urged before the tribunal. But I think it is quite clear, or at all events has been clear since *Peche v. Wilkins* (1), that the selling price or purchase price of a property is not a relevant factor for the purpose for which the ratepayer sought to use it, for the reasons to which MORRIS, L.J., referred in his judgment in that case. One therefore comes down to a pure question of fact. As to that I have nothing to add to what the Master of the Rolls has said, and I agree with him. F

SELLERS, L.J.: I agree with the judgment of the Master of the Rolls. G

Appeal dismissed.

Solicitor: *Solicitor of Inland Revenue* (for the respondent).

[Reported by F. A. AMES, Esq., *Barrister-at-Law.*]

A

SALES-MATIC, LTD. v. HINCHLIFFE.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Ashworth and Hinchcliffe, JJ.), October 7, 1959.]

Gaming—Lottery—Whether any substantive offence created by Betting and Lotteries Act, 1934 (24 & 25 Geo. 5 c. 58), s. 21.

B

Section 21 of the Betting and Lotteries Act, 1934, which reads: "Subject to the provisions of this Part* of this Act, all lotteries are unlawful", does not create any substantive offence but is merely a declaration that lotteries are unlawful.

C

[As to lotteries, see 18 HALSBURY'S LAWS (3rd Edn.) 238-240, paras. 460, 461. For the Betting and Lotteries Act, 1934, s. 21, s. 22 and s. 30, see 10 HALSBURY'S STATUTES (2nd Edn.) 801, 807.]

Case Stated.

D

This was a Case Stated by justices for the City of Bradford in respect of their adjudication as a magistrates' court sitting at Bradford on Jan. 30, 1959. On Oct. 1, 1958, two informations were preferred by the respondent, a police inspector, against the appellants charging them with unlawfully conducting a lottery by means of a bubble gum machine, contrary to s. 21 of the Betting and Lotteries Act, 1934, between July 18 and Aug. 3, 1958, outside the shop, 192, Manchester Road, Bradford, in one case, and between May 20 and May 24, 1958, outside the shop, 11, Otley Road, Bradford, in the other case. The following facts were found.

E

The appellants installed and maintained in position outside each of the shop premises, between the relevant dates, a coin-operated automatic vending machine, which was filled with coloured balls of chewing gum and a quantity of trinkets or charms of plastic material. The number of trinkets or charms in the machine was appreciably less than the number of balls of chewing gum. The intrinsic value of a trinket or charm was trivial, but was an inducement to children to purchase the chewing gum. The machine was operated by the insertion therein of one penny, in return for which the customer received either one ball of chewing gum or one ball of chewing gum plus a trinket or charm. It was a matter of pure chance whether the customer received a trinket as well as a ball of chewing gum. Members of the public had full and free access to the machine and used it between the relevant dates. It was contended by the appellants that s. 21 of the Act of 1934 did not create a substantive offence, but was merely declaratory of the law. The justices were of the opinion that the appellants had been properly charged under that section. They convicted the appellants and imposed a fine of £10, with costs, in respect of each of the offences.

G

J. R. Phillips for the appellants.

G. Baker for the respondent.

H

LORD PARKER, C.J.: This is an appeal by way of Case Stated by justices for the City of Bradford, before whom informations were preferred by the respondent, a police inspector, against the appellants that on certain days outside certain shop premises at Bradford they

I

"did unlawfully conduct a lottery by means of a certain machine, namely, a bubble gum machine, contrary to s. 21 of the Betting and Lotteries Act, 1934."

The magistrates found the offences proved and imposed a fine of £10 with five guineas costs in respect of each of the two offences. The machine, in each case, was apparently situated on the pavement outside the shop, and it contained a number of balls of chewing gum for which a child desiring to purchase one put

* Part 2, which is headed "Lotteries and Prize Competitions" and consists of s. 21-s. 28, inclusive.

a coin in the slot. Attached to some of the chewing gum balls were trinkets or charms which had an additional attraction for children. When one put a penny into the slot, it was pure chance whether one got just a ball of gum or a ball of gum and a trinket. A

The only question that arises here is whether the appellants, the company which had these machines, were properly charged with an offence. As I have said, they were charged with an offence contrary to s. 21. Section 21, which is the opening section of Part 2 of the Act dealing with lotteries and prize competitions, is very short and is to this effect: B

"Subject to the provisions of this Part of this Act, all lotteries are unlawful."

The sole question is: Do those words, as the magistrates have held, create an offence? C

Section 21 is followed by s. 22, which sets out a number of offences in connexion with lotteries. Section 22 (1) is in this form:

"Subject to the provisions of this section, every person who in connexion with any lottery promoted or proposed to be promoted either in Great Britain or elsewhere . . ." D

Then follows a number of things such as printing tickets, selling tickets, using premises, causing or procuring certain matters; and s. 22 (1) provides that in all those cases the doer shall be guilty of an offence. The penalties are laid down by s. 30, which provides that a person guilty of an offence under any section contained in Part 2 shall be liable on summary conviction and on indictment as there set out. E

For my part, I find it unnecessary to refer to any other provisions of the Act, save to say that by s. 23 and s. 24 certain lotteries, which otherwise would be unlawful by reason of the general statement in s. 21, are said to be not unlawful if certain conditions are fulfilled. Each of those sections goes on to provide that, if the conditions are not fulfilled, then the person concerned in the promotion shall be guilty of an offence. F

Going back to s. 21, it is, in general terms, declaring all lotteries to be unlawful. It is, to my mind, a novel way of declaring something to be an offence. One may test it in this way: Always supposing that the intention was to create an offence or offences by those words, what are they? Is it saying that anybody who conducts a lottery or promotes a lottery is guilty of an offence? Is it saying that anybody who partakes in a lottery is guilty of an offence? It seems to me that the proper construction of the section is that it is a declaration that all lotteries are unlawful, and then, owing to the difficulty of saying what is meant by promoting or conducting or being concerned with a lottery, the legislature goes on, by s. 22, to declare a number of matters, which are connected with the promotion and form part of the promotion and conducting of a lottery, to be offences. Whether if the appellants had been charged under s. 22 they could have been held guilty, I do not know. I suspect that in the normal way the appellants would have been charged under s. 22 (1) (f) in that they used premises for purposes connected with the promotion or conduct of a lottery, but that whoever was considering the matter thought that it was difficult to say that part of a pavement outside a shop was premises, and, therefore, fell back then on the general provisions of s. 21. In my opinion, s. 21 does not create an offence, and, accordingly, this appeal succeeds. G H I

ASHWORTH, J.: I agree.

HINCHCLIFFE, J.: I also agree.

- A **LORD PARKER, C.J.:** The case must go back to the magistrates with an intimation that s. 21 creates no substantive offence and that the appellants were not properly convicted.

Appeal allowed.

- Solicitors: *Ward, Bowie & Co.*, agents for *James A. Lee & Priestley*, Bradford (for the appellants); *Wilkinson, Howlett & Moorhouse*, agents for *Town clerk*, Bradford (for the respondent).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

C UDALAGAMA v. BOANGE.

[PRIVY COUNCIL (Lord Reid, Lord Tucker, Lord Somervell of Harrow, Lord Denning and Mr. L. M. D. de Silva), June 1, 2, July 29, 1959.]

- Privy Council—Ceylon—Marriage—Breach of promise—Action for damages for breach of promise—Promise to be made in writing—Ceylon Marriage Registration Ordinance (c. 95, Legislative Enactments of Ceylon, Vol. III), s. 19, proviso.*

By the Ceylon Marriage Registration Ordinance, s. 19, proviso, it is provided: “. . . no action shall lie for the recovery of damages for breach of promise of marriage, unless such promise of marriage shall have been made in writing”.

- E **Held:** the writing required to satisfy the ordinance must contain an express promise to marry or confirm a previous oral promise to marry, i.e., must admit the making of the promise and evince continuing willingness to be bound by it; writing which merely affords evidence of a previous oral promise to marry is insufficient, but writing which imports an express promise to be bound by a previous promise will suffice.

- F *Jayesinhe v. Perera* ((1903), 9 N.L.R. 62) overruled.
Appeal allowed.

Cases referred to:

Jayesinhe v. Perera, (1903), 9 N.L.R. 62.
Karunawathie v. Wimalasuria, (1941), 42 N.L.R. 390.
Misi Nona v. Arnolis, (1914), 17 N.L.R. 425.

G Appeal.

Appeal by Cyril Vernal Udalagama from a judgment and decree of the Supreme Court of Ceylon (GRATIAEN and SWAN, JJ.), dated Nov. 25, 1955, reversing a judgment and decree of the District Court of Kegalle dated Mar. 10, 1954, in which an action by the respondent, Iranganie Boange, against the appellant for damages for breach of promise of marriage was dismissed. The facts are set out in the judgment of the Board, p. 405, letter E, post.

- H *Sir Frank Soskice, Q.C.*, and *R. Millner* for the appellant.
The respondent did not appear and was not represented.

- I **LORD TUCKER:** In this case, the respondent sued the appellant for damages for breach of promise of marriage. A good deal of oral evidence, conflicting on many points, and some documentary evidence was placed before the trial judge who held that no written or oral promise to marry was established on the evidence before him. The greater part of the evidence related to the question whether there was an oral promise to marry. For reasons which appear later, it will be seen that this evidence was immaterial to a decision of this case and should, therefore, have been excluded. On appeal, the Supreme Court held (1) that, under the earlier decisions of that court, an

(1) (1955), 57 N.L.R. at p. 392.

“action for damages lies if, in a letter addressed by the defendant to the plaintiff, there is confirmation or at least an unqualified admission of a subsisting and binding oral promise of marriage.” A

It held that the necessary elements existed and, setting aside the order of the district judge, entered judgment for the respondent. The question is whether this ruling was correct.

It is convenient at this stage to state what, in their Lordships' opinion, is the law of Ceylon relating to the matter. An action does not lie in Ceylon for every breach of a promise to marry. A restriction is imposed by s. 19 of the Marriage Registration Ordinance (c. 95 Legislative Enactments of Ceylon, Vol. III, p. 122), which, after making certain provision which has no bearing on cases of breach of promise, enacts as its final provision B

“... no action shall lie for the recovery of damages for breach of promise of marriage, unless such promise of marriage shall have been made in writing.” C

There is nothing further in the ordinance or in any other statute which has a bearing on the point. Their Lordships are of opinion that the policy of the legislature has been to limit the cases in which an action can be brought to those in which the promise itself is in writing. It may be contained in one or more documents. Documentary evidence which does not in express or other unequivocal terms contain a promise to marry is insufficient, even though it may afford evidence of an oral promise to marry. D

Some confusion seems to have arisen in this case with regard to the meaning of such words as “evidenced in writing” and “confirmation”. The distinction which must always be borne in mind is between writing which contains the promise to marry and writing which may afford corroboration of a previous oral promise. The latter, which is sometimes described as writing “which evidences a previous oral promise” is insufficient to support an action for breach of promise. E
The writing required to satisfy the ordinance must contain an express promise to marry or confirm a previous oral promise to marry, i.e., admit the making of the promise and evince continuing willingness to be bound by it. An illustration of a writing which, while not containing in itself a promise to marry, might be put forward as affording evidence in writing of an oral promise to marry is to be found in the case of a writing which says, “I assure you I will carry out the promise I made last month”. On such a writing, the question at once arises, was it a promise to marry? or a promise to lend money? or some other promise? F
The writing by itself only establishes that a promise was made. If it were possible to establish by oral evidence that the “promise made last month” was a promise to marry, the conflicts and uncertainties which may arise would be almost as much, if not quite as much, as in a case resting on oral testimony alone. G
In answer to oral evidence that it was a promise to marry, a contesting defendant may say it was a promise other than a promise to marry. Their Lordships are of the view that such a writing is insufficient to satisfy the statute. The decision in *Jayesinke v. Perera* (2) has been questioned in subsequent cases. Doubts have been expressed whether the writing relied on amounted merely to an admission in writing of a previous oral promise or was a repetition of the promise. If the word repetition imports an express promise to be bound by the previous oral promise this will suffice, but their Lordships are unable to find this in the letter in question in that case which, in answer to a request for a written promise of marriage, said: H

“I am not agreeable to what papa says, for this reason: that is, if I trust darling, should not darling trust me? ... If they have no faith in my word, I cannot help it. If they don't believe my word, I am not to blame.” I

This is, in effect, saying, “You must rest content with such remedy as is offered you by an oral promise”, and is an express refusal to give what the ordinance

A requires. Their Lordships are, accordingly, of opinion that the decision cannot be upheld. Extrinsic evidence is only admissible where such evidence is permissible on general grounds, e.g., where the surrounding circumstances may explain some ambiguity or identify some person referred to in the writing.

The basis of the judgment of the Supreme Court is to be found in the following passage (3):

B “Does P.1, read in conjunction with the letters D.7 and D.8, constitute a ‘written promise’ within the meaning of the proviso to s. 19 (3)? The ordinance does not declare that oral promises of marriage are null and void; it merely renders them unenforceable unless they be evidenced in writing. The object is to avoid the risk of vexatious actions based on perjured testimony. The earlier authorities of this court were all discussed during the argument and it is settled law that an action for damages lies if, in a letter addressed by the defendant to the plaintiff, there is either confirmation or at least an unqualified admission of a subsisting and binding oral promise of marriage. This is the effect of *Jayesinha v. Perera* (4), *Misi Nona v. Arnolis* (5), and *Karunawathie v. Wimalasuria* (6). The letter P.1 completely satisfies this minimum test.”

D Their Lordships have already indicated that the test referred to in this passage is not entirely satisfactory and has, in fact, given rise to differences of interpretation in its application. As stated in the judgment of the Supreme Court (7),

“The parties are well-educated Kandyan gentlefolk, and each of them is the child of parents who hold conservative ideas on the subject of marriage.”

E Negotiations for a marriage between them took place in the manner customary to such persons and various things had been done, including the fixing of a dowry to be given by the respondent's father. If a marriage had gone through, the next step would have been a betrothal at which a certain ceremony would have been performed. This did not take place. It will appear from what is stated later that it is not necessary to examine the reasons for the failure. The parties saw each other and some letters passed between them. Their Lordships will now examine the documentary evidence to ascertain whether a promise to marry can be said to be contained in it. Three letters were relied on, two from the respondent to the appellant and one from the appellant to the respondent. These are the documents referred to in the judgment of the Supreme Court as D.7, D.8 and P.1. The first is the following:

“Boange Walauwa,
Kadugannawa.

18.12.50

“My darling Teddy,

H “I asked Mumy if I may write to you, and though she did not say no, she does not like me corresponding fearing that I might fall into trouble. But I thought it is my duty to write to you, and keep to my promise inspite of any obstacle standing in my way.

I “The other day I was anxiously waiting to meet you before leaving, but I had to come away with a heavy heart, as Daddy came early. I am still feeling wretched without you. The evenings are unbearable. When I think of you darling, I wish I could fly back to you. I don't know how I will stay here all alone till the 7th.

“I would have liked to spend even the whole holiday there, but I have to please so many, with the result that I am unable to do what I want. I hope you understand me, my darling, and will not get angry with me for leaving

(3) (1955), 57 N.L.R. at p. 392.

(4) (1903), 9 N.L.R. 62.

(5) (1914), 17 N.L.R. 425.

(6) (1941), 42 N.L.R. 390.

(7) (1955), 57 N.L.R. at p. 386.

you, inspite of you worrying me so much to stay behind. To spend even a minute with you is a great joy to me, though you seem to think that I was impatiently waiting to come home.

"I am eveready to do anything for you, but unfortunately it is my fate that I am forbidden to do all I can for you, whom I love more than any one in this world. I know you always think that I don't care for you because I say can't for anything at all. Please don't think that I have no love for you, as I will truthfully tell you that I really love you from the very bottom of my heart.

"[—] came here a few minutes after we came home. He was very good and did not try any of his pranks on me. Please don't tell anything to [—] because I don't want the others to say that I made up false stories about an innocent man. I am sure, now you have room to think that I too encouraged him; that is why I don't want you to speak to [—] about this. I am not boasting, but it is the actual fact. I have never had anything to do with another person, and it has always been my one idea to love only one. Take my word I am not a person who is easily tempted. I have always aimed at having a pure character and you can be sure that in rain or sunshine I will stand by you till the end of my life. It was my ambition to find a man too with a pure character and I have found it in you. Therefore don't fear. I will always be faithful to you my darling. I hope you are going for a change. If you are going to N'Eliya please be careful the way you drive the car. Can't you get someone to accompany you, without going alone? I think I had better stop writing as I am getting late for the post. I will write to you again on Thursday.

With much love and kisses.
from

Yours for ever.

Girlie."

Certain initials irrelevant for the purposes of this appeal appear in the spaces left blank. The next letter is:

"Boange Walauwa,
Kadugannawa.

19.12.50

"My darling Teddy,

"I hope my letter has reached you safely. Please be careful with my letters because there are silly people waiting to make unnecessary fuss.

"Where did you all go yesterday? I heard that you were going home last evening.

"A little while ago we returned after a days outing in Kandy. I had a long jaw with Aunt about the girl whom [—] and sister went to see at Kurunegala. As for me I was anxiously waiting to come back soon, so that I may keep to my promise.

"Have you decided about your holiday? Darling, you must go somewhere and have a good time. Again I am telling you, if you are going to N'Eliya please be careful the way you drive your car.

"Though I am here my thoughts are with you my love. Day and night, I think of nothing else but you my darling. The house is still been built. My one work is telling Mummy how unfair they are in delaying like this. She too agrees with me, but I haven't got the courage to go and tell Daddy. He doesn't understand our position and is ready to get upset for the least thing. That is why I am telling you that I am placed in such a difficult position where I have to please so many.

"Only I know what a lot of mental agony I have to undergo. Inspite of everything I never show it because I don't wish others to say that I can't get on in life.

A "I am also very anxious to know about your arrangements etc. therefore please write to me on Saturday. I can send one of my brothers to the post on that day. So please don't fail to let me know all about yourself. I am taking a great risk in asking you to write to me, but I hope everything will be O.K. Another thing, if you are going anywhere or not please let me know your holiday address.

B "I am sending you the Observer Crossword puzzle. If it is possible please do it and send it to me.

"I have sat up till late today because I wanted to write to you somehow, when no one is about the place. It's past one o'clock and I am feeling sleepy too, so I think I had better conclude. Now please don't disappoint me.

"With much love and kisses.

C From

Yours for ever,

Girlie."

The third letter, from appellant to respondent, is:

"Kegalle.

21st December, 1950.

D "My darling dearest Girlie,

"I received both your letters safe & sound. It was indeed sweet of you to have written to me exactly as promised. As you wanted to know my arrangements for the holidays—well here they are. Tomorrow morning I will be going to Kandy and Katugastota. As a matter of fact as the post mark will show you, I am posting this letter from Kandy. I will try to pick up Shelly and failing I will go up alone even to Nuwara Eliya. If I go up alone I will stay at the Grand Hotel Nuwara Eliya. Otherwise I cannot definitely tell you where I will stay. I shall send you a christmas card from Nuwara Eliya to reach you on the 25th morning. Thank you Darling for the anxiety you have expressed regarding my driving up. I shall indeed try to be careful as possible. Somebody has given you some wrong information, since I have not left Kegalle since you left on the 16th instant.

"I am glad to hear that you have been getting out a bit. I think Darling if you can manage it, you too, should take a holiday somewhere, why not induce your Daddy to go somewhere for a few days. You have been working very hard and I think you fully well deserve a good holiday.

G "Girlie dear, I have been missing you very badly these days. Indeed the evenings are very dull and boring without you and I am waiting to go somewhere for a little rest. I am much thankful to you for the kind thoughts you have been having about me. Girlie I don't think I need repeat all what you have written to me, because I feel just the same way as you have expressed. I can assure you that all the expectations and the dreams you have of your future will not be in vain, you can confidently hope. The sooner it is, the better, I think. So that you should, if you possibly can, have a chat with your Daddy and tell him that this unnecessary delay is by no means good to either. It has been hanging fire since June but I find nothing appears to have been done. It is no use delaying now. I can tell your Daddy about it, but I don't want to hurt your feelings, it will be better if you could put it to him.

H "... is yet down with measeles and it looks as if Sister and them will not be going anywhere for the holidays.

I "Darling I hope you are keeping good health. Please be careful of yourself and don't fall ill like last time what happened. I suppose the mornings are bitterly cold there.

"Daya and I just returned from seeing 'The Prince & the Pauper'. It was a nice picture with a fine story of how Henry VIII's son Edward for a lark exchanged places with a pauper's son and it became a serious matter and it was with great difficulty that the Prince managed to convince the people

that he was the real Prince. I wonder whether you have seen any picture since you left on the 16th. Yes, that day, I thought you might still be there, when I came after the pictures and it was with great sorrow that I learnt from Daya that you had left. Darling my thoughts are always of you every day and I am most anxiously waiting till the 7th of next month. So please on no account must you keep away from coming on the 7th.

"Don't worry I will not tell [—] a word of what you have told me, nor will I tell anyone a word of it. But Darling you must be extremely careful of yourself and don't allow people to treat you in the same manner that you were treated when you were a small girl of eight or nine years. Show them a little reserveness on your part and I am sure they will understand.

"As regards the Puzzle I don't think you are in a hurry. I think the closing date is 16th January. I will have it made and give it to you when you come on the 7th.

"Well, Girlie my sweetheart, what do you want from Nuwara Eliya—don't tell me you want the lake, or the park. I always think how wonderful it would have been if you could have accompanied me on this holiday—just you and me with all the cares and worries of this world forgotten for ten glorious days!

"L. B. and Nanda were here last Friday evening. They too don't intend going anywhere. L. B. it seems is going to take a course of medicine at Galagedera and I suppose Nanda too will be there. Daya told me today that Nanda's little daughter is also down with measels—that means they too will have to stick at Yatiyantota.

"Well Darling I think I better stop, now it is nearly 11.30 p.m. In the christmas card I shall give you my address in Nuwara Eliya and the date of my last day of stay there. Write to me then if you can.

Cheerio my sweetheart.

With love.

Teddy."

Neither of the courts in Ceylon has been able to find in the correspondence above a promise to marry. Their Lordships are in the same position. The letters on the construction most favourable to the respondent do no more than assume that a marriage will take place as a result of an oral promise. Whether such promise was conditional or unconditional, and if the former, whether the condition was ever fulfilled, is not stated. Extrinsic evidence being inadmissible to supply the deficiencies in the correspondence, the action necessarily failed.

For the reasons which they have given, their Lordships will humbly advise Her Majesty that the appeal be allowed, the judgment and decree of the Supreme Court be set aside and the decree of the District Court restored. The respondent must pay the costs of this appeal and of the appeal to the Supreme Court.

Appeal allowed.

Solicitors: *T. L. Wilson & Co.* (for the appellant).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

A

CENTRAL ELECTRICITY GENERATING BOARD v. JENNAWAY.

[CHANCERY DIVISION (Lloyd-Jacob, J.), June 17, 18, 19, July 13, 1959.]

B

Electricity—Supply—Wayleave—Consent of Minister of Power to acquisition of wayleave in default of consent of landowner—Deviation of position of proposed lines from position for which planning permission given by Minister—Right to erect supporting towers—Functions of Central Electricity Authority transferred to Central Electricity Generating Board—Transfer of benefit of consent—Electric Lighting Act, 1882 (45 & 46 Vict. c. 56), s. 32—Electric Lighting (Clauses) Act, 1899 (62 & 63 Vict. c. 19), Schedule, s. 10 (b), as amended by the Electricity Act, 1947 (10 & 11 Geo. 6 c. 54), s. 57, Sch. 4, Part 3—Electricity (Supply) Act, 1919 (9 & 10 Geo. 5 c. 100), s. 22 (1), as amended by the Electricity Act, 1947 (10 & 11 Geo. 6 c. 54), s. 57, Sch. 4, Part 1—Electricity Act, 1957 (5 & 6 Eliz. 2 c. 48), s. 26 (1) (b), (2).

C

D

Compulsory Purchase—Implied grant—Acquisition of right analogous to easement—Implied grant of additional right necessary for the enjoyment of the right acquired—Wayleave for electric transmission lines carrying right to erect supporting towers—Electricity (Supply) Act, 1919 (9 & 10 Geo. 5 c. 100), s. 22 (1), as amended by the Electricity Act, 1947 (10 & 11 Geo. 6 c. 54), s. 57, Sch. 4, Part 1.

E

F

G

H

I

On Jan. 15, 1957, the Central Electricity Authority served on the defendant, pursuant to s. 22 (1)* of the Electricity (Supply) Act, 1919 (as amended), notice of intention to place electric transmission lines above ground across his land, and sought his consent to a wayleave for the lines and for three supporting towers. That notice identified the location of the towers and of the lines on an attached plan. On Aug. 30, 1957, pursuant to s. 10 (b) of the Schedule to the Electric Lighting (Clauses) Act, 1899 (as amended), the authority applied for the consent of the Minister of Power under that enactment (i.e., a planning consent) to the placing of the electric lines. On Oct. 21, 1957, the authority again served a similar notice under s. 22 (1) of the Act of 1919 on the defendant, which notice, however, showed a slightly different route for the electric lines. The Minister's consent under s. 10 (b) was given in a letter dated Jan. 17, 1958, addressed to the Central Electricity Generating Board, and was subject to certain conditions of which one was as follows: "the lines being erected [as shown on a map enclosed with the application] and along the route . . . as delineated . . . in a full red line or as near as possible thereto, as may be agreed by the owners and occupiers of any land across which the lines may be placed; provided that [the board] shall not deviate laterally from the line of the said route to a greater extent than two hundred yards". The defendant did not consent to the lines being placed above ground across his land. On Dec. 5, 1958, the Minister, under s. 22 (1) of the Act of 1919 (as amended), gave his consent in writing (i.e., consent for the purposes of wayleave) to the placing of the lines above ground across the defendant's land in the position shown on a map annexed to the consent. On this map the position of the proposed lines deviated from that shown on the plan attached to the consent of Jan. 17, 1958, but the deviation was only some thirty-five yards at the defendant's south-eastern boundary and fifteen yards at the defendant's north-western

* For the terms of s. 22 (1) of the Electricity (Supply) Act, 1919, see p. 412, letter G, post.

boundary. By s. 25 (5) of the Electricity Act, 1957, all property, rights, liabilities and obligations of the authority were transferred to the board as from Jan. 1, 1958, and the authority ceased to exist on that date. By s. 26 (2)* of the Act of 1957 documents that referred to the authority were to be construed in accordance with a provision in s. 26 (1) whereby a reference to the appropriate transferees was to be substituted for any reference to the authority. The board brought an action for a declaration that it was entitled to place the lines across the defendant's land in accordance with the consent of Dec. 5, 1958, and to erect and maintain on the land three supporting towers.

Held: the board was entitled, under s. 22 of the Electricity (Supply) Act, 1919, to place the electric transmission lines above ground across the defendant's land and to erect the supporting towers, because—

(i) in the wayleave consent of Dec. 5, 1958, given for the purposes of s. 22 any variation from the route originally proposed by the authority for the electric transmission lines in its application for planning consent under s. 10 (b) of the Schedule to the Act of 1899 was within the two hundred yards referred to in the consent of Jan. 17, 1958, and

(ii) the wayleave acquired under s. 22 of the Act of 1919 carried with it the right to erect supporting towers necessary for the support of the transmission lines, and

(iii) the board was substituted, by virtue of s. 26 (2) of the Electricity Act, 1957, for the authority for the purposes of the notices served by the authority and the board was deemed to have served them.

Held, further: a supporting tower was not within the definition of "electric line" in s. 32† of the Electric Lighting Act, 1882.

[For the Electric Lighting Act, 1882, s. 32, the Electric Lighting (Clauses) Act, 1899, Schedule, s. 10 (b), as amended by the Electricity Act, 1947, and the Electricity (Supply) Act, 1919, s. 22, as amended by the Electricity Act, 1947, see 8 HALSBURY'S STATUTES (2nd Edn.) 843, 852, 895.]

For the Electricity Act, 1957, s. 1, s. 2, s. 25 (5), and s. 26, see 37 HALSBURY'S STATUTES (2nd Edn.) 221, 222, 243, 244.]

Action.

The plaintiffs, the Central Electricity Generating Board, were established under s. 2 of the Electricity Act, 1957, to perform, as from Jan. 1, 1958 (the vesting date under the Act), the functions assigned to them by the Act, together with such functions of the Central Electricity Authority under the Electricity Act, 1947, and other enactments, as were transferred to the plaintiffs by the Act of 1957. By s. 2 (5) of the Act of 1957, it was the plaintiffs' duty to develop and maintain an efficient system of supply of electricity for all parts of England and Wales. In this action the plaintiffs claimed (i) a declaration that, in accordance with the terms of a consent given on Dec. 5, 1958, by the Minister of Power, and so long as the consent remained in force, they were entitled to place electric lines above ground on the defendant's property, Folly Farm, Peckleton, Leicestershire, in the position shown by a red line on the plan attached to the consent, and to maintain three towers on the property for the purpose of supporting the lines; (ii) an injunction to restrain the defendant from hindering or preventing the plaintiffs' servants or independent contractors from entering on the defendant's property for the purpose of erecting the towers; and (iii) damages.

* The relevant provisions of s. 26 of the Electricity Act, 1957, are printed at p. 416, letter D, post.

† The definition of "electric line" is printed at p. 414, letter G, post.

A The defendant denied the plaintiffs' right to any of the relief claimed by them, and, by his counterclaim, claimed, among other relief, (a) a declaration that the purported consent given by the Minister of Power on Dec. 5, 1958, was illegal, ultra vires and void; (b) alternatively, a declaration that the consent was confined to the placing of electric lines across the defendant's land and did not authorise the erection thereon of any towers; and (c) an injunction restraining the plaintiffs from entering on the defendant's property for the purpose of putting electric lines across the property, and, or alternatively, erecting towers thereon.

The facts are stated in the judgment.

Sir Milner Holland, Q.C., and *G. T. Hesketh* for the plaintiffs.

J. L. Arnold, Q.C., and *J. P. Harris* for the defendant.

Cur. adv. vult.

July 13. LLOYD-JACOB, J., read the following judgment: By this action the plaintiffs, who are in process of installing a transmission system for electrical energy at a pressure of 275,000 volts from a point in Leicestershire to a terminus in Buckinghamshire, which system will traverse certain farmlands of the defendant, seek a declaration and injunction and other relief in justification of their intention to erect and maintain three supporting towers on the defendant's property and to suspend an array of electrical conductors and ancillary mechanism therefrom, despite the defendant's refusal of consent.

The intended transmission system is of the most advanced type as yet installed in Great Britain for the conveyance of current and will carry such current at the highest pressure so far developed for the purpose. It will operate on the double circuit principle, so that each tower will support two sets of three phase conductor cables, suitably spaced to minimise electrical losses and protected by an earth wire mounted above them. Such an array will be subject to heavy physical stresses and, if, as is proposed, it is to be carried above ground, compliance with the appropriate regulations will require that a minimum height of twenty-three feet for the lowermost conductor must be provided. Where, as here, a sag of forty feet or so is to be anticipated, as the supporting towers are about 1,200 feet apart, the effective height of the uppermost portion of the array at a supporting tower will be of the order of 136 feet or so. The evidence established that the construction and design of these supporting towers had been the subject of much consideration. They are to be of steel construction, with each of the four legs sunk about twelve feet to fifteen feet into the ground and embedded in concrete muffs each some three to four feet square. The lateral spread of the array will be of the order of sixty feet.

The plan for this system has taken some years to prepare and, when devised and improved, the implementation was the responsibility of the Central Electricity Authority. By s. 25 (5) of the Electricity Act, 1957, the property, rights, liabilities and obligations of that authority were transferred to the plaintiffs as on Jan. 1, 1958. Some questions were raised in relation to this devolution of title, which must later be considered, but, for the more convenient statement of the history of the case, the expression "the authority" will be used to denote the current responsible electrical authority at all material times.

The necessity of providing and maintaining an efficient and economical system of electrical supply for the whole country has been the concern of the legislature over many years and it has come to be recognised that the installation of a grid arrangement whereby appropriately sited generating stations can be selectively utilised to maintain electrical pressure at widely spaced consuming areas must require great lengths of transmission lines, which lines, in order that

transmission losses may be kept as low as possible, will operate at high electrical pressures and be preferably located above ground. It has thus been found necessary to devise means whereby the conflict between different aspects of the public interest can be reconciled. For present purposes two, in particular, must be noted. The first concerns the aesthetic objection to the introduction of a line of cable-carrying towers across stretches of the countryside, and for this "planning permission" (1) is required. The second is concerned with the invasion of the rights of individual landowners in cases where the transmission lines will pass over private property and may need supporting therefrom. This calls for the grant of a voluntary or compulsory wayleave.

The effective statutory provision in regard to planning permission is to be found in the Electric Lighting (Clauses) Act, 1899, s. 10 (b) of the Schedule to which, as modified by subsequent statutory enactments (2), provides that, save with the express consent and authorisation of the Minister of Power, no authority shall place any electric line above ground except in locations which are not material to the present case. The authority made application on Aug. 30, 1957, for the consent of the Minister to the placing of electric lines transmitting energy at 275,000 volts above ground, which consent was given in writing (3) on Jan. 17, 1958. This consent was conditional and the material condition for present purposes (modified merely to read only in respect of the defendant's property) can be expressed as follows:

"The Minister's consent is given subject to . . . the lines being erected . . . as shown on [map No. ZL 12] enclosed with the authority's application and along the route . . . as delineated . . . in a full red line or as near as possible thereto, as may be agreed by the owners and occupiers of any land across which the lines may be placed; provided that the [authority] shall not deviate laterally from the line of the said route to a greater extent than two hundred yards."

A copy of map ZL 12, carrying a full red line corresponding to that referred to in the consent, forms part of another document.

The statutory provision which deals with the acquisition of wayleaves is to be found in s. 22 of the Electricity (Supply) Act, 1919, the material portion of which, namely sub-s. (1), modified by subsequent legislation (4), reads:

"Any authorised undertakers may place any electric line below ground across any land, and above ground across any land other than land covered by buildings or used as a garden or pleasure ground in cases where the placing of such lines above ground is otherwise lawful, and where any line has been so placed across any land the undertakers may enter on the land for the purpose of repairing or altering the line: Provided that, before placing any such line across any land, the undertakers shall serve on the owner and occupier of the land notice of their intention, together with a description of the nature and position of the lines proposed to be so placed; and if, within

(1) This was granted under s. 10 (b) of the Schedule to the Act of 1899 by the consent of Jan. 17, 1958; see also footnote (3), *infra*.

(2) Section 10 (b) of the Act of 1899 was amended by the Electricity Act, 1947, s. 57 and Sch. 4, Part 3; and the style and title of the Minister of Fuel and Power was changed to "the Minister of Power" by the Minister of Fuel and Power (Change of Style and Title) Order, 1957 (S.I. 1957 No. 48).

(3) This was a letter addressed to the plaintiffs, the Central Electricity Generating Board; see ante, at p. 410, letter G. The letter included a direction by the Minister that permission for the development should, in pursuance of s. 35 (1) of the Town and Country Planning Act, 1947, be deemed to be granted under Part 3 of that Act.

(4) Section 22 (1) of the Act of 1919 was amended by the Electricity Act, 1947, s. 57 and Sch. 4, Part 1. The powers now vested in the Minister of Power were originally vested in the Board of Trade, and consequential amendments were made to the subsection on the transfer of powers.

A twenty-one days after the service of the notice, the owner and occupier fail to give their consent or attach to their consent any terms or conditions or stipulations to which the undertakers object, it shall not be lawful to place the line across that land without the consent of the Minister of Power; and the Minister of Power may, if after giving all parties concerned an opportunity of being heard he thinks it just, give his consent either unconditionally or subject to such terms, conditions, and stipulations as he thinks just;

B and in deciding whether to give or withhold his consent, or to impose any terms, conditions, or stipulations (including the carrying of any portion of the line underground) the Minister shall, among other considerations, have regard to the effect, if any, on the amenities or value of the land of the placing of the line in the manner proposed."

C The authority served on the defendant on Jan. 15, 1957, notice (5) of intention to place lines above ground across his land, seeking his consent to a wayleave for the same and for three supporting towers, identifying the location of the towers and of the lines on an attached plan. No consent was forthcoming from the defendant and the authority applied to the Minister. The Minister directed a public inquiry before one of his inspectors, which was held on Sept. 24, 1958, and at which the defendant was represented and gave evidence. After consideration, the Minister gave his consent in writing under date Dec. 5, 1958. This consent identified the location of the lines and the sites of the towers on a map which corresponded precisely to that attached to the notice of intention served on the defendant on Jan. 15, 1957. It recited that:

E "... on Jan. 17, 1958, the consent as required under the provisions of s. 10 (b) of the Schedule to the Electric Lighting (Clauses) Act, 1899, as incorporated in the Electricity Act, 1947, to the placing of the lines above ground was duly given."

F It is not disputed that there is a variation in the location of the lines between that shown on the plan attached to the consent of Dec. 5, 1958, and that shown on the plan attached to the Minister's consent of Jan. 17, 1958. This variation, which appears to have been due to the authority's acquiescence in a sixty yard deviation sought by a neighbouring landowner, will take the lines further from the defendant's house, the lines being moved in a westerly direction thirty-five yards at the defendant's south-eastern boundary and fifteen yards at his north-western boundary. The defendant, who has at all material times refused to give any consent to the placing of any lines or the installation of any towers over or on his property, contends that this variation has nullified the plaintiffs' purported entitlement to proceed with the work on the defendant's land.

G The point was developed and argued in a number of ways, but all depend initially on the true construction of the condition attached by the Minister to the planning consent given by him on Jan. 17, 1958, the terms of which have already been set out (6). This condition includes the phrase, "as may be agreed by the owners and occupiers of any land across which the lines may be placed", and it is necessary to ascertain the matter to which this qualification applies. In my judgment it must be read as applying to the phrase, "the lines being erected" and relate to the fact of erection. It does not, as I read it, give to

I any one owner or occupier of the land over which the section of the line will run any part in the determination of how near to the full red line the possible location of the line must be brought, for this may well depend on the siting of

(5) This notice was a notice in pursuance of s. 22 (1) of the Act of 1919. A second similar notice dated Oct. 21, 1957, was subsequently served on the defendant, the route of the transmission line referred to in that notice being slightly different (see p. 416, letter I, post).

(6) See p. 412, letter E, ante.

supporting towers on land not so owned or occupied. It is in effect, although somewhat inelegantly, confining the Minister's expressed consent to the planning permission aspect of his powers and leaving for subsequent consideration, should any owner or occupier fail to agree to the erection of lines across his land, the powers open to the Minister under s. 22 of the Act of 1919, should they be invoked by the authority. A

If this construction of the condition under s. 10 (b) of the Schedule to the Act of 1899 be right, it follows that the recital in the consent under s. 22 of the Act of 1919 (the document of Dec. 5, 1958) that "the consent as required under the provisions of s. 10 (b) . . . to the placing of the lines above ground was duly given" cannot be untrue, misleading or incorrect, as the defendant contends, for the location of the lines shown on the plan attached to the consent of Dec. 5, 1958, is such as to fall within the terms of the consent; for it nowhere deviates beyond the lateral limit of two hundred yards, nor is there any material to show that, the towers on adjacent properties being where they are, the lines could have been brought any nearer to the line originally marked out. If, as I hold, the consent of the Minister given under s. 10 (b) rendered lawful the placing of electric lines above ground across the defendant's land (albeit within a limited zone thereof), the fact that his consent under s. 22 more particularly specified the position of the proposed lines, provided it was within the zone limits, cannot be held to be *ultra vires*. I conclude, therefore, that the two necessary consents have been given. B C D

It then becomes necessary to consider the defendant's next point, which is that such consents relate only to the placing of lines above ground and do not, either explicitly or implicitly, cover the installation of three or any supporting towers. The use in the Electricity Acts of the antithesis "below or above ground", as well as the characteristics of these transmission lines with which they deal, lead me to the conclusion that "above ground" cannot properly be limited to "on the ground". The Minister's consent must, accordingly, be treated as the grant of a wayleave to carry the lines over the defendant's land. E F

It was contended by the plaintiffs that these lines must be deemed to include the supporting towers by reason of the definition of "electric line" in s. 32 of the Electric Lighting Act, 1882, which reads:

"The expression 'electric line' means a wire or wires, conductor, or other means used for the purpose of conveying, transmitting, or distributing electricity with any casing, coating, covering, tube, pipe, or insulator enclosing, surrounding, or supporting the same, or any part thereof, or any apparatus connected therewith for the purpose of conveying, transmitting, or distributing electricity or electric currents." G

As that definition makes plain, the insulator wherewith the line is supported is to be treated as part of the line, but a structure which is required for the support of an insulator itself could only come within the definition if it comprises apparatus connected to the insulator for the purpose of conveying, transmitting or distributing current. If for the purposes of argument it be assumed that a supporting tower can properly be called apparatus, it is most certainly not connected to the insulator for the purpose of conveying, transmitting or distributing current. This is the function of the line and the function of the tower is physical and not electrical in its nature. I accordingly reject this contention. H I

The plaintiffs alternatively relied on the well established doctrine that, in the grant of an easement or like right, the law will imply the additional grant of what is necessary for the enjoyment of the same, and they contend that a wayleave for overhead transmission lines must accordingly carry with it the right to place such supports as are requisite to the carriage thereof. The defendant, whilst not

A questioning the proposition of law, contends that it has, or should have, no application where the power to secure the easement derives from a statute, and he further contends that, in the particular case of rights procured under the Electricity Acts, the existence of alternative procedures for the acquisition of ancillary rights negatives any such implication. So far as concerns the contention in its broadest form, there is no intrinsic reason for supposing that the

B legislature, in directing the procedure for the acquisition of easements, intended them, when procured, to be shorn of any of the rights which the law regards as normally and properly incidental to them, so that, in the absence of any context which indicates some intended limitation, an easement secured otherwise than from a consenting dominant grantor ought not to be rendered ineffective by a denial of ancillary rights.

C In the present case, it is urged that no implication of ancillary rights in a wayleave procured pursuant to s. 22 of the Act of 1919 is proper, because by s. 9 of the Electricity Act, 1947, the Minister may authorise the compulsory purchase of land. Section 9 (2) reads:

D “ In this section the expression ‘ land ’ includes easements and other rights over land, and an electricity board may be authorised under this section to purchase compulsorily a right to place an electric line across land, whether above or below ground, and to repair and maintain the line, without purchasing any other interest in the land.”

E This subsection makes it plain that the purpose is to offer an alternative to the procedure under s. 22 of the Act of 1919, rather than to supplement deficiencies in it (see also s. 44 of the Electricity (Supply) Act, 1926) and if, contrary to my opinion, an easement procured under s. 22 is devoid of any ancillary rights, it would appear that a similar defect would attach to an easement purchased pursuant to s. 9 of the Act of 1947, if it related simply to the right to place an electric line above ground across land. I can find no reason for construing these

F Acts as depriving a compulsory wayleave secured under s. 22 of the Act of 1919 of any incidental right which its proper exercise requires.

The defendant then contends that such incidental right, being limited to the provision of such supporting means as are necessary, does not extend to cover the towers proposed. The evidence established that, if the transmission array were to be re-arranged, with the spacing necessary for the avoidance of electrical losses provided by horizontal and not vertical distances, the individual conductor

G cables could be supported on a collection of wooden poles which need no concrete surround for their effective maintenance, but which would extend the width of the array to some sixty yards and would involve a conversion of a neighbouring 11,000 volt transmission line from above to below ground for part of its run. The evidence further established that, although a sufficient number of appropriate

H poles might be procured to carry the transmission across the defendant's property, it would not be practicable to adopt such suspension for the generality of the run.

In my judgment, the court must approach this aspect of the case on the footing of what is reasonable. If, as is to my mind manifest, the general conception of this important project required a decision as between horizontal and vertical spacing of conductors, and the propriety of the authority's determination of this issue is not challenged, it is the transmission line designed in accordance with that

I determination which has to be carried across the defendant's land. Can it be said to be reasonable to leave to the choice of any individual landowner the redesign of the electrical array, whatever his lack of qualifications for the task, and to provide him with an alternative group of supports which cannot in practice be made available to others who may share his aversion to steel and concrete. In my judgment, the siting and the type of the proposed three towers on the defendant's land is necessary for the authorised transmission line to be carried above ground, and an alteration of the system for that section of the line

which crosses the defendant's land, which would permit of substitution by wooden poles, would be unreasonable. A

The defendant, who admits that notices of intention (7) were served on him on Jan. 15, 1957 and Oct. 21, 1957 (8), respectively, by the Central Electricity Authority, then contends that such service is of no avail to the plaintiffs, the Central Electricity Generating Board, in the acquisition of a right under s. 22 of the Act of 1919. That section requires the undertakers, before placing a line across another's land, to serve notice of intention, and it is the defendant's submission that the plaintiffs, as the present authorised undertakers, must themselves serve or have served such notice. It is clear that at the times of service of these two notices, the then authorised undertakers were the Central Electricity Authority and that such service completed the statutory requirements for seeking the Minister's consent under s. 22. This authority was dissolved by s. 1 of the Electricity Act, 1957, as on Jan. 1, 1958, and other sections of that Act transferred to the plaintiffs the exercise of certain functions previously performed by the authority. B C

Section 26 (2) of the Act of 1957 provides:

"Other documents, not being enactments, which refer, whether specifically or generally, to the Central Authority shall be construed in accordance with the provisions of the preceding subsection, so far as applicable." D

The material provision of the preceding subsection is sub-s. (1) (b) which reads:

"for any reference (however worded and whether express or implied) to the Central Authority there were substituted, as respects anything falling to be done on or after the vesting date, a reference to the appropriate transferees." E

If the notice (9) is construed in accordance with these provisions, that part of it which gives notice of intention will read:

"I am directed to give you formal notice in pursuance of s. 22 (1) of the Electricity (Supply) Act, 1919, as amended by s. 57 of, and Part 1 of Sch. 4 to, the Electricity Act, 1947, of the intention of the Central Electricity Authority [and if anything falls to be done on or after Jan. 1, 1958, of the Central Electricity Generating Board] to place electric lines above ground..." F

This is clearly a statement of intention on the part of the present authorised undertakers in relation to a continuing intention, should fulfilment of it not be possible before their powers accrue. Moreover, the plaintiffs must, by virtue of s. 26 of the Act of 1957, be regarded as the substitute party serving the notice. They must, accordingly, be deemed to have served the document wherein their intention to place the line above ground in the position identified by the appended map was transmitted to the defendant, and I must hold accordingly that the requirements of s. 22 of the Act of 1919 have been complied with. G H

There were a number of alternative submissions developed by counsel for the defendant, which I have not as yet set out. On the conclusions which I have already expressed, they do not strictly arise and, save to acknowledge that they were made and that I have had them in mind, I can see no point in burdening

(7) The notice of intention dated Jan. 15, 1957, was that referred to at p. 413, letter C, ante. I

(8) The notice of intention dated Oct. 21, 1957, was a similar notice, accompanying a letter of that date to the defendant. There was a plan annexed to the notice which showed the proposed route of the transmission lines passing, seemingly, slightly nearer to the defendant's farm premises shown on the plan. The form of consent accompanying this letter and notice also contained a further condition or clause (cl. 4 (d)) providing for the negotiation of compensation for loss and the grant of an easement in fee simple for the lines. The statement of claim pleaded only the notice of Oct. 21, 1957.

(9) The notice here referred to was the notice dated Oct. 21, 1957.

A this judgment with further reference to them and still less to their recital in extenso. I turn, therefore, to the question of relief. In the light of my conclusion that the proper consents under s. 10 (b) of the Schedule to the Act of 1899 and s. 22 of the Act of 1919 have been given to the plaintiffs and of my conclusion that supporting towers of the type and locations proposed are necessarily incidental to the carriage of this transmission line across the defendant's property,

B the declaration in the form sought in the statement of claim appears to be proper to be granted, and I accordingly make it. My impression at the hearing was that the defendant's expressed intention to deny access to the plaintiff's contractors was based on his views of his legal rights, and it may be that it will not be repeated or persisted in hereafter. It would, of course, be undesirable to leave the prompt

C completion of this transmission line project at risk of such repetition or persistence and thus create the possibility of further proceedings, but I will invite the defendant by his counsel, if he so wishes, to make any suggestion which, whilst removing any likelihood of further interference, would make it unnecessary to grant an injunction. So far as concerns the claim to damages, the plaintiffs' evidence failed to establish the facts on which either liability for compensation

D to contractors or for increase in installation costs were at one time thought to be justified. There was a dispute between the parties on the legality of the right claimed by the plaintiffs which, in the absence of evidence of actual or potential damage, could at the most justify only a nominal award. The defendant's submissions possessed sufficient substance to show that his objections were not fractious and, in my discretion, I shall refrain from making even a nominal award.

E The defendant has failed, in my judgment, to establish his counterclaim and I must in consequence dismiss it.

[The plaintiffs were given liberty to apply for an injunction.]

Judgment for the plaintiffs.

Solicitors: *Solicitor to the Central Electricity Generating Board* (for the plaintiffs); *Kingsford, Dorman & Co.*, agents for *Crane & Walton*, Leicester (for the defendant).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

R. v. PODOLA.

[CENTRAL CRIMINAL COURT (Edmund Davies, J.), September 10, 11, 14, 15, 16, 17, 18, 21, 22, 23, 24, 1959.]

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Hilbery, Donovan, Ashworth and Paull, JJ.), October 14, 15, 20, 1959.]

Criminal Law—Trial—Plea—Fitness to plead—Burden of proof—Amnesia.

Where a preliminary issue as to an accused person's sanity is raised at a criminal trial the jury should be directed, whether the issue is or is not contested, that they should consider the whole of the evidence and should answer the question "Are you satisfied on that evidence that the accused person is insane so that he cannot be tried on the indictment?" (See p. 429, letter E, post.)

The burden of proof of insanity on such a preliminary issue, if the issue is disputed, is on the defence if they raise the issue or on the prosecution if they raise it; and the measure of the onus, if the defence raise the issue, is the balance of probability. (See p. 429, letter F, post.)

R. v. Turton ((1854), 6 Cox C.C. 385); *Russell v. H.M. Advocate* (1946 S.C. (J.) 37) applied.

Ley's Case ((1828), 1 Lew. C.C. 239); *R. v. Davies* ((1853), 3 Car. & Kir. 328); *R. v. Sharp* ([1958] 1 All E.R. 62) overruled.

Directions of the trial judge approved.

Per EDMUND DAVIES, J.: if the prosecution raise the preliminary issue, the measure of the onus of proof on them is proof beyond reasonable doubt (see p. 422, letter E, post).

Criminal Law—Insanity—Amnesia—Whether hysterical amnesia can amount to such insanity as renders an accused unfit to stand trial.

Hysterical amnesia covering the period of events which are the subject of the indictment (though not covering the time of the trial) does not render the accused unfit on the ground of insanity to stand his trial; but a trial judge should point out to the jury that they must take into consideration carefully the fact that the accused cannot remember the events (see p. 433, letters C and D, post).

Russell v. H.M. Advocate (1946 S.C. (J.) 37) applied.

Criminal Law—Appeal—Reference by Secretary of State—Whether court has jurisdiction to determine question of onus of proof on issue of unfitness to plead—Criminal Appeal Act, 1907 (7 Edw. 7 c. 23), s. 19 (a).

P. was indicted for capital murder. At his trial a preliminary issue of unfitness to plead owing to alleged loss of memory of events prior to the time of the homicide was raised on his behalf. The jury were directed that the burden of proof lay on the defence. They found that the alleged loss of memory was not genuine. P. was tried and convicted. He did not appeal. His case was referred by the Secretary of State to the Court of Criminal Appeal under s. 19 (a) of the Criminal Appeal Act, 1907, on the question whether the onus of proof of the issue of fitness to plead was on the prosecution or on the defence. The question was raised whether the court had no jurisdiction to determine the reference on the ground that there was no right to question by way of appeal the finding of a jury on fitness to plead as it was not a conviction.

Held: the court had jurisdiction to determine the reference, for P. could have appealed against his conviction of capital murder on the ground that

- A at the hearing of the preliminary issue the judge had misdirected the jury and that he should never have been tried on the charge (see p. 428, letters B and C, post).

R. v. Jefferson ((1908), 24 T.L.R. 877) criticised.

- [**Editorial Note.** The determination of an issue of fitness or unfitness to stand trial on a criminal charge is an inquiry, not a trial (see p. 429, letter B, post).

As to the preliminary issue of fitness to plead, see 10 HALSBURY'S LAWS (3rd Edn.) 402, 403, paras. 729, 730, subject to the present decision as regards the onus of proof.

For cases on the subject, see 14 DIGEST (Repl.) 279, 280, 2493-2503.

- C As to references by the Secretary of State to the Court of Criminal Appeal, see 10 HALSBURY'S LAWS (3rd Edn.) 523, 524, para. 962.

As to appeals in relation to findings of fitness to plead, see 10 HALSBURY'S LAWS (3rd Edn.) 521, para. 957.

- D For the Criminal Appeal Act, 1907, s. 19, see 5 HALSBURY'S STATUTES (2nd Edn.) 938; and for the Criminal Lunatics Act, 1800, s. 2 and the Trial of Lunatics Act, 1883, s. 2, see *ibid.*, 593, 903.]

Cases referred to:

Advocate (H.M.) v. Brown, 1907 S.C. (J.) 67.

Advocate (H.M.) v. Robertson, (1891), 3 White, 6; 14 Digest (Repl.) 280, 1561.

- E *Beverley's Case*, (1603), 4 Co. Rep. 123b; 76 E.R. 1118; 33 Digest 127, 32.

Crane v. Public Prosecutions Director, [1921] 2 A.C. 299; 90 L.J.K.B. 1160; 125 L.T. 642; 85 J.P. 245; 14 Digest (Repl.) 274, 2411.

Harrod v. Harrod, (1854), 1 K. & J. 4; 23 L.T.O.S. 243; 69 E.R. 344; 33 Digest 137, 148.

- F *Hess (Rudolf)*, (1945). The Trial of German Major War Criminals, Published under the authority of H.M. Attorney-General, at p. 294, Nov. 30, 1945.

Hill v. Baxter, [1958] 1 All E.R. 193; [1958] 1 Q.B. 277; [1958] 2 W.L.R. 76.

Ley's Case, (1828), 1 Lew. C.C. 239; 168 E.R. 1026.

R. v. Berry, (1876), 1 Q.B.D. 447; 45 L.J.M.C. 123; 34 L.T. 590; 40 J.P. 484; 14 Digest (Repl.) 278, 2476.

- G *R. v. Beynon*, [1957] 2 All E.R. 513; [1957] 2 Q.B. 111; 121 J.P. 366; [1957] 2 W.L.R. 956; 3rd Digest Supp.

R. v. Bourne, (1952), 36 Cr. App. Rep. 125; 14 Digest (Repl.) 353, 3423.

R. v. Caborn-Waterfield, [1956] 2 All E.R. 636; [1956] 2 Q.B. 379; 120 J.P. 373; [1956] 3 W.L.R. 277; 3rd Digest Supp.

- H *R. v. Carr-Briant*, [1943] 2 All E.R. 156; [1943] K.B. 607; 112 L.J.K.B. 581; 169 L.T. 175; 107 J.P. 167; 14 Digest (Repl.) 495, 4791.

R. v. Dashwood, [1942] 2 All E.R. 586; [1943] K.B. 1; 112 L.J.K.B. 257; 14 Digest (Repl.) 627, 6336.

R. v. Davies, (1853), 3 Car. & Kir. 328; 175 E.R. 575; 14 Digest (Repl.) 280, 2505.

- I *R. v. Dudley & Stephens*, (1884), 14 Q.B.D. 273; 54 L.J.M.C. 32; 52 L.T. 107; 49 J.P. 69; 14 Digest (Repl.) 75, 359.

R. v. Dyson, (1831), 1 Lew. C.C. 64; 7 C. & P. 305, n.; 173 E.R. 135; 14 Digest (Repl.) 278, 2471.

R. v. Harris, (1897), 61 J.P. 792; 14 Digest (Repl.) 279, 2502.

R. v. Jefferson, (1908), 72 J.P. 467; 24 T.L.R. 877; 1 Cr. App. Rep. 95; 14 Digest (Repl.) 280, 2508.

- R. v. Kemp*, [1956] 3 All E.R. 249; [1957] 1 Q.B. 399; 120 J.P. 457; [1956] 3 W.L.R. 724; 3rd Digest Supp. A
- R. v. Naylor*, (1865), L.R. 1 C.C.R. 4; 35 L.J.M.C. 61; 13 L.T. 381; 30 J.P. 6; 14 Digest (Repl.) 353, 3431.
- R. v. Pritchard*, (1836), 7 C. & P. 303; 173 E.R. 135; 14 Digest (Repl.) 278, 2472.
- R. v. Rivett*, (1950), 34 Cr. App. Rep. 87; 14 Digest (Repl.) 69, 313. B
- R. v. Roberts*, [1953] 2 All E.R. 340; [1954] 2 Q.B. 329; 117 J.P. 341; [1953] 3 W.L.R. 178; 14 Digest (Repl.) 285, 2611.
- R. v. Sharp*, [1958] 1 All E.R. 62; 121 J.P. 51; 41 Cr. App. Rep. 197; 3rd Digest Supp.
- R. v. Stafford Prison (Governor), Ex p. Emery*, [1909] 2 K.B. 81; 78 L.J.K.B. 629; 100 L.T. 993; 73 J.P. 284; 14 Digest (Repl.) 278, 2477. C
- R. v. Turton*, (1854), 6 Cox C.C. 385; 14 Digest (Repl.) 280, 2506.
- Russell v. H.M. Advocate*, 1946 S.C. (J.) 37; [1946] S.L.T. 93; 14 Digest (Repl.) 68, 251.

Trial on Indictment.

The accused, Guenther Fritz Erwin Podola, was indicted for the capital murder of Raymond William Purdy, a police officer acting in the execution of his duty, on July 13, 1959, by shooting him. A preliminary issue was raised on the defendant's behalf in relation to his fitness to plead to the indictment and to stand his trial thereon. D

Maxwell Turner and *J. H. Buzzard* for the Crown.

F. H. Lawton, Q.C., and *R. J. S. Harvey* for the defendant. E

F. H. Lawton, Q.C., having informed the court that he had evidence available which raised a preliminary issue which he was told would be contested, stated that both he and counsel for the Crown asked for the court's ruling on what procedure was appropriate to be adopted. The nature of the evidence available was that the defendant had completely lost his memory for all events before July 17, 1959. The questions arising were: Who should open the preliminary issue to the jury? Who should call evidence first? What was the burden of proof? In any event, assuming that complete loss of memory was established, was that a reason why the defendant should not stand his trial? He had discussed the procedure with counsel for the Crown and, while they were agreed on what probably was the proper procedure, it was for the court to rule whether their views were correct. Counsel, continuing, referred to authorities (1). As regards the measure of the burden of proof counsel submitted that, even if the burden were on the defendant, the measure of it could not be more than satisfying the jury of the probability, sometimes referred to as the "Carr-Briant balance" (2). F

Maxwell Turner, after drawing attention to a dictum that special verdicts should be required only in exceptional cases (3) and referring to authorities (4) submitted that the desirable course, with which he understood counsel for the defence was in agreement, was to swear the jury to return a verdict on the issue whether the defendant, in the phraseology of the oath, was insane so that he could not be tried on the indictment, and for the court to ask the jury to find as a fact, before the jury were directed on the law on the issue, whether the amnesia was genuine or was feigned. G H

(1) These were *R. v. Roberts*, [1953] 2 All E.R. 340; *Harrod v. Harrod* (1854), 1 K. & J. 4, 9; and *R. v. Sharp*, [1958] 1 All E.R. 62. Counsel also referred to *R. v. Davies* (1853), 3 Car. & Kir. 328, to *R. v. Turton* (1854), 6 Cox C.C. 385, and to para. 220 of the Report of the Royal Commission on Capital Punishment, 1953 (Cmd. 8932).

(2) *R. v. Carr-Briant*, [1943] 2 All E.R. 156; [1943] K.B. 607.

(3) *R. v. Bourne* (1952), 36 Cr. App. Rep. 125 at p. 127 per LORD GODDARD, C.J.

(4) *R. v. Dudley & Stephens* (1884), 14 Q.B.D. 273; *R. v. Naylor* (1865), L.R. 1 C.C.R. 4; *R. v. Harris* (1897), 61 J.P. 792. I

- A Counsel for the Crown further submitted, with the concurrence of counsel for the defendant, that counsel for the defence should open his case to the jury and then present his evidence, and that counsel for the prosecution should open his case and call his evidence. Counsel for the prosecution would then make his final speech and counsel for the defence would follow. Counsel for the prosecution then drew attention to the question concerning onus of proof submitting also that the measure of the burden was the "Carr-Briant balance" (5).

F. H. Lawton, Q.C., made his submission, arguing that the onus of proof rested on the prosecution (6).

Maxwell Turner submitted that the burden of proof lay on the defendant, just as the burden of proof of the defence of insanity rested on a defendant (7).

- C **EDMUND DAVIES, J.**, asked counsel for the defence whether he could point to any material distinction between the manner in which the court should approach the question of where the burden of proof lay in relation to insanity at the time of the commission of the act and the manner in which the court should approach insanity within s. 2 of the Criminal Lunatics Act, 1800.

- D *F. H. Lawton, Q.C.*, submitted that insanity in answer to a charge of an offence was a defence, but that an issue of unfitness to plead was not a defence; it raised the question whether the defendant was in a position to defend himself.

- E Sept. 10. **EDMUND DAVIES, J.**: A preliminary issue is raised in this case in relation to the fitness of the defendant to plead to the indictment and to stand his trial thereon. The first question that is thereby raised is where the burden of proof lies; in other words, is it for the prosecution to establish that the defendant is fit to stand his trial or, on the other hand, is it for the defence to establish his unfitness to stand his trial?

- F Learned counsel for the defence, to whose submissions like those of the learned counsel for the Crown this court is greatly indebted, desires to call, in the first place, evidence as to unfitness, but he urges that, although he desires to call that evidence, there is no burden on the defence at all, the burden being wholly the other way. Unhappily the authorities on this matter are conflicting. I do not propose to go through the authorities again for the purposes of this ruling. As recently as 1957 the matter came before *SALMON, J.*, on circuit in the case of *R. v. Sharp* (8), which is reported in the All England Law Reports and also in the Criminal Appeal Reports, and though counsel for the Crown has submitted that the reports are in some respects unsatisfactory and that it is not easy to elicit what exactly the learned judge did decide, I for my part have no doubt, and I have taken steps to make some inquiries about the matter, that the learned judge did in fact rule (9) that the burden of proof on this issue was on the Crown. A decision so recently given and, if I may be allowed to say so, by so exalted a member of the Bench, is one which must command and certainly does receive from this court the profoundest respect. This is not the first decision in which it has been so held; there are in fact decisions both ways.

- H I come back to this—it is well established law, where an accused person is charged with a crime and it is sought on his behalf to establish that at the time of the commission of the alleged offence the man was suffering under such a mental defect as to justify and call for a verdict of guilty but insane, that it is

(5) *R. v. Carr-Briant*, [1943] 2 All E.R. 156; [1943] K.B. 607.

(6) The authorities cited were *Ley's Case* (1828), 1 Lew. C.C. 239; *R. v. Sharp*, [1958] 1 All E.R. 62. Counsel had previously, and again subsequently, referred to *R. v. Davies* (1853), 3 Car. & Kir. 328.

(7) The following authorities were referred to: *R. v. Turton* (1854), 6 Cox C.C. 385; *Russell v. H.M. Advocate*, 1946 S.C. (J.) 37. His LORDSHIP drew attention to *Hill v. Baxter*, [1958] 1 All E.R. 193.

(8) [1958] 1 All E.R. 62; 41 Cr. App. Rep. 197.

(9) See [1958] 1 All E.R. 62 letters GH, 64 letter A.

for the defence to call evidence and to establish that defence on the balance of probabilities. That matter was dealt with by the Criminal Lunatics Act, 1800, s. 1, which is now replaced by s. 2 of the Trial of Lunatics Act, 1883. Section 2 of the Act of 1800 deals with the matter on which this court is now engaged, namely, as to the capacity of the accused to plead on arraignment. It uses the word "insane", the wording of the section so far as it is relevant being:

"...if any person indicted for any offence shall be insane, and shall upon arraignment be found so to be by a jury..."

I cannot myself see any reason in law, logic or fairness why the approach to the application of those two sections, originally contained in the same Act of Parliament, should be different. I asked counsel for the defence if he could point to any rational distinction which would lead to a different approach in the one case from the approach adopted in the other. He submitted such considerations as occurred to him, but for my part I can see no valid distinction to be drawn between the two.

I differ from SALMON, J., with extreme reluctance, but having had the inestimable advantage of all the authorities which appear to be available being submitted to me and exhaustively dealt with by learned counsel this morning, that is my conclusion. I rule accordingly on this preliminary issue that it is for the defence to establish that the accused man is insane so as to be unfit to plead to this indictment.

But it must be understood, and indeed it is a matter of common agreement between learned counsel, that whereas if the burden of proving fitness were on the Crown, the Crown would have to establish it in accordance with the ordinary standards of proof in criminal trials, namely, beyond all reasonable doubt, yet the burden which is cast on the defence in accordance with the ruling which I have just enunciated is of a different order. In my judgment it is sufficient for the defence to discharge the burden if they can show on balance of probabilities that the defendant is unfit to stand his trial.

[Counsel for the defence then opened his case on the preliminary issue of unfitness to plead and called evidence; counsel for the prosecution opened his case and called evidence. Counsel addressed the jury. The following authorities were referred to for the prosecution: *HALE'S PLEAS OF THE CROWN*, Vol. 1, p. 34; *R. v. Beynon* (10); *R. v. Stafford Prison (Governor), Ex p. Emery* (11); *R. v. Dashwood* (12); *R. v. Pritchard* (13); *Russell v. H.M. Advocate* (14); and the case of *Rudolf Hess* at the Nuremberg trials (15). The following further authorities were referred to for the defence: *Beverley's Case* (16); *H.M. Advocate v. Robertson* (17); *H.M. Advocate v. Brown* (18); and *R. v. Kemp* (19).]

Sept. 21. **EDMUND DAVIES, J.**, summed up to the jury on the preliminary issue. After referring to the gravity of the charge and to the desirability that a criminal charge should be disposed of speedily, **HIS LORDSHIP** continued: It is a cardinal principle of our criminal law that no man may be brought to trial on any criminal charge unless and until he is mentally capable fairly of standing his trial. That cardinal principle goes back hundreds of years into the common law of this country, and it received statutory recognition

(10) [1957] 2 All E.R. 513; [1957] 2 Q.B. 111.

(11) [1909] 2 K.B. 81, 84.

(12) [1942] 2 All E.R. 586; [1943] K.B. 1.

(13) (1836), 7 C. & P. 303.

(14) 1946 S.C. (J.) 37.

(15) The Trial of German Major War Criminals, published under the authority of H.M. Attorney-General, at pp. 296, 298, 300, 301, 302, 305, Nov. 30, 1945.

(16) (1603), 4 Co. Rep. 123 b.

(17) (1891), 3 White, 6.

(18) 1907 S.C. (J.) 67.

(19) [1956] 3 All E.R. 249; [1957] 1 Q.B. 399.

A over one hundred and fifty years ago in the Criminal Lunatics Act, 1800, the essential words (20) of which provide that if a man be found to be insane so that he cannot be tried on the indictment, then the jury's verdict to that effect is required and certain steps are to be taken in relation to it.

B At the present stage there are several matters which call for comment arising out of the submission that has been made on behalf of the defence that the defendant is unfit to plead to the indictment and to stand his trial. The first is this: that that submission gives rise to an issue of fact and nothing but fact. That means that it is an issue to be decided by none other than you ten men and two women. It has nothing to do with me as the judge of trial at all. You and you alone decide facts. I and I alone decide the law, and you will follow, I am sure, loyally my directions in law, but you decide the facts for yourselves.

C The phrase has been used—I think originally by me and later by learned counsel—that this is not a trial by doctors. Of course it is not. The doctors are here to give their opinions on such material as has been made available to them, and I have no doubt that you will think it right in the course of your deliberations to give the most anxious consideration to what the doctors on both sides have said. No disrespect of the slightest kind is meant by using the phrase D “this is not a trial by doctors.” Their assistance may be very great. I know not. You will decide. But ultimately, no matter how many opinions by doctors or others have been expressed in this case—whether you find the opinions pointing unmistakably in one direction or hopelessly divided I know not—it is for you to evaluate those opinions and say which, if any, you accept.

E It goes without saying that you decide this issue only on the evidence which you have heard. I do not suppose that there is a person in this country who has not read somewhere at some time something about the defendant, but you will undertake your important task by doing all that you humanly can to dismiss from your minds anything which you have read about this case, to dismiss anything that has been said in any place about this case, even indeed anything which has been said in the highest debating chamber in the land about this F case. You decide it on the evidence.

The third matter which you must have clearly before you is this. The issue to which you have to address your minds is not as to the mental qualities or abilities of the accused man on July 13, 1959, when, so it is alleged, he shot down Detective Sergeant Purdy. That has nothing to do with you at all. G It might—one knows not—be something to do with another jury; though that is not likely, in view of evidence you have heard as to the state of this man's mind in every respect except one. The only matter that you have to decide is: Is he now unfit to take his trial? As a preliminary issue, you have to decide: Is the loss of memory which is claimed here established? It matters not, except in so far as you find it of assistance at the present time, what his state of mind was two months ago, or two weeks ago. The question is: Is he H now fit to stand his trial?

Now under our law every man is presumed to be sane until the contrary is proved, and I direct you, for the purposes of this trial, that the presumption of sanity includes a presumption that the accused person who is charged is fit to stand his trial on the charge. That is the presumption with which one begins I in this case. I further direct you (as I indicated some days ago that I would direct you) as a matter of law that here, where the accused alleges and it is asserted on his behalf that he is for some reason or other unfit to stand his trial, it is for the accused to prove it and not for the Crown to disprove it. The accused has on the balance of probabilities to establish that in fact he ought not to stand his trial now because of his unfitness. He does not have to establish that matter beyond all reasonable doubt. He has to satisfy you, and each and

every one of you, that, to use the analogy of a pair of scales (which is so frequently A used in these cases), the scales have gone down in his favour. Members of the jury, if your state of mind, having heard the whole of this evidence, is that on balance it has been shown that this man has lost his memory in the way about which I shall remind you, you will say so. On the other hand, if your conclusion is that the scales remain evenly balanced, or even more if your view, having B heard the whole of the evidence, is that the scales are tipped against the defendant, you will say that his alleged unfitness is not established.

The preliminary matter that you have to try, and the only matter which is alleged to constitute unfitness in this case, is that the defendant has, apart from what have been described as two or three windows of memory, completely lost all recollection of what happened before he had a lumbar puncture on July 16, 1959. In effect, what is said by him and on his behalf is this: "No matter C what I did on July 13, you cannot try me for it because I do not remember what I did on July 13. Indeed, I have no memory before July 17, and that absence of my memory renders me unfit to be tried." Members of the jury, that is the submission that is made on behalf of the defence in its broadest form. You may think that it is a startling claim. Speaking after many years at the Bar and a much shorter time on the Bench, I tell you that in my experience D it is a unique claim. I have never heard of such a submission being made before, and there is no recorded case in this country of such a submission being made before—although there is one case in Scotland (21) where such a claim was attempted to be asserted—and learned counsel have not been able to refer this court to a single case. Such a plea is easy to advance, and it may be extremely difficult to refute. It affords an obvious and convenient refuge to a person E finding himself or herself in a position of grave difficulty and danger—and, the graver the danger the greater the motive for making an assertion of this kind. But unique though such a submission is in my experience and easy though it is to put forward such an assertion, your duty is to examine it with scrupulous care and determination to do justice. You will examine the whole of the evidence and ultimately say whether on balance this matter has in fact F been established.

[His LORDSHIP then reviewed the evidence and put before the jury the two views, that of the defence and that of the prosecution, of the evidence. His LORDSHIP continued:]

Sept. 22. EDMUND DAVIES, J.: Members of the jury, lying on the G ledge before you is a copy of the question, drafted by learned counsel and approved by me, to which you will address your minds at this stage of your deliberations. It reads in this way:

"Is the defendant now suffering from a genuine loss of memory covering at least all the events with which he was concerned between July 1, 1959, H and the time of his arrest on July 16?"

That question is, of course, inextricably bound up with the claim of a far more expansive and comprehensive loss of memory than is confined to those dates, and you will, I imagine, find it impossible to answer that question without having regard to the evidence as a whole; nevertheless, those are the dates I to which you will principally address yourselves.

[His LORDSHIP intimated to the jury that they should address their minds to the question and should not have regard to any consequences that might flow from it and, after referring to a point on the evidence, continued:]

Now, members of the jury, those in essence are the two conflicting views. Fear which has destroyed this man's memory and so prevented him from

(21) *Russell v. H.M. Advocate*, 1946 S.C. (J.) 37; [1946] S.L.T. 93.

A dealing with the charge properly and fairly on the one hand. Fear on the other hand, it is suggested, which has caused this man to seek to lie his way out and so to obstruct the course of justice. You must say which of those two versions you think is the correct one, bearing in mind that the burden of proof of the kind and nature which I have already indicated to you is placed on the defendant.

B Members of the jury, that concludes, at long last, my review of the evidence in this case. The claim that a man cannot be tried for a crime if he does not remember what happened is so novel that however you answer the question which has been placed before you the name of Guenther Podola is assured of a secure place in the legal history of this country. Long and anxious the case unquestionably has been. Whether you find it a difficult case to decide is your concern and not mine. The three doctors called for the defence—Dr. Edwards, C Dr. Ashby and Dr. Larkin—claim to have recognised this as a true bill the very first time that they saw the defendant, although such a case had not previously been within their personal experience. The Crown doctors on the other hand say that they found the case a difficult one and they felt compelled to suspend judgment, to reflect before deciding, but they have expressed to you their final conclusion with, you may think, certainly as much decisiveness as that D with which the three defence doctors have expressed theirs. Has the whole of the evidence in this case, medical and non-medical, satisfied you that the probability is that the defendant is suffering from the hysterical amnesia, the loss of memory, which is claimed? If on the balance you think that the answer to that question is “Yes, the defence have proved it”, then you will say so. If on the other hand your view on the whole of it is that the burden of proof E which is on the defence has not been discharged by the defence, you will answer the question which is now before you in the negative.

[The jury retired and considered their finding. Having sent a note to the judge, they returned.]

F EDMUND DAVIES, J.: The note which the jury have sent me reads as follows:

G “My Lord, Clarification of the direction. You said in your closing remarks, ‘Has the whole of [the] evidence satisfied you that the probability is that this man has lost his memory for the period of time mentioned? If on balance you accept this then your answer must be “Yes”.’ With this in mind, is the onus on the defence to prove beyond reasonable doubt that the defendant is suffering from loss of memory for the period in question?”

That is the matter, members of the jury, on which, as I gather, you desire my further observations.

H In criminal matters where the burden of proof is on the Crown, the Crown has to prove the essential matters beyond all reasonable doubt. In criminal matters where a burden is cast on the defence, the burden is a lesser burden of proving that on the balance of probabilities what the defence have to prove has been established.

I In this case, as I have directed you, it is for the defence to establish the alleged loss of memory. They have to prove it, accordingly, not beyond all reasonable doubt but on the balance of probabilities. They have, however, to prove it, and if they have not proved it you say so and you reject what is alleged. On the other hand, if on the balance of probabilities they have established it, then you say so.

[The jury again retired. They returned to state their finding that the defendant was not suffering from genuine loss of memory. On the direction of the court that there was no evidence of insanity beyond the evidence which the jury had rejected, the jury then found that the defendant was sane and fit to

be tried. The defendant was then arraigned on the charge of capital murder. His trial on the charge took place on the two following days when, evidence having been called for the prosecution, none was tendered on behalf of the defendant, who, however, made a statement from the dock. He was convicted and sentenced.] A

Solicitors: *Director of Public Prosecutions; Brignall, White & Orchard, Stevenage* (for the defendant). B

Oct. 14, 15. Reference to the Court of Criminal Appeal.

On Sept. 24, 1959, Guenther Fritz Erwin Podola was found guilty of the capital murder of Detective Sergeant Raymond Purdy and was sentenced to death. He did not appeal against the conviction. On Oct. 5, 1959, the Secretary of State, being of opinion that a question of law raised by the case, viz., whether the onus of proof on the issue of fitness to plead rests on the prosecution or the defence, ought to be considered by the Court of Criminal Appeal, referred the whole case to the court for determination under s. 19 (a) of the Criminal Appeal Act, 1907. On Oct. 15 the Court of Criminal Appeal announced its determination of the reference, reserving its reasons to a later date. C

The prisoner is referred to, throughout the rest of this report, as the "appellant". D

F. H. Lawton, Q.C., and R. J. S. Harvey for the appellant, the defendant.

Maxwell Turner and J. H. Buzzard for the Crown.

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.) and J. R. Cumming-Bruce, as amici curiae.

Cur. adv. vult. E

Oct. 20. **LORD PARKER, C.J.**, read the following judgment of the court: The events leading to the present reference may be shortly stated. On Sept. 10, 1959, before the appellant was arraigned, counsel, on his behalf, informed EDMUND DAVIES, J., that he had evidence available which raised a preliminary issue, namely, whether the appellant was fit to plead to the indictment, on the ground that he had completely lost his memory for all events before July 17, the day after his arrest. The learned judge was also informed that this preliminary issue would be contested, and he then heard argument on the question whether the burden of proof in that issue rested on the defence or on the prosecution. His decision was given in the following terms: F

"I rule accordingly on this preliminary issue that it is for the defence to establish that the [appellant] is insane so as to be unfit to plead to the indictment." G

He went on to rule:

"It is sufficient for the defence to discharge the burden if they can show, on the balance of probabilities, that [the appellant] is unfit to stand his trial." H

At the suggestion of counsel on both sides the trial of the preliminary issue was itself taken in two stages. In the first stage the jury empanelled to try the issue were required to answer a specific question: I

"Is the [appellant] now suffering from a genuine loss of memory covering at least all the events with which he was concerned between July 1, 1959, and the time of his arrest on July 16?"

The trial of this issue lasted for nine days, in the course of which evidence was given by doctors on both sides, and after deliberating for nearly 3½ hours, the jury's answer to the question was that the appellant was not suffering from genuine loss of memory. As a result of that answer the second stage of the

A preliminary issue, in which the jury were required to find whether the appellant was insane so that he could not be tried, was very short. In our judgment the learned judge rightly directed the jury that, in view of their answer to the specific question and in the absence of any other evidence pointing to the appellant's insanity, it was their duty to say that he was fit to stand his trial. The jury's verdict was in accordance with this direction.

B Having regard to the jury's answer to the specific question, the learned judge was not required to give any ruling or direction on the issue whether, in the circumstances, the appellant's loss of memory (if established) would have been sufficient in law to bring him within the ambit of s. 2 of the Criminal Lunatics Act, 1800.

C The trial of the appellant on the charge of capital murder was then begun. He pleaded "Not Guilty" but was convicted and sentenced to death. No criticism is made on his behalf as to that trial.

The reference to this court was heard by us on Oct. 14 and Oct. 15, 1959. At the outset of the hearing the Attorney-General, as *amicus curiae*, raised the question of our jurisdiction to hear the reference. Section 19 (a) of the Criminal Appeal Act, 1907, provides (22) as follows:

D "Nothing in this Act shall affect the prerogative of mercy, but the Secretary of State on the consideration of any petition for the exercise of His Majesty's mercy or of any representation made by any other person, having reference to the conviction of a person on indictment or to the sentence (other than sentence of death) passed on a person so convicted, may, if he thinks fit, at any time either—(a) refer the whole case to the Court of Criminal Appeal, and the case shall then be heard and determined by the Court of Criminal Appeal as in the case of an appeal by a person convicted . . ."

E In substance the Attorney-General's contention was that this court's jurisdiction to hear and determine a case referred to it under s. 19 (a) was limited to cases in which the person convicted would have had a right under the Act to appeal to the court. He pointed out that a possible difficulty in the way of our hearing the reference was created by the decision of this court in *R. v. Jefferson* (23), which is most fully reported in the *Times Law Reports*. In that case, the accused man had been found fit to plead and had then been tried for murder and convicted. In his appeal it was contended (*inter alia*) that on the medical evidence given at the preliminary inquiry he ought not to have been tried on the main charge at all. DARLING, J., intervened to say:

G "The Act only gives leave to appeal against a 'conviction'; how can you say that a finding that a prisoner is fit to plead is a conviction?"

H Thereupon counsel for the prisoner said that he must withdraw the appeal against the finding that the prisoner was fit to plead. DARLING, J., then added: "I want to make that clear as a ruling of this court." What was intended to be covered by that ruling is not altogether clear. It may be that its effect was limited to this: that the Act of 1907 does not enable this court to hear an appeal specifically expressed to be an appeal against a finding on a preliminary issue as to an accused person's fitness to plead, such finding not being a conviction. On the other hand that ruling has apparently been taken to be a ruling that a person who has been found fit to plead, and thereafter convicted, cannot in any circumstances question the finding on the preliminary issue, or matters which arose in the course of its hearing. If the latter is the true meaning we think that the ruling was wrong. If a convicted person appeals against his conviction on the ground that the hearing of the preliminary issue was open

(22) Section 19 is here printed as amended by the Criminal Justice Act, 1948, s. 79 and Sch. 9.

(23) (1908), 72 J.P. 467; 24 T.L.R. 877.

to objection for error in law, so that he should never have been tried on the substantive charge at all, we are of opinion that this court has jurisdiction to entertain the appeal. In such a case it seems to us that the principles laid down in *Crane v. Public Prosecutions Director* (24), are applicable, and that a convicted person is entitled to contend, in the words of LORD SUMNER (25), that: A

“ . . . [he] should not have been given in charge to the jury as he was, or have been made the subject of any verdict at all, but should have had the proceedings stopped at the outset . . . ” B

In our judgment the appellant in the present case could have appealed against his conviction on the ground that in the hearing of the preliminary issue the learned judge misdirected the jury, and therefore that he should never have been tried on the main charge at all. It follows that this court has jurisdiction to hear and determine the case referred. C

In these circumstances we do not think it necessary to deal with an alternative contention put forward by counsel for the appellant that on the true construction of s. 19 (a) of the Act of 1907 this court has jurisdiction to hear and determine a case referred to it, even if the convicted person could not have appealed against the finding complained of. As it seems to us, a situation of that sort is unlikely to arise in practice and we think it undesirable to rule on it in advance. D

In the course of the hearing before us we heard argument not only on the question specifically mentioned in the reference under s. 19 (a), but also on the question of to what extent (if any) amnesia could in law be regarded as a form of insanity within the meaning of s. 2 of the Criminal Lunatics Act, 1800. Before we decided to consider the second of these questions, it was necessary for us to decide whether, in view of the decision of this court in *R. v. Caborn-Waterfield* (26) it was open to us to do so. In giving the judgment of the court in that case LORD GODDARD, C.J., said: E

“ The court thinks that when a matter of this sort is referred by the Home Secretary, the court sees the ground on which the Home Secretary has referred the case and must confine itself to that ground. ” F

In the present case the specific question referred to us related to onus of proof, but in our view that question involved by necessary implication the overriding question whether the issue, in respect of which there was doubt as to the onus of proof, was itself a relevant issue to be tried. In other words, the question as to onus of proof could only arise if the alleged amnesia could in law bring the appellant within the scope of s. 2 of the Criminal Lunatics Act, 1800. Accordingly, in hearing argument as to the legal effect of amnesia, we were considering a matter necessarily involved in the reference and were not departing in any way from the principle laid down in *R. v. Caborn-Waterfield* (27). The decision in that case remains unaffected by the present case. G

We deal first with the matter specifically referred to us, namely, the question as to onus of proof. The relevant words in s. 2 of the Criminal Lunatics Act, 1800, are as follows:— H

“ . . . if any person indicted for any offence shall be insane, and shall upon arraignment be found so to be by a jury lawfully empanelled for that purpose, so that such person cannot be tried upon such indictment . . . ” I

Those words do not indicate how or by whom the question of the accused person's sanity is to be raised, but it is now well established that the question may be

(24) [1921] 2 A.C. 299.

(25) [1921] 2 A.C. at p. 332.

(26) [1956] 2 All E.R. 636 at p. 638; [1956] 2 Q.B. 379 at p. 385.

(27) [1956] 2 All E.R. at p. 638; [1956] 2 Q.B. at p. 385.

A raised either by the prosecution or by the defence or by the court itself. Indeed, if a court becomes aware, either before or during a trial, that the accused person's sanity is doubtful, it is the duty of the court to have the doubt resolved before beginning or continuing the trial. For the purpose of deciding whether a person is "insane . . . so that he cannot be tried upon the indictment" a jury is empanelled, and as counsel for the appellant emphasised, the procedure

B before that jury is an inquiry and not a trial. In most cases in which this course is taken, there is no contest between the prosecution and the defence as to the accused person's insanity, and the evidence to that effect is unchallenged. In such cases, although the jury must be satisfied of the accused person's insanity before so finding, the question of onus of proof is not a live issue. But cases have arisen, of which the present one is an example, where either the prosecution

C or the defence has challenged the alleged insanity, and in a case in Scotland (*Russell v. H.M. Advocate* (28)), to which more detailed reference will be made later, the court itself refused to give effect to a plea in bar of trial put forward on behalf of the defence and not contested by the prosecution.

It was contended by counsel for the appellant that, inasmuch as the proceedings on the issue of insanity are an inquiry and not a trial, it is wrong to introduce

D any principle as to onus of proof, derived from proceedings properly regarded as trials. We do not agree with this contention. In our judgment the right principles may be stated as follows:—

1. In all cases in which a preliminary issue as to the accused person's sanity is raised, whether that issue is contested or not, the jury should be directed to consider the whole of the evidence and to answer the question "Are you satisfied

E on that evidence that the accused person is insane so that he cannot be tried on the indictment?" If authority were needed for the principle, it is to be found in the very words of the section itself, quoted above.

2. If the contention that the accused is insane is put forward by the defence and contested by the prosecution, there is in our judgment a burden on the defence of satisfying the jury of the accused's insanity. In such a case, as in

F other criminal cases in which the onus of proof rests on the defence, the onus is discharged if the jury are satisfied on the balance of probabilities that the accused's insanity has been made out.

3. Conversely, if the prosecution alleges and the defence disputes insanity, there is a burden on the prosecution of establishing it.

G These principles are in accordance with those laid down in a number of the cases to which our attention was called. In *R. v. Dyson* (29), PARKE, J., told the jury that:

"if they were satisfied that the prisoner had not then, from the defect of her faculties, intelligence enough to understand the nature of the proceedings against her, they ought to find her not sane."

H

Five years later ALDERSON, B., in *R. v. Pritchard* (30) expressly followed the course taken in *R. v. Dyson* (29) and observed that *R. v. Dyson* (29) had been considered by several of the judges who had approved of the course adopted by PARKE, J. In *R. v. Turton* (31) CRESSWELL, J., addressing counsel for the

I defence, said:

"Why is a man to be presumed insane when called upon to plead? The presumption is that he is sane. I do not see any sufficient reason for deviating from the old practice. If you suggest that the prisoner is not in such a state of mind as to be able to plead to the indictment, you must give evidence of the fact."

(28) 1946 S.C. (J.) 37; [1946] S.L.T. 93.
 (30) (1836), 7 C. & P. 303.

(29) (1831), 7 C. & P. 305n. at p. 307.
 (31) (1854), 6 Cox C.C. 385.

In *R. v. Rivett*, tried in 1950, STABLE, J., directed the jury to answer a question worded in similar terms to that contained in the first of the principles set out above, and when the case came before this court on appeal (32), LORD GODDARD, C.J., referred to the learned judge's charge as "careful and accurate". Lastly, in the Scottish case of *Russell v. H.M. Advocate* (33) the Lord Justice-Clerk (LORD COOPER) in giving the opinion of the court on appeal by the accused, said:

"The onus is always on the accused to justify a plea in bar of trial, and to do so not to the satisfaction of expert witnesses but to the satisfaction of the court."

Decisions conflicting with the principles enunciated above were brought to our notice: *Ley's Case* (34), *R. v. Davies* (35) and *R. v. Sharp* (36). In our judgment these cases must be taken to have been wrongly decided, and a statement in 10 HALSBURY'S LAWS OF ENGLAND (3rd Edn.) 403 to the effect that when a preliminary issue of this sort is raised "the onus is on the prosecution to prove the sanity of the defendant" is incorrect.

In our judgment, therefore, the direction of EDMUND DAVIES, J., in the present case on the subject of onus of proof was right.

As already indicated we have, however, thought it necessary, in the circumstances of the case, to consider whether the alleged state of mind of the appellant would have brought him within the provisions of s. 2 of the Criminal Lunatics Act, 1800, if the jury had found that that state of mind was a genuine one.

In considering this problem it is important to stress that the appellant, in the proceedings at the Central Criminal Court, relied solely on an hysterical amnesia preventing him from remembering events during the whole of the period material to the question whether he committed the crime alleged. There was no suggestion that his mind in other respects was not a completely normal mind. His case on this point was that this defect of memory rendered him unable properly to instruct his advisers, with the consequence that he could not make "a proper defence". It was urged that the killing may have been accidental, or that there may have been provocation, but the appellant could give no instructions thereon. This defect, it was argued, rendered the appellant insane within the meaning of the Act of 1800.

Counsel for the appellant, in the course of his careful and at first attractive argument, pointed out that the Act of 1800 was an Act declaratory of the common law, and invited us to go back and trace historically the meaning of the word "insane" which appears in the Act. He referred to the expressions "non sana memoria", "non sane memory", and "not of sound memory" which are to be found in the books. He relied mainly on the following passages in *HALE'S PLEAS OF THE CROWN*, Vol. 1, pp. 34, 35:

"If a man in his sound memory commits a capital offence, and before arraignment becomes absolutely mad, he ought not by law to be arraigned during such his frenzy, but be remitted to prison until that incapacity be removed, the reason is because he cannot advisedly plead to the indictment . . . and if such person after his plea and before his trial become of non sane memory, he shall not be tried."

Counsel for the appellant urged that these expressions must apply where all memory of the events surrounding the alleged crime has disappeared owing to hysterical amnesia.

It is to be observed, however, that the above passages occur in chapter 4 where SIR MATTHEW HALE is considering "the defect of idiocy, madness and

(32) *R. v. Rivett* (1950), 34 Cr. App. Rep. 87.

(33) 1946 S.C. (J.) 37 at p. 44; [1946] S.L.T. 93 at p. 96.

(34) (1828), 1 Lew. C.C. 239.

(35) (1853), 3 Car. & Kir. 328.

(36) [1958] 1 All E.R. 62.

- A lunacy" in reference to criminal offences. It will also be seen that in the first passage quoted, "sound memory" is contrasted with "absolutely mad" and with "frenzy". Accordingly, in our judgment the word "memory" there used does not relate to recollection but to a state of mind. We think that this meaning is to be attached to the word "memory" not only in the passages in HALE but also in the passage in SIR EDWARD COKE's notes on *Beverley's Case* (37) and in other authorities previous to the Act of 1800 to which we were referred.

- The words "if any person . . . shall be insane . . . so that such person cannot be tried upon such indictment" contained in s. 2 of the Criminal Lunatics Act, 1800, have in many cases since 1800 been construed as including persons who are not insane within the McNaghten rules, but who by reason of some physical or mental condition, cannot follow the proceedings at the trial and so cannot make a proper defence in those proceedings. A well-known illustration is that of a deaf mute who is also unable to write or to use and understand sign language. It was in the case of a deaf mute that ALDERSON, B., in *R. v. Pritchard* (38) laid down the tests which ought to be applied when juries are considering whether a prisoner ought not to be tried by reason of his mental condition. These tests have been followed so often that they may be said to be firmly embodied in our law (see for example *R. v. Berry* (39) and *R. v. Stafford Prison (Governor)*, *Ex p. Emery* (40)). In his address to the jury on the preliminary issue whether the prisoner was sane or not, ALDERSON, B. said (41):

- "There are three points to be inquired into:—First, whether the prisoner is mute of malice or not; secondly, whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of proceedings on the trial, so as to make a proper defence—to know that he might challenge any of you to whom he may object—and to comprehend the details of the evidence, which in a case of this nature must constitute a minute investigation. Upon this issue, therefore, if you think that there is no certain mode of communicating the details of the trial to the prisoner, so that he can clearly understand them, and be able properly to make his defence to the charge; you ought to find that he is not of sane mind. It is not enough, that he may have a general capacity of communicating on ordinary matters."

- It is not suggested in this case that the appellant could not plead to the indictment, or that he did not know that he had the right of challenge, or that he could not follow the evidence given, but counsel for the appellant submitted strongly that, where there was the partial obliteration of memory alleged in this case, a prisoner could not make a proper defence and could not "comprehend" the details of the evidence within the meaning of the words used in *R. v. Pritchard* (42). So far as "making a proper defence" is concerned, it is important to note that the words do not stand alone, but form part of a sentence the whole of which is "whether he is of sufficient intellect to comprehend the course of proceedings on the trial, so as to make a proper defence". In other words this passage itself defines what ALDERSON, B., meant by "making a proper defence". As to the word "comprehend" we do not think that this word goes further in meaning than the word "understand". In our judgment the direction given by ALDERSON, B., is not intended to cover and does not cover a case where the prisoner can plead to the indictment and has the physical and mental capacity to know that he has the right of challenge and to understand the case as it proceeds.

(37) (1603), 4 Co. Rep. 123 b.

(38) (1836), 7 C. & P. 303.

(39) (1876), 1 Q.B.D. 447.

(40) [1909] 2 K.B. 81.

(41) *R. v. Pritchard* (1836), 7 C. & P. at p. 304.

(42) (1836), 7 C. & P. at p. 304.

This case is the first attempt in England to assert that hysterical amnesia covering the period of events which are the subject of the indictment renders a man insane so that he cannot be tried. The matter has, however, come before the courts in Scotland. In 1907 there was *H.M. Advocate v. Brown* (43) in the High Court of Justiciary. In the course of summing-up the Lord Justice-General (LORD DUNEDIN) said:

"It[insanity] means insanity which prevents a man from doing what a truly sane man would do and is entitled to do, maintain in sober sanity his plea of innocence and instruct those who defend him as a truly sane man would do . . . But that is not enough. There is something which is not generally asked about, and that is that a person who is giving these instructions should not only intelligently but without obliteration of memory as to what has happened in his life, give a true history of the circumstances of his life at the time the supposed crime was committed."

These are strong words, but it is important to realise that the medical evidence was that Brown was of unsound mind and not capable of pleading to the indictment, quite apart from any loss of memory.

In 1946 *Russell v. H.M. Advocate* (44) came before the High Court of Justiciary. In that case LORD SORN, before proceeding with the case on its merits, held a preliminary inquiry into the facts on which the prisoner based her plea in bar of trial. That plea was that she was suffering from hysterical amnesia and on that account was unable to plead to the charge or give instructions for her defence. That case therefore was a case very similar to the one before us. In his judgment on this preliminary matter (which he tried without a jury) LORD SORN said that he was quite satisfied that the accused had in fact suffered a loss of memory. He went on to say (45): "... the next question, and the difficult question, for me is: 'Does this loss of memory render her unfit to plead?'" He continued (46):

"... I have felt that the court in dealing with a plea in bar of trial is primarily concerned with the condition of the accused now at the time of trial and at no other time. She is able to instruct, in my opinion, a defence, even though that defence has the peculiarity of including in its features that the accused has forgotten the period of the events dealt with in the charge . . . I am unable to see that unfairness should follow from this situation. The Crown must prove their case, and must prove it to the satisfaction of the jury, and the accused can tell the jury that she has no recollection of these events . . ."

This decision of LORD SORN came by way of appeal before the Lord Justice-Clerk (LORD COOPER), LORD MACKAY and LORD STEVENSON. In the judgment of the court the Lord Justice-Clerk supported LORD SORN, and in the course of his judgment said (47):

"The only grounds associated with the abnormal personal condition of the accused which our law and practice have ever yet recognised as the basis of a plea in bar are (a) insanity (either in the ordinary sense, or in the special sense of the Lunacy (Scotland) Act, 1857, s. 87 [where the words are similar to the words of the Criminal Lunatics Act, 1800]) and (b) the condition of the deaf mute. There is no trace in either Scotland or England of a plea in bar founded upon loss of memory by a sane and otherwise normal accused person . . ."

Later he said (48):

(43) 1907 S.C. (J.) 67 at p. 77.

(44) 1946 S.C. (J.) 37; [1946] S.L.T. 93.

(45) 1946 S.C. (J.) at p. 39.

(46) 1946 S.C. (J.) at p. 40.

(47) 1946 S.C. (J.) at p. 46.

(48) 1946 S.C. (J.) at p. 47.

A “ I do not consider that they [that is the dicta which are found in *Brown's* case (49)] were intended to be understood, or are capable of being understood, literally as applying to the case of a sane prisoner . . . for so to read them would come near to paralysing the administration of criminal justice.”

Still later he said (50):

B “ The conclusions which I feel bound to draw are that loss of memory may be an important element in leading to the conclusion that an accused person is insane . . . But if it falls short of that, loss of memory in a person otherwise normal and sane plays its full part, if it is sufficiently proved, in increasing the onus on the Crown, and in raising doubts to which it may be the duty of the jury to give effect in a verdict of acquittal after investigation of the whole case. But as our law stands, it can have no further or other effect.”

As we understand it, the words “ in increasing the onus on the Crown ” do not mean that strictly the onus is any greater, but that a judge should point out to a jury that they must take into consideration carefully the fact that the accused cannot remember the events.

D We agree with the opinions stated and the conclusions arrived at in *Russell v. H.M. Advocate* (50). The word used in the Criminal Lunatics Act, 1800, is the word “ insane ”. It is true that in the case of a deaf mute the word “ insane ” does not strictly apply, but as was pointed out in *R. v. Stafford Prison (Governor)*, *Ex p. Emery* (51) by LORD ALVERSTONE, C.J., the practice of including as coming within that word the case of persons who, from mental or physical infirmity, cannot follow what is happening in a case is in accordance with reason and common sense. We cannot see that it is in accordance either with reason or common sense to extend the meaning of the word to include persons who are mentally normal at the time of the hearing of the proceedings against them and are perfectly capable of instructing their solicitors as to what submission their counsel is to put forward with regard to the commission of the crime.

F To sum up the matter before us:

1. In our judgment there was a right of appeal by the appellant to this court.
2. There is no criticism to be made of the summing-up of the learned judge on the preliminary issue.

G 3. Even if the loss of memory had been a genuine loss of memory, that did not of itself render the appellant insane so that he could not be tried on the indictment, and no other ground for alleging insanity was put forward.

Accordingly, as the court stated earlier, this appeal is dismissed.

Appeal dismissed.

Solicitors: Registrar, Court of Criminal Appeal; Director of Public Prosecutions; Treasury Solicitor.

[Reported by KEVIN WINSTAIN, Esq., Barrister-at-Law.]

(49) 1907 S.C. (J.) 67.

(50) 1946 S.C. (J.) at p. 48; [1946] S.L.T. at p. 98.

(51) [1909] 2 K.B. 81.

REARDON SMITH LINE, LTD. *v.* MINISTRY OF AGRICULTURE,
FISHERIES AND FOOD.

GARIBALDI SOCIETA CO-OPERATIVA DI NAVIGAZIONE
A.R.L. *v.* PRESIDENT OF INDIA.

CARLTON STEAMSHIP CO., LTD. *v.* MINISTRY OF
AGRICULTURE, FISHERIES AND FOOD.

CAPE OF GOOD HOPE MOTORSHIP CO., LTD. *v.* SAME.
MIRAMAR COMPANIA NAVIERA S.A. *v.* GOVERNMENT OF
THE UNION OF SOUTH AFRICA.

[QUEEN'S BENCH DIVISION (McNair, J.), June 9, 10, 11, 12, 15, 16, 17, 18, 22,
23, 24, 25, 26, 29, 30, July 1, 2, 3, 6, 7, 8, 9, 30, 1959.]

*Shipping—Charterparty—Construction—Exception—Strikes, "force majeure"
or "hindrance . . . beyond charterers' control"—Nomination of loading
port where five out of seven grain elevators strike-bound—Wheat intended
cargo, but alternative cargo options—Decision of Wheat Board to load only
liners and not tramps at port during strike—Sufficient wheat in non-strike
bound elevators to load tramps concerned—Delay in loading tramps—
Whether nomination of strike-bound loading port valid—Whether charterers
protected from demurrage claims by exceptions clause—Whether charterers
bound to ship alternative cargoes—Whether, on a berth charterparty, charterers
were in breach for not acquiring cargo until congestion of shipping after strike
would allow ship to berth.*

*Shipping—Demurrage—Computation—Lay days—Reversible lay days—Method
of computation of time—Saturdays.*

Under a charterparty containing an exceptions clause in respect of strikes,
in such form as that stated at p. 435, letter E, post, there is no obligation on
the charterers, unless the charterparty so provides, not to nominate a port of
loading which is strike-bound (i.e., a port at which loading of the vessel
cannot take place within a reasonable time or without such delay as will
frustrate the commercial object of the adventure), or to make a fresh
nomination of a substitute port of loading if a properly nominated port of
loading becomes strike-bound (see p. 453, letter G, p. 447, letter I, post).

Dobell & Co. v. Green & Co. ([1900] 1 Q.B. 526) and dicta of PARKER,
L.J., in *Agrimpex Hungarian Trading Co. for Agricultural Products v.
Sociedad Financiera de Bienes Raices S.A.* ([1958] 2 All E.R. at p. 701) and of
DIPLOCK, J., in *South African Despatch Line v. Panamanian S.S. Niki*
(*Owners*) ([1958] 3 All E.R. at p. 596) applied.

The Teutonia ((1872), L.R. 4 P.C. 171) considered and explained.

By agreements made in 1952 between the governments of Great Britain,
India and South Africa and the Canadian Wheat Board, the board under-
took to sell certain quantities of wheat to the respective governments, for
shipment between August, 1952 and July, 1953 from Canadian Pacific
ports. The Canadian Wheat Board, which was a statutory body exercising
its powers as agent for the Crown, had the monopoly of exporting ninety-
five per cent. of the grain produced for export in Canada; further, at the
ports of shipment the board controlled both the quantity of grain loaded into
vessels and the choice of loading berths. On Feb. 17, 1953, a strike broke
out at five of the seven grain elevators at Vancouver and at the single
elevator at the neighbouring port of New Westminster, which together
handled eighty-seven per cent. of the bulk grain shipments from these
ports. On Feb. 18 the railways stopped movement of grain from up-country

A elevators to the strike-bound elevators; soon after this, the board decided as a matter of policy to restrict the two non-strike bound elevators at Vancouver to loading parcel shipments into liners and not to use these elevators for loading chartered tramps during the strike; the board decided that tramps would be loaded after the strike was over in the order of their arrival at Vancouver. The strike continued without interruption until

B May 7, 1953. Before the strike broke out the British government had chartered three tramps, the Queen City, Riverton and Cape Rodney, to ship wheat from Canada; during the strike, the government of India chartered the Agostino Bertani, and the government of South Africa chartered the Moderator, for the same purpose. The material terms of the charterparties for these five vessels were substantially similar, four of the charterparties

C being Pacific Coast Grain Charters. The charterparties provided that the vessel should proceed to a usual loading place, where she could safely load, as the charterers might order at Vancouver, New Westminster, Victoria, Tacoma, Seattle or certain other named places (the range for the Moderator being limited to the first three named ports), and there load a full and complete cargo of wheat in bulk. In the case of the Queen City, Riverton

D and Cape Rodney there were alternative cargo options which attracted extra freight; in fact the charterers intended to load, and made arrangements to load, full cargoes of wheat in all five cases. Six weather working days were allowed for loading each vessel, lay days for all the vessels, other than the Moderator, commencing twenty-four hours after receipt at the loading port of the captain's notice of readiness to load whether the vessel

E was in berth or not; in the case of the Moderator, lay days commenced twenty-four hours after she got into berth and gave notice of readiness to load. By the exceptions clause contained in the five charterparties it was provided that, "Lay or working days shall not count at ports of loading during any time when...the supply or bringing by rail...to port of loading or alongside the vessel, or the loading of the cargo or intended

F cargo or any part thereof, is delayed by...force majeure...strikes...or any other hindrance of whatsoever nature beyond the charterers' control". The charterers nominated Vancouver as the loading port for each of the five vessels. The nomination of Vancouver for the Queen City was made before the strike began; the nominations for the Riverton, Cape Rodney and Agostino Bertani were made on dates during the

G strike, and the Moderator was ordered to Vancouver on June 4, 1953, after the strike had ended. The Queen City, Riverton, Cape Rodney and Agostino Bertani arrived and gave notice of readiness to load at Vancouver during the strike, viz., on Feb. 18, Mar. 25, Apr. 2 and Apr. 29, 1953, respectively. As a result of the strike the Queen City, Riverton, Cape Rodney and Agostino Bertani were subject to serious delay since no

H loading was done during the strike, and, thereafter, the vessels had to wait their turn to load. As a result of congestion after the strike the Moderator was unable to get into berth on her arrival at Vancouver on June 6, 1953, but had to wait for a berth until June 12, 1953, when she commenced loading.

I Normal working hours at Vancouver, the port of loading, were eight hours on each weekday other than Saturdays. The charterparties stipulated weather working days for lay time in relation to loading. Under the charterparty relating to the Moderator the working day at the port of discharge was in effect* a twenty-four hour day (subject to certain qualifications) and it was provided that "loading and discharging time shall be reversible".

* The terms of the relevant clause, cl. 26, which was introduced into the charterparty before the decision in *Alvion Steamship Corp'n. of Panama v. Galban Lobo Trading Co. S.A. of Havana* ([1955] 1 All E.R. 457), are set out at p. 441, letter F, post.

In actions by the owners of the five vessels claiming demurrage from the charterers the court found and held that, on the facts existing before and during the strike, the strike was unlikely to last more than six weeks, but that a well-informed charterer could not have reliably estimated its duration; that the action of the Canadian Wheat Board in deciding not to load tramps during the strike was taken in the board's executive capacity and not as agent for the charterers; that it would have been unreasonable for the charterers to attempt to get the board's decision reversed; and that there was sufficient wheat in the non-strike bound elevators to load full cargoes of wheat into the five vessels.

Held: (i) the charterers were protected by the exceptions clause concerning strikes, etc. for the following reasons—

(a) the cause of the delay was the strike (see p. 455, letter D, post), and

(b) there was no settled rule of construction that a specific exception, such as a strike or war could not be relied on if it were operative at the time when the contract was made or the vessel was ordered to the affected port (see p. 457, letter B, post).

Dicta in *France, Fenwick & Co., Ltd. v. Philip Spackman & Sons* ((1912), 18 Com. Cas. at p. 57), *Ciampa v. British India Steam Navigation Co., Ltd.* ([1915] 2 K.B. at p. 779), *Safadi v. Western Assurance Co.* ((1933), 46 Lloyd's Rep. at p. 143) and *Steamship "Induna" Co., Ltd. v. British Phosphate Comrs.* ([1949] 1 All E.R. at pp. 524, 525) considered.

(c) the exceptions clause qualified the obligation of the charterers to have the cargo ready at the port of loading (see p. 454, letter G, post) and, the action of the board in using the elevators that were not strike-bound for loading only into liners being reasonable and done on behalf of Her Majesty (not as agent of the charterers), the delay in loading cargo was caused by "force majeure" or "other hindrance . . . beyond the charterers' control" within the exceptions clause (see p. 458, letter D, post); moreover, even if the board were to be regarded as the agent of the charterers, the charterers were protected by the words last quoted (see p. 461, letter C, post).

Dicta of LORDS DUNEDIN and SUMNER in *Bunge Y Born Co. v. H. A. Brightman & Co.* ([1925] A.C. at pp. 807, 816) applied.

Dicta on the meaning of "hindering" in *Tennants (Lancashire), Ltd. v. C. S. Wilson & Co., Ltd.* ([1917] A.C. at p. 510 per LORD LOREBURN and at p. 515 per LORD DUNEDIN) and in *Crawford & Rowat v. Wilson, Sons & Co.* ((1896), 1 Com. Cas at p. 280 per LORD ESHER, M.R.) applied.

(ii) on the true construction of the charterparties of the vessels other than the Agostino Bertani and the Moderator (whose charterparties contained no alternative cargo options), it being admitted that the charterers intended to load wheat in bulk, no obligation to exercise any of the options to ship an alternative cargo arose when it became impossible to ship the intended cargo (see p. 463, letter C, post) and, having regard particularly to the words "intended cargo" in the exceptions clause (see p. 462, letter B, post) the exceptions clause operated and protected the charterers.

Brightman & Co. v. Bunge Y Born ([1924] 2 K.B. 619) distinguished.

(iii) (a) since Saturday was not part of the usual working week of elevator men, it did not count as a whole or half weather working day for the purpose of computing lay time for loading (see p. 466, letter A, post).

(b) reversible lay days should be treated as a pool in computing demurrage, and the factor was the working day (whether it was a period of eight hours or of twenty-four hours) or a part of a working day (see p. 470, letter E, post).

(iv) the charterers of the Moderator were not in breach of obligation to

A provide a cargo at Vancouver, although they did not have cargo available or contract for its acquisition until about June 11, 1953, because the strike had caused congestion of the berths there and cargo could not be made available until the ships having priority to the Moderator had loaded (see p. 468, letter H, cf. p. 466, letter I, post).

B Per CURIAM: assuming that the construction of the charterparty stated at (ii) ante was wrong, the onus of proof would be on the charterers to show what time was required to change to an alternative cargo and that if they had changed the delay would have been the same (see p. 463, letters D and I, post).

[As to the charterers' obligation to nominate a safe port of loading, see 30 HALSBURY'S LAWS (2nd Edn.) 422, para. 591.]

C As to the charterers' duty to provide a cargo at the port of loading and the effect of exceptions on that duty, see 30 HALSBURY'S LAWS (2nd Edn.) 434-442, paras. 602-605; and as to the effect of specified exceptions on delay in loading, see *ibid.*, 449, para. 609.]

D Cases referred to:

Agrimex Hungarian Trading Co. for Agricultural Products v. Sociedad Financiera de Bienes Raices S.A., [1958] 2 All E.R. 695; [1958] 2 Q.B. 385; 3rd Digest Supp.

Alma Shipping Co. S.A. v. V. M. Salgaoncar E. Irmaos, Ltda., [1954] 2 All E.R. 92; [1954] 2 Q.B. 94; [1954] 1 W.L.R. 650; 3rd Digest Supp.

E *Alvion Steamship Corpn. of Panama v. Galban Lobo Trading Co. S.A. of Havana*, [1955] 1 All E.R. 457; [1955] 1 Q.B. 430; [1955] 2 W.L.R. 543; 3rd Digest Supp.

Anglo-Danubian Transport Co., Ltd. v. Ministry of Food, [1949] 2 All E.R. 1068; 2nd Digest Supp.

F *Ardan S.S. Co. v. Weir (Andrew) & Co.*, [1905] A.C. 501; 74 L.J.P.C. 143; 93 L.T. 559; 41 Digest 453, 2848.

Arden S.S. Co., Ltd. v. Mathwin & Son, 1912 S.C. 211; 49 Sc.L.R. 143; 41 Digest 443, p.

Bulman & Dickson v. Fenwick & Co., [1894] 1 Q.B. 179; 63 L.J.Q.B. 123; 69 L.T. 651; 41 Digest 439, 2757.

G *Bunge Y Born Co. v. Brightman (H. A.) & Co.*, [1925] A.C. 799; 94 L.J.K.B. 840; 133 L.T. 738; *affg.* S.C. sub nom. *Brightman & Co. v. Bunge Y Born*, [1924] 2 K.B. 619; 93 L.J.K.B. 1070; 132 L.T. 188; 41 Digest 442, 2776.

Central Argentine Ry., Ltd. v. Marwood, [1915] A.C. 981; 84 L.J.K.B. 1593; 113 L.T. 786; 41 Digest 439, 2762.

H *Ciampa v. British India Steam Navigation Co., Ltd.*, [1915] 2 K.B. 774; 84 L.J.K.B. 1653; 20 Com. Cas. 247; 41 Digest 413, 2569.

Crawford & Rowat v. Wilson, Sons & Co., (1896), 12 T.L.R. 170; 1 Com. Cas. 277; 41 Digest 441, 2769.

Dahl v. Nelson, Donkin & Co., (1881), 6 App. Cas. 38; 50 L.J.Ch. 411; 44 L.T. 381; *affg.* S.C. sub nom. *Nelson v. Dahl*, (1879), 12 Ch.D. 568; 41 Digest 518, 3471.

I *Dobell & Co. v. Green & Co.*, [1900] 1 Q.B. 526; 69 L.J.Q.B. 454; 82 L.T. 314; 5 Com. Cas. 161; 41 Digest 456, 2871.

Dollar & Co. v. Blood Holman & Co., (1920), 4 Lloyd's Rep. 345; 36 T.L.R. 843; 41 Digest 313, 1738.

Duncan v. Köster, The Teutonia, (1872), L.R. 4 P.C. 171; 41 L.J. Adm. 57; 26 L.T. 48; 17 E.R. 366; *affg.*, (1871), L.R. 3 A. & E. 394; 41 Digest 484, 3165.

- France, Fenwick & Co., Ltd. v. Spackman (Philip) & Sons*, (1912), 108 L.T. 371; A 18 Com. Cas. 52; 41 Digest 452, 2836.
- Gaetano & Maria, The*, (1882), 7 P.D. 137; 51 L.J.P. 67; 46 L.T. 835; 41 Digest 507, 3358.
- Glendarroch, The*, [1894] P. 226; 63 L.J.P. 89; 70 L.T. 344; 41 Digest 414, 2580.
- Larsen v. Sylvester & Co.*, [1908] A.C. 295; 77 L.J.K.B. 993; 99 L.T. 94; 41 B Digest 306, 1682.
- Leonis S.S. Co., Ltd. v. Rank, Ltd.*, [1908] 1 K.B. 499; 77 L.J.K.B. 224; 13 Com. Cas. 136; 41 Digest 569, 3937.
- Leonis S.S. Co., Ltd. v. Joseph Rank, Ltd. (No. 2)*, (1908), 13 Com. Cas. 295.
- Leyland Shipping Co. v. Norwich Union Fire Insurance Society*, [1918] A.C. 350; 87 L.J.K.B. 395; 118 L.T. 120; *affg.* [1917] 1 K.B. 873; 29 C Digest 229, 1858.
- Love & Stewart, Ltd. v. Rowtor S.S. Co., Ltd.*, [1916] 2 A.C. 527; 86 L.J.P.C. 1; 115 L.T. 415; 41 Digest 310, 1712.
- Matheos (Owners) v. Dreyfus (Louis) & Co.*, [1925] A.C. 654; 94 L.J.K.B. 465; 133 L.T. 146; 30 Com. Cas. 241; 41 Digest 436, 2736. D
- Metropolitan Water Board v. Dick, Kerr & Co.*, [1918] A.C. 119; 87 L.J.K.B. 370; 117 L.T. 766; 82 J.P. 61; *affg.*, [1917] 2 K.B. 1; 12 Digest (Repl.) 456, 3410.
- Mitsubishi Shoji Kaisha, Ltd. v. S. Soskin & Co., Ltd.*, (1925), 23 Lloyd's Rep. 198.
- Naamlooze Venootschap A.C. Lensens Stoomvaart Maatschappij v. Muller & Co. (London), Ltd.*, (1921), 7 Lloyd's Rep. 248. E
- Northumbria, The*, [1906] P. 292; 75 L.J.P. 101; 95 L.T. 618; 41 Digest 417, 2606.
- Ogden v. Graham*, (1861), 1 B. & S. 773; 31 L.J.Q.B. 26; 5 L.T. 396; 121 E.R. 901; 41 Digest 522, 3509.
- Olivebank (Akt.) v. Dansk Svovlsyre Fabrik*, [1919] 2 K.B. 162; 120 L.T. 629; sub nom. *Geyser (Akt.) v. Dansk Svovlsyre & Superphosphat Fabrik*, *Olivebank (Akt.) v. Same*, 88 L.J.K.B. 745; *affg.*, [1919] 1 K.B. 388; 41 Digest 335, 1885. F
- Penelope, The*, [1928] P. 180; 97 L.J.P. 127; 139 L.T. 355; 12 Digest (Repl.) 439, 3344. G
- Phosphate Mining Co. v. Rankin, Gilmour & Co.*, (1916), 86 L.J.K.B. 358; 115 L.T. 211; 21 Com. Cas. 248; 41 Digest 443, 2782.
- Pinch & Simpson v. Harrison, Whitfield & Co.*, (1948), 81 Lloyd's Rep. 268.
- Rederiakt. Transatlantic v. Compagnie Francaise des Phosphates de l'Oceanie*, (1926), 136 L.T. 619; 32 Com. Cas. 126; 41 Digest 576, 3996.
- Richardsons & Samuel (M.) & Co., Re*, [1898] 1 Q.B. 261; 66 L.J.Q.B. 868; 77 L.T. 479; 13 Com. Cas. 79; 41 Digest 306, 1680. H
- Ropner & Co. v. Ronnebeck*, (1914), 84 L.J.K.B. 392; 112 L.T. 723; 20 Com. Cas. 95; 41 Digest 439, 2759.
- Safadi v. Western Assurance Co.*, (1933), 46 Lloyd's Rep. 140.
- Samuel v. Royal Exchange Assurance Co.*, (1828), 8 B. & C. 119; 6 L.J.O.S.K.B. 315; 108 E.R. 987; 29 Digest 139, 915. I
- Scheepvaart Maatschappij Gylsen v. North African Coaling Co.*, (1916), 85 L.J.K.B. 1386; 114 L.T. 755; 39 Digest 461, 882.
- South African Despatch Line v. Panamanian S.S. Niki (Owners)*, [1958] 3 All E.R. 590; [1959] 1 Q.B. 238; [1958] 3 W.L.R. 718; 3rd Digest Supp.
- Steamship "Induna" Co., Ltd. v. British Phosphate Comrs.*, [1949] 1 All E.R. 522; [1949] 2 K.B. 430; [1949] L.J.R. 1058; 2nd Digest Supp.

- A *Tapscott v. Balfour*, (1872), L.R. 8 C.P. 46; 42 L.J.C.P. 16; 27 L.T. 710; 41 Digest 559, 3851.
- Taylor v. John Lewis, Ltd.*, 1927 S.C. 891; 41 Digest 413, a.
- Tennants (Lancashire), Ltd. v. Wilson (C. S.) & Co., Ltd.*, [1917] A.C. 495; 86 L.J.K.B. 1191; 116 L.T. 780; 23 Com. Cas. 41; *revsq.* sub nom. *Wilson & Co. v. Tennants (Lancashire), Ltd.*, [1917] 1 K.B. 208; 12 Digest (Repl.) 449, 3387.
- B *Tharsis Sulphur & Copper Co. v. Morel Brothers & Co.*, [1891] 2 Q.B. 647; 61 L.J.Q.B. 11; 65 L.T. 659; 41 Digest 525, 3543.
- Verren v. Anglo-Dutch Brick Co. (1927), Ltd.*, (1929), 45 T.L.R. 556; Digest Supp.
- C *Z. Steamship Co., Ltd. v. Amtorg New York*, (1938), 54 T.L.R. 849; Digest Supp.

Actions.

- In these five actions, tried together by consent of the parties, shipowners claimed from charterers demurrage and damages for breach of the charterparties arising out of serious delay in loading the shipowners' vessels at Vancouver, British Columbia; the charterers counterclaimed for declarations that they were entitled to despatch money. The delay in loading was caused by a strike of elevator men at five out of the seven grain elevators at Vancouver and at the single grain elevator at the neighbouring port of New Westminster. The five shipowners, the plaintiffs, were Reardon Smith Line, Ltd., owners of the m.v. Queen City, Carlton Steamship Co., Ltd., owners of the s.s. Riverton, Cape of Good Hope Motorship Co., Ltd., owners of the m.v. Cape Rodney, Garibaldi Societa Co-operativa Di Navigazione A.R.L., owners of the m.v. Agostino Bertani, and Miramar Compania Naviera S.A., owners of the s.s. Moderator. The strike of elevator men at Vancouver and New Westminster broke out at midnight on Feb. 16/17, 1953, and continued without interruption until May 7, 1953, a period of eighty days. The vessels Queen City, Riverton and Cape Rodney were chartered by the Ministry of Food* respectively, on Nov. 12, 1952, Nov. 28, 1952, and Jan. 19, 1953, before the strike had begun. The vessel Agostino Bertani was chartered by the President of India on Mar. 12, 1953, and the vessel the Moderator, by the Government of the Union of South Africa on Apr. 2, 1953, both these charters being made during the continuance of the strike. With the exception of the Moderator, the vessels were chartered on the terms of the Pacific Coast Grain Charter and the relevant clauses of these charters were in identical terms apart from certain variations in the options as to the cargoes to be shipped. The Moderator was chartered under a Pacific Coast charter, the main fabric of which was in the same form as the charters for the other four vessels except that there was provision for making lay days at loading ports and discharging ports reversible and a clause dealing with ordering the vessel to strike-bound ports. The relevant terms of the charterparties for the vessels, Queen City, Riverton, Cape Rodney and Agostino Bertani were as follows except where otherwise stated:

- "... vessel . . . shall proceed in ballast and, upon arrival be made ready, and shall receive on board at Tacoma and/or Seattle or Portland Oregon, Vancouver, B.C., or New Westminster or Victoria, B.C. or other loading places as hereinafter provided† . . . a full and complete cargo of [in the case of the Queen City, Riverton and Cape Rodney wheat in bulk, any bags and/or bagging required for safe stowage to be supplied and paid for by the shipowners, and/or barley in bulk, and/or flour in sacks; in the case of the Agostino Bertani wheat in bulk only‡] which the charterers bind themselves
- I

* Now the Ministry of Agriculture, Fisheries and Food; see Transfer of Functions (Ministry of Food) Order, 1955 (S.I. 1955 No. 554).

† In the case of the Moderator, the loading ports were confined to Vancouver, New Westminster or Victoria.

‡ The Moderator's charter also provided for shipment of wheat in bulk only.

shall be shipped, and being so loaded, shall therewith proceed to one safe port in the United Kingdom . . . or on the Continent between Antwerp and Hamburg . . . or as near thereunto as she may safely get, and there deliver the same and be paid freight as hereinafter provided."

The Queen City's charter provided for a wheat freight at the rate of 80s. per ton and gave the charterer the option of loading up to one third cargo of barley in bulk, in which case the rate of freight was increased by 2s. 6d. on the quantity of barley loaded, and the option of loading up to one third cargo of flour in bags at 10s. per ton extra over the freight rate for wheat on the quantity of flour loaded if loaded in British Columbia, and 12s. 6d. per ton extra if loaded at ports in the United States. The Cape Rodney's commodity options were the same: in the case of the Riverton the barley options were also the same but the flour option was to load a full cargo of flour in bags at 10s. per ton extra over the freight rate for wheat if loaded at British Columbia, and 12s. 6d. per ton extra if loaded at ports in the United States. Under the charter of the Agostino Bertani there was no alternative cargo option. The charterparties continued:

"II. Readiness. The captain shall give charterers usual written notice of readiness, accompanied by certificate of charterers' competent surveyor, that vessel is ready to take in cargo and the quantity required . . . Upon receipt of said written notice and certificate . . . charterers shall furnish the vessel with the required cargo. 14. Loading Places. Vessel to proceed to such usual loading place or places where she can safely load, always afloat, as may be ordered by the charterers, at Vancouver, B.C. or New Westminster or Victoria or Tacoma and/or Seattle or Portland and/or Astoria and/or loading places on the Columbia and/or Willamette Rivers, and there receive the cargo in manner customary alongside, afloat and/or from the wharf and/or elevators. Should the vessel be required by charterers to be moved more than twice after being in her loading berth, extra cost of towage to be paid by them . . . 15. Lay Days. Six weather working lay days (Sundays, holidays, and rainy days not to be counted as lay or working days . . .), to commence twenty-four hours after the receipt by charterers' agents at loading port of the captain's written notice of readiness, accompanied by surveyor's certificate that his vessel is fitted with shifting boards and dunnage according to underwriters' requirements and is ready to receive cargo, whether in berth or not*, are to be allowed the charterers for loading at places as hereinbefore provided, but should the loading be completed in less time the charterers have the privilege of detaining the vessel until the expiry of said lay days. 16. Despatch Money. Despatch money (which is to be paid to charterers before vessel sails) shall be payable for all working time saved in loading at the rate of one half of demurrage rate per day or pro rata . . . 30. Demurrage and Lien etc. It is agreed that for each and every day's detention or demurrage at the port of loading by default of [the charterers] or their agents, 8d. per G.R.T. per day or pro rata shall be paid . . ."

In the case of the Queen City, the rates of demurrage and despatch respectively were subsequently altered to 10d. and 5d. by an addendum, dated July 22, 1953, to the charter of that vessel:

"31. Act of God, War etc. Lay or working days shall not count at ports of loading during any time when the supply or loading of stiffening, or the supply or bringing by rail, craft or otherwise, to port of loading or alongside the vessel, or the loading of the cargo or intended cargo or any part thereof, is delayed by the Act of God, war, restraint of princes, rulers or people,

* The charter for the Moderator did not contain the words "whether in berth or not", and thus, unlike the other four charters, it was a berth charterparty (see p. 466, letter E, post).

A force majeure . . . strikes, lock-outs, civil commotions, political disturbances or impediments, holidays (ecclesiastical or civil), cessations or stoppages of labour . . . railway accidents or impediments or any other hindrance of whatsoever nature beyond the charterers' control . . ."

Clause 18 of the Moderator's charter was in identical terms to cl. 31.

B The following typed clauses were added to the printed charterparties:

" 37. Overtime at loading or discharging port to be for the account of the party ordering it. If ordered by the port controller or his representative, charterer to pay all extra expenses incurred. 38. Despatch money and/or demurrage at loading and/or discharging ports to be adjusted on completion of discharge . . . 42. Where charter calls for loading port orders, master to make application to Messrs. Thomson & Earle, Vancouver . . . by wireless, ninety-six hours before vessel is due to arrive off Pacific coast. Orders for loading port are to be given by wireless within forty-eight hours of receipt of master's application, unless given earlier."

D In the case of the Agostino Bertani, application for loading port orders had to be made to the India Supply Mission, Washington, and in the case of the Moderator, application had to be made to the Empire Shipping Co., Ltd., Vancouver, when the Moderator was approximately ninety-six hours off Vancouver, giving the time of her expected arrival in the district of Vancouver and on receipt of the master's application, loading orders were to be given to the Empire Shipping Co., Ltd. on the vessel's arrival in the Vancouver district.

E The charterparty for the Moderator contained terms substantially the same as those which are set out above, save for the variations referred to previously; but the charterparty contained no alternative cargo option. In addition, however, the Moderator's charter contained two relevant clauses not present in the other charters; by cl. 26, it was provided:

F "Any time lost to the vessel by bad weather preventing discharge . . . to be calculated on the basis of twenty-four hours at the ratio which the actual time lost bears to the normal working hours of the port",

and by cl. 36,

G "If the grain elevators at Vancouver or New Westminster or Victoria, B.C. [i.e., the full range of loading ports for the Moderator] are strike-bound when vessel is seven days off Vancouver this charterparty to be null and void."

H Finally, in the Moderator's charter there was a clause (cl. 27) providing that "loading and discharging time shall be reversible" and by a typed clause (cl. 17) it was provided that "If the charterers elect to treat lay days in loading and discharging as per cl. 27 despatch or alternatively demurrage to be settled on completion . . ." The charterers of the Moderator did so elect.

I The following facts were found by McNair, J. On Sept. 19, 1952, the Ministry of Food entered into a master agreement with the Canadian Wheat Board (hereinafter referred to as "the board") for the purchase of wheat and flour, for shipment from Canadian ports between Aug. 1, 1952, and July 31, 1953. By this agreement the board undertook to make available through its agents, for sale to the Ministry between the above dates, 2,614,000 tons of wheat and 350,000 tons of flour at the current selling price for each grade, such purchases to be registered under the International Wheat Agreement, 1949. Of the 2,614,000 tons of wheat, 1,422,000 tons were to be made available for shipment from the St. Lawrence and Atlantic winter ports and 850,000 tons from Canadian Pacific coast ports; approximately 100,000 tons were to be made available for each of the months January, February and March, 1953, and 90,000 tons in each

of the months April and May, 1953. Shipment and delivery of the total quantity of flour to be purchased from the mills was to be a matter of arrangement between the Ministry and the mills concerned. The master agreement further provided: A

“To facilitate the carrying out of this agreement each party undertakes to advise the other party from time to time of its progress in meeting supply requirements or in securing tonnage as the case may be. While it is the intent of this agreement that the respective parties will endeavour, to the best of their ability, to make available the supplies, it is agreed that failure to carry out their respective obligations in that regard will not result in the charging by the Ministry of demurrage charges to the board or its agents, or the charging by the board of any additional carrying charge to the Ministry or its agents.” B C

Similar master agreements were entered into between the India Supply Mission, on behalf of the Government of India, and the board, dated Oct. 11, 1952, covering 300,000 tons of wheat to be shipped from Pacific coast ports over the months January to July, 1953, and between the South African Wheat Board, on behalf of the South African Government, and the board, dated June 4, 1952, for the supply of 150,000 tons of wheat to be shipped from Pacific coast ports over the months of January to July, 1953. In all these agreements the respective charterers made reasonable and proper arrangements for securing delivery of cargoes to the vessels in due time, and all charterers notified the board in due time of the quantities of bulk wheat required for each of the ships concerned. D

The board was established under the Canadian Wheat Board Act, 1935. By s. 4 (1) of that Act the board could sue and be sued in its own name, but by sub-s. (2) of s. 4, E

“the board is for all purposes, an agent of Her Majesty in right of Canada, and its powers under this Act may be exercised by it only as an agent of Her Majesty in the said right.” F

The board had the monopoly of exporting wheat and barley from “the designated areas” of Canada which produced ninety-five per cent. of the grain fit for export. The object of the board was the marketing in orderly manner in inter-provincial and export trade, of grain grown in Canada and for this purpose the board was given wide powers; but by s. 10 of the Act, G

“the Governor in Council may by order not inconsistent with the provisions of this Act direct the board as to the manner in which any of its operations, powers and duties under this Act shall be conducted, exercised or performed.”

Though without express statutory power to do so, the board did in fact control loading berths at ports of shipment since the property in the grain for export remained in the board from the time the grain reached the up-country elevators, situated by the railways, until it was discharged from the terminal elevators into the vessel at the port of shipment; the flow of grain by rail from the up-country to the terminal elevators was controlled by the board. At the port of shipment the terminal elevators were instructed by the board as to the quantities and grades to be loaded into each vessel and the board also gave instructions as to the loading berths for ships. H I

At all material times there were seven terminal elevators at Vancouver of which two were operating throughout the strike the rest being strike-bound. There was a single elevator at the neighbouring port of New Westminster which was strike-bound throughout the strike, and there was also a single elevator at Victoria which, at the outbreak of the strike, was being used only as a storage elevator for maize; by the middle of March, 1953, the maize had been removed

- A and one vessel which had arrived at Vancouver before the strike and also before any of the five vessels in the present case, was loaded from the Victoria elevator with a full cargo of wheat. There was evidence that smaller parcel shipments of wheat on to liners were also made from Victoria but that there was never sufficient wheat at this elevator to make up a full cargo, with the exception of the above vessel. The normal output of the elevators at Vancouver and New
- B Westminster was about 20,000 tons per day of which the two non-strike bound elevators handled between them some eighteen per cent. On Feb. 17, 1953, when the strike began, there were 1,500,000 tons of wheat in the eight elevators at Vancouver and New Westminster, of which about 16,900 tons were in the two non-strike bound elevators, set aside for completion of contracts for bagged wheat.
- C The elevator men, other than those who worked at the two non-strike bound elevators (hereafter referred to as the "non-union elevators") were organised in a local branch of the International Union of Brewery, Flour, Soft Drinks and Distillery Workers of America (hereafter referred to as "the union"). In October, 1952, with a view to negotiating a new agreement for the elevator men, the union gave notice of intention to terminate the working agreement which
- D then existed between the men and their employers. Negotiations then took place between the union and the employers and later continued through the medium of a conciliation board, until the end of January, 1953. On Feb. 3, 1953, the union rejected the terms set out in a report made by the conciliation board; on Feb. 4 these terms were also rejected by the employers. A strike vote was then taken and on or about Feb. 10 notice was given that the strike of
- E elevator men would be effective from midnight Feb. 16/17. On Feb. 12, the Queen City was ordered by her charterers (the Ministry of Food) to load at Vancouver. Work stopped at all the elevators at Vancouver and New Westminster, other than at the two non-union elevators, as from midnight Feb. 16/17. The evidence showed that at this stage of the strike there was a confused picture as to the generally accepted view of the strike's duration. On Feb. 18 an embargo was placed by the railways on any movement of grain from the up-country
- F elevators to the strike-bound terminal elevators, and the men at the two non-union elevators agreed with the union that they would handle only wheat coming from their own regular suppliers and would notify the union if wheat from any other source was offered to them; no such wheat was offered but had it been, it was clear that the men at these two elevators would have come out on strike. At
- G 9.45 a.m. on Feb. 18 the Queen City, having arrived at Vancouver, gave notice of readiness to load. By a cable dated Feb. 26/27, Thomson & Earle, Ltd. (the Ministry of Food's Vancouver agents) reported to the Ministry "Vancouver strike situation obscure. No negotiations; anybody's guess duration: local opinion settlement may still be two three weeks away or longer". Meanwhile an offer was made by the Prairie Farmers Union to mediate in the strike but the offer
- H was turned down by the employers on Mar. 6; that union then asked the Federal Government to intervene. By this time, the Canadian Wheat Board, acting through their manager at Vancouver, had decided as a matter of policy, in order to make the best use of the port of Vancouver and of available supplies of wheat, to confine the use of the two non-union elevators to the supply of parcels to "liners" or "F.I.C. bottoms", viz., vessels plying in and out of Vancouver on
- I more or less regular schedules for passengers and goods and loading on berth terms, and not to use these elevators for loading full cargoes of wheat on chartered tramps (as were the five vessels concerned here) but to load these vessels after the strike in the order of their arrival in port. In fact, wheat in bulk amounting to 63,435 tons was loaded as parcel cargoes into liners from the non-union elevators; of this quantity, 17,000 tons went into liners chartered by persons other than the defendant charterers. This policy decision of the board was accepted by the Vancouver chamber of shipping on Mar. 2 as being in the best interest of the community. The trial judge found that the board's decision was a

reasonable policy to adopt in the discharge of their duties. The policy was pursued A throughout the strike and no tramp (except the vessel which, as stated above, was diverted to Victoria) was loaded with either a full or part cargo of wheat; the decision affected about one hundred liners and tramps arriving at Vancouver to load grain between Feb. 17 and May 7 (when the strike ended). Government intervention having been asked for, an official of the Federal Conciliation Service arrived at Vancouver on Mar. 9, and put up six proposals for the parties' consideration, the most important being a wage increase of three cents per hour retro- B spective to Dec. 1, 1952. The union rejected all six proposals, while the employers, rejecting the proposed wage increase, were prepared to accept part of the remaining proposals. The official returned to Ottawa on Mar. 20 having put forward new proposals which involved, for the first time, submission to arbitration. Before either party had replied to the suggestion for arbitration, C the Riverton on Mar. 22 and the Cape Rodney on Mar. 27 had been ordered by the Ministry of Food to Vancouver to load; the Riverton gave notice of readiness to load on Mar. 25 and the Cape Rodney on Apr. 2. On Apr. 10 the employers agreed to accept arbitration but on Apr. 11 the union refused. On Apr. 15 the Canadian Prime Minister indicated that the government might take over the elevators, but in an open letter to the union dated Apr. 22, the employers offered to submit all outstanding issues to arbitration, and on Apr. 23 the union offered to cut their wage demands. On Apr. 23 the Agostino Bertani was ordered to Vancouver and gave notice of readiness to load on Apr. 29. On Apr. 30 a meeting took place between the union and the operators, and on May 7 the strike was settled. The Moderator was ordered to Vancouver to load on June 4. She gave notice of readiness to load on June 6 when the board's agent at Vancouver, Mr. Smith, E was so notified. By letter received by the charterers on June 8, Mr. Smith wrote:

"With regard to your advice that the s.s. Moderator has been tendered to you for loading and your request that we nominate a loading berth from which a cargo of wheat will be supplied to her, we wish to advise that all F available berths are occupied at this time and there are other vessels already waiting their turn to load as berths become vacant. The s.s. Moderator is being placed in rotation for loading in accordance with time of presentation along with those other vessels in port awaiting loading berths and a berth will be nominated in due course when one is available."

The extent of the congestion at Vancouver caused by the strike, and continuing G after the strike ended, was shown by the fact that nineteen tramp vessels, chartered by the defendant charterers and arriving at Vancouver between Feb. 16 and the end of April, and six more tramps arriving in May, waited and ultimately loaded full cargoes of bulk wheat at New Westminster and Vancouver, in order of their arrival, and, therefore, in turn before the Moderator (in addition to an unspecified number of tramps chartered by other persons); H and after the strike ended on May 7 seven tramps chartered by persons other than the defendant charterers loaded full cargoes of bulk wheat before the Moderator, being on turn before her. In addition, parcel shipments of bulk wheat were being made on to liners. On the evidence before him the judge reached the conclusions (a) that at no time before the strike began or at any stage during its continuance was the position such that a well-informed ship- I owner or charterer, making use of the facilities for inquiry open to him, could have formed any really reliable appreciation as to the likely duration of the strike, and (b) in fact, at no time before the strike began or at any stage during its continuance was it on balance of probabilities likely that the strike would last more than two or three weeks, or more than a further two or three weeks. The fact that only a small number of men, 250 to 260 in all, were on strike was no reason for thinking that the strike would be a long one; further there was no

- A history of embittered industrial relations in the industry concerned and the strike never affected more than part of the industry.

As a result of the strike the Queen City, Riverton, Cape Rodney and Agostino Bertani, while respectively giving notice of readiness to load on Feb. 18, Mar. 25, Apr. 2 and Apr. 29, were unable to commence loading until after the strike ended on May 7. The Queen City and Riverton commenced loading on May 7 and completed loading on May 12; the Cape Rodney commenced loading on May 13 and completed on May 15 and the Agostino Bertani commenced loading on May 20 and completed loading on May 27. In each of these four cases it was agreed that the ship was an "arrived ship" when she gave notice of readiness in view of the inclusion in the lay days clause of the charters of the words "whether in berth or not". The Moderator (chartered on Apr. 2, 1953), which had given notice of readiness to load on June 6, did not commence loading until June 12 owing to post-strike congestion at Vancouver, and completed loading on June 18, 1953. The shipowners claimed that they were entitled to demurrage in respect of these delays in loading the vessels. They further contended that by ordering the vessels to Vancouver the charterers were in breach of an implied condition of the charterparties that the port of loading nominated by them would be, at the time the order was given and/or at the time when the vessel arrived at the port and/or at the time of her readiness to load, a port which was reasonably fit for the purpose of loading the contractual cargo or would be fit to load the cargo within a reasonable time or within such time as would not frustrate the commercial venture; alternatively, the shipowners contended that the charterers warranted that Vancouver was a fit port in the manner set out above. The shipowners also contended that the charterers were in breach of a further implied condition, namely, that if it was impossible to load the vessels at Vancouver without such delay as would frustrate the commercial venture, the charterers, within a reasonable time, would order the vessels to another non-strike bound loading port within the range set out in the charterparties. Finally, the shipowners contended that the charterers were in breach of their obligation to provide a cargo for loading the vessels. The charterers contended that they were protected from the claims for demurrage by the exceptions clause contained in each of the charterparties (cl. 18 of the Moderator's charter and cl. 31 of the other four charters) since the clause prevented the running of lay days during the continuance of the strike; further, they were not precluded from relying on the clause merely because the strike was in existence or was about to begin when the nomination of the port of Vancouver was made. In this connexion, the charterers also contended that the decision of the Canadian Wheat Board to withhold wheat for bulk cargoes for tramps came within the meaning of "force majeure . . . or any other hindrance whatsoever beyond the charterers' control", and that the existence in the non-union elevators of sufficient wheat to load a particular ship did not debar the charterers from relying on the wide exceptions clause. As to the suggested obligations regarding nomination of a loading port and the suggested warranty, the charterers submitted that in nominating a loading port, they were not obliged to take into account the convenience of the shipowners, and that the only implied limitations were that, at the time of the nomination, the port must be a safe port in the physical or political sense and it must be possible for the ship to get in and load; the test was whether any obstacle, impediment or prohibition was likely to be operative for so long as to frustrate the commercial object of the venture. On the facts the charterers submitted that at no time could it have been said with any certainty that the strike would continue for so long as to make the port an impossible port, and that the law had always treated strikes as subject to such unexpected termination that their existence would not abrogate contracts or involve substituted obligations. The charterers further contended that once a proper nomination was made the charter must be construed as if the nominated

port had been originally written into the charter as the loading port. Finally, A the charterers of the Queen City, Riverton and Cape Rodney submitted that they were not obliged to ship alternative cargoes when it became impossible to ship the intended cargo of wheat in bulk.

In all the cases controversy arose, in calculating lay days, as to the proper treatment of Saturdays and as to the proper calculation of "working days". B In the case of the Moderator the effect of cl. 27, making loading and discharging time reversible, fell to be considered.

Eustace Roskill, Q.C., T. G. Roche, Q.C., and A. J. Bateson for the shipowners (the plaintiffs).

A. A. Mocatta, Q.C., and M. R. E. Kerr for the charterers (the defendants).

Cur. adv. vult. C

July 30. McNAIR, J., read the following judgment: On Feb. 17, 1953, a strike of elevator men at five out of the seven elevators at Vancouver and at the single elevator at the neighbouring port of New Westminster, which together normally handled eighty-five to eighty-seven per cent. of the bulk grain shipments from those ports, broke out and continued without interruption until D May 7, a period of eighty days. As a result thirty-one tramp vessels chartered by the Ministry of Food and the governments of India and South Africa to load full cargoes of wheat and arriving in Vancouver after the strike began, were subject to very serious delays since no full cargoes of wheat were loaded there during the strike. In addition a number of other tramps were diverted to U.S. ports or had their charters either cancelled by agreement or otherwise E postponed. The demurrage claims involved in the ships which were delayed at Vancouver amount to very large sums and involve in many cases complicated and difficult issues of fact and of law. In addition, on certain views of the facts and law, claims for despatch money arise. The shipowning interests and the three governments concerned have selected five cases which are the subject of the five separate actions, which I have tried together in the hope and expectation that the decision in these cases will enable settlement to be reached in the other cases, though the selected cases are not strictly test cases. F

[HIS LORDSHIP, having referred to the five cases selected, stated the relevant terms of the charterparties for the five vessels concerned in these cases, and gave in outline the submissions of the parties (which are set out also in the course of the judgment, post). HIS LORDSHIP then set out the facts, and made certain findings of fact and continued:] This strike, although it turned out to be a long strike, did not in my judgment differ in its essentials from other strikes. It is an obvious truism that no one can predict in advance how long a strike will last, and even when the contestants appear to be far apart, a strike may end suddenly without any advance warning. In this connexion I was usefully referred to a number of reported cases in which the courts have had H to consider strikes in relation to problems of frustration, and it is true to say that in no case, except possibly *The Penelope* (1) has it been held that a strike has brought into operation the doctrine of frustration. For instance, in *Bulman & Dickson v. Fenwick & Co.* (2), the question arose whether under a charterparty containing an exception of any delay occasioned by strikes, which provided that the vessels should discharge at a number of places in the Thames, I including the Regent's Canal, the charterers were entitled to insist on the vessel remaining at Regent's Canal when a strike broke out after Regent's Canal had been nominated. Though, as appears from the argument, it had been argued that the strike was a labour war and was bound to last so long as to defeat the adventure, POLLOCK, B., held that the strike was very sudden and unexpected and no one could tell at what period the strike would be over; and LORD ESHER,

A M.R., said "This is as clear a case as can be" (3). In *Dobell & Co. v. Green & Co.*, COLLINS, L.J., says (4):

"I think it would be unreasonable, having regard to the uncertainty of the duration of strikes, to impose upon the charterers an obligation to name a colliery where there was no strike in existence at the moment."

B In *Ropner & Co. v. Ronnebeck*, BAILHACHE, J., said (5):

"I have never heard it suggested before today that a charterer is not bound to load a steamer which is ready to take the cargo on board because of the existence of a strike which might affect the time of her sailing. I am not prepared to be the first to apply this principle, which, as I have said, has been applied in cases arising at a time of war, to cases arising through the existence of a strike; to do so would be a new departure. Strikes, of course, vary in length. No man can say when a strike begins whether it will be a long strike or a short one."

C Again in *Metropolitan Water Board v. Dick, Kerr & Co.* (6), SCRUTTON, L.J., approving the reasoning of BAILHACHE, J., in the case last cited, says:

"... strikes have always been treated by the courts as subject to such unexpected termination that they cannot without more be treated as abrogating contracts."

E (As regards *The Penelope* (7) it seems to me that the better view of this confusing case is that LORD MERRIVALE held that it was the coal embargo rather than the strike that produced frustration.) Finally, in *South African Despatch Line v. Panamanian S.S. Niki (Owners)* (8) DIPLOCK, J., obiter says:

"A strike being something which may end at any time, a charterer is entitled to continue to exercise his right under the charterparty to send the vessel to a strike-bound port in the hope and expectation that the strike will be over when he gets there."

F I cite these passages for the moment as merely indicating the approach of the courts to the problem of strikes rather than for the legal consequences that follow from such approach.

G I now turn to the questions of primary importance in these cases, viz., as to the obligations of the charterers when the intended port of loading or a nominated port of loading becomes "strike-bound" in the sense of being a port at which loading of the vessel cannot take place within a reasonable time or without such delay as would frustrate the commercial object of the adventure. These questions I take first as in the case of each ship they arise first in chronology. Though on my findings of fact as to the strike (9) it is not necessary for me to express any final opinion on these questions, it is probably desirable that I should do so in view of the sustained and interesting arguments addressed to me on them.

H There is no dispute between the parties on one point at least. The obligation, if any, to name a substitute port after a properly nominated port becomes strike-bound and the limitation (if any) on the charterers' option as to nominating loading ports to the nominating of ports which are not strike-bound, do not arise by reason of any express provision of the charter but arise, if at all, by implication from its express terms. For my part I approach the question of implying terms into a written contract with great caution, especially when the material contract is a charterparty such as those in the present cases which

(3) [1894] 1 Q.B. at pp. 182 and 185. (4) [1900] 1 Q.B. at p. 533.

(5) (1914), 20 Com. Cas. at p. 99.

(6) [1917] 2 K.B. 1 at p. 35.

(7) [1928] P. 180.

(8) [1958] 3 All E.R. at p. 596; [1959] 1 Q.B. at p. 252.

(9) See p. 444, letter I, ante.

make detailed and elaborate provisions for a great and varied number of contingencies. As SCRUTTON, L.J., observed in *Brightman & Co. v. Bunge Y Born* (10) in relation to the charterparty there in question: A

"It contains phrases not easy to construe, as is often the case when parties with conflicting interests adopt an ambiguous form which each side dare not make precise for fear the other party should disagree with their meaning if stated precisely." B

The limits within which terms can be applied are now well settled in principle, though difficulty still lies in their application. The court will only imply such terms as are necessary to give such business efficacy to the contract as both parties must have intended. It is not sufficient to show that an implication would be reasonable, for it is not the function of the court to make a contract for the parties. I bear in mind the often quoted passage in LORD WATSON's speech in *Dahl v. Nelson, Donkin & Co.* (11). C

In broadest outline the argument on behalf of the ship proceeded on these lines:

(a) In the opening clause of the charterparties the range of loading ports and the range of permitted cargoes is dealt with in substantially the same language; and a priori it is reasonable to suppose that the options as to ports should be exercised in the same manner and subject to the same limitations as the options for cargo. D

(b) If, as is established by the decision in *Brightman & Co. v. Bunge Y Born* (12) it is the duty of the charterer when once a class of contractual cargo becomes impossible to load to take steps after a reasonable time to ship another class of contractual cargo not subject to such impossibility, it must be by analogy the duty of the charterer to nominate a substitute loading port when the port first nominated becomes strike-bound, and, if no port has been nominated, to nominate a port which is not strike-bound. E

(c) On the authority of *Duncan v. Köster, The Teutonia* (13), it is the duty of the charterer, when the port first nominated becomes strike-bound, to nominate from the range a further port which is not strike-bound. F

(d) That just as the court must in considering the content of the phrase "proceed to a port as ordered" or "proceed to X or so near thereto as she can safely get" imply the term that the vessel can get to port in safety within a reasonable time or without such delay as will frustrate the commercial adventure, so the court by analogy in considering whether the port nominated is or remains a proper port from the point of view of the loading facilities, must imply the term that the port must be in such a condition that loading can take place within a reasonable time or without such delay as will frustrate the commercial adventure. G

As to (a), my first comment is that argument by way of analogy is dangerous; if the facts are the same the analogy is unnecessary; if the facts are different, the difference in fact may destroy the analogy. As to (b), accepting as I must that the decision in *Brightman & Co. v. Bunge Y Born* (12) is good law, it seems to me that there is a striking difference between a switch over from one type of cargo to another which may not involve even the movement to another loading berth and a switch over to another port in the range which will necessarily involve clearance from the port which is being vacated, probably an ocean voyage to a new port and entry into the new port, all at the expense of the shipowner. If it is said that in the circumstances contemplated the shipowner would readily shoulder those expenses, this, as it seems to me, is no answer, since if the charterer is under the obligation alleged, he must have the right to switch over even though the shipowner objects. H I

(10) [1924] 2 K.B. at p. 629.

(12) [1924] 2 K.B. 619.

(11) (1881), 6 App. Cas. at p. 59.

(13) (1872), L.R. 4 P.C. 171.

A I now turn to argument (c) based on *The Teutonia* (14). This decision is, of course, a decision of the Privy Council on appeal from SIR ROBERT PHILLIMORE sitting as judge of the High Court of Admiralty and as such is not strictly binding on me though entitled to the greatest respect. It is a decision which, in later decisions and in the text-books, has been the subject of much differing comment but so far as I know, except in one passage in SCRUTTON ON CHARTERPARTIES (15), it has never been suggested that it is an authority for the proposition that, the charterer having nominated a safe port which becomes unsafe before the vessel arrives at or off the port, the master is entitled to call on the charterer to nominate another safe port within the charter range.

As appears from the report of the proceedings before SIR ROBERT PHILLIMORE (16), the proceedings were instituted under s. 6 of the Admiralty Court Act, 1861, by petition by the assignees of cargo shipped on board the *Teutonia*, a Prussian vessel, at Pisagua and bound for Cork, Cowes or Falmouth for orders, which orders by the charterparty were limited to orders to any safe port in Great Britain or on the Continent between Havre and Hamburg. The vessel proceeded to Falmouth and arriving there on July 10, received orders to discharge at Dunkirk. At that time no war had broken out between France and Prussia. But on arrival off Dunkirk the master received information that war had broken out and so proceeded to the Downs. While at the Downs it was confirmed that war had broken out, and on instructions from the owner the master proceeded to Dover where the ship remained with the goods on board. The consignees demanded possession of their cargo at Dover without paying or offering to pay the freight or any portion thereof but the master refused to deliver the goods to them. The main issue in the action was as to the master's right not to put into Dunkirk on receipt of intelligence that war had broken out. This point, which was decided in favour of the master, is irrelevant in the present case. On the second point, namely, the right of the merchant to delivery of the cargo freight free, SIR ROBERT PHILLIMORE (17) makes it quite clear that even if there were such a right at common law it would not necessarily be the law administered by a court of equity or by the Admiralty Court, and he concludes as follows (18):

“After as careful a consideration as I have been able to give to the general principles of jurisprudence applicable to the circumstances of this case, in the absence of any direct judicial precedent, I have arrived at the following conclusion: that the owners of the *Teutonia* have not committed any breach of the contract contained in the charterparty and bill of lading, either first, by refusing, in the circumstances, to carry the cargo to the port of Dunkirk; or, secondly, by refusing to deliver up the cargo to the plaintiffs at Dover without any payment of freight whatever either pro rata itineris or by way of compensation for the carriage of the goods . . .”

H Though in the Privy Council the advice as delivered by MELLISH, L.J., proceeded on the lines that the original contract was not dissolved by the impossibility of delivering the cargo at Dunkirk, I can find nothing which suggests that the Board were accepting the shipowners' argument “that the charterer was bound to select another port from among those named in the charterparty” or that its acceptance of that argument was implicit in the conclusion at which the Board arrived. Although it was argued that the Court of Admiralty could only exercise a common law jurisdiction, I do not understand the Privy Council to have accepted this contention. So to hold would be contrary to the later decisions of the Court of Appeal in *The Gaetano & Maria* (19), per BRETT, L.J.

In my judgment *The Teutonia* (20) is no authority for the proposition that

(14) (1872), L.R. 4 P.C. 171. (15) 11th Edn., p. 124 and 16th Edn., p. 129, Case 1.

(16) (1871), L.R. 3 A. & E. 394, 395.

(17) (1871), L.R. 3 A. & E. at p. 417.

(18) (1871), L.R. 3 A. & E. at p. 424.

(19) (1882), 7 P.D. 137, see at p. 143.

(20) (1872), L.R. 4 P.C. 171.

according to English common law a charterer, having once made a proper nomination of a port, is obliged to make a second nomination when the port first nominated becomes an impossible port. At most (apart from the point as to the master's right to act on reasonable intelligence) it supports the proposition that the port nominated must be safe both at the time of ordering and at the time when the ship gets there; for which proposition it is cited in SCRUTTON ON CHARTERPARTIES (21).

Against the wider proposition that a substitute port must be ordered after a proper nomination has been made, there is a well-settled line of authority to the effect that once a port has been properly nominated, the charterparty is to be construed as if the nominated port had been originally written into the charterparty. See *Tapscott v. Balfour* (22), per BOVILL, C.J., which was accepted in *Tharsis Sulphur & Copper Co. v. Morel Brothers & Co.* (23), per LORD ESHER, M.R., per BOWEN, L.J. (23), and KAY, L.J. (24), as supporting that proposition. To the same effect is the judgment of KENNEDY, L.J., in *Leonis S.S. Co., Ltd. v. Rank, Ltd.* (25). More recently the same principle was restated by DEVLIN, J., in *Anglo-Danubian Transport Co., Ltd. v. Ministry of Food* (26) where the learned judge adds the further point that the charterer, having once made a proper nomination, has not the right—still less the obligation—to make a second nomination.

With this class of case must be contrasted cases where the original nomination has been held to be bad and therefore nugatory. In such a case—at least unless the shipowner has treated the original nomination as an anticipatory breach—the charterer can, so long as his time for doing so has not expired, make a fresh nomination which, if good, will be treated as written into the contract. Such a case is *Akt. Olivebank v. Dansk Svovlsyre Fabrik* (27), (28), where the nomination of a Danish port to which a British ship could not lawfully proceed to deliver nitrate was held by BAILHACHE, J. (27), to be a “mere nugatory nomination”, and he held that the charterers were obliged to give a fresh nomination of a port within the charter range. In the Court of Appeal (28), each of the lords justices treated the original nomination as ineffective, though BANKES, L.J., preferred to rest his judgment on rather different grounds to that adopted by BAILHACHE, J.

Next, as to point (d) of the summary of the shipowners' argument, viz., that just as the court in considering the content of the phrase “proceed to a port as ordered” or “proceed to X or so near thereunto as she can safely get” will imply the term that the vessel can get there in safety within a reasonable time or without such delay as will frustrate the commercial adventure, so the court by analogy in considering whether the port nominated is or remains a proper port from the point of view of loading facilities must imply the term that the port must be in such a condition that loading can take place within a reasonable time or without such delay as will frustrate the commercial adventure.

For my part I derive little assistance for the purpose of solving the present problem from *Nelson v. Dahl* (29), important as that case is in other branches of shipping law. In that case the question for determination was whether under a charterparty to “proceed to London, Surrey Commercial Docks, or so near thereunto as she may safely get . . . and deliver” her cargo, the shipowners were entitled to deliver the cargo at Deptford Buoys outside the Surrey Commercial Docks by reason of the fact that no berth could be obtained in the docks owing to congestion which was likely to last for many months. The importance of the

(21) 11th Edn., p. 123; 16th Edn., p. 128, note (d).

(22) (1872), L.R. 8 C.P. at p. 52.

(24) 65 L.T. at p. 662.

(26) [1949] 2 All E.R. at p. 1069.

(23) [1891] 2 Q.B. at pp. 650, 652.

(25) [1908] 1 K.B. at p. 518.

(27) [1919] 1 K.B. 388 at p. 392.

(28) [1919] 2 K.B. 162, C.A.

(29) (1879), 12 Ch.D. 568; on appeal, sub nom. *Dahl v. Nelson, Donkin & Co.* (1881), 6 App. Cas. 38.

A case in other branches of shipping law is that it decided that in construing the phrase "or so near thereunto as she can safely get" it was legitimate to treat as "permanent not only obstacles which will remain for ever but also obstacles which will prevent entry for a time which is unreasonable having regard to the object of the common adventure". See per LORD WATSON (30):

B "There must in every case be some limit of time within which an obstacle ceasing to exist cannot be regarded as permanent, and beyond which a continuing obstacle ceases to be temporary."

This case in my judgment throws no light or at least a very indirect light on the problem in the present case.

C Admittedly, with the exception of the obiter observations of DIPLOCK, J., in *South African Despatch Line v. Panamanian S.S. Niki (Owners)* (31), to which I have already referred, there is no reported case in which the strike-bound port problem has been considered; but in the argument before me both sides in turn relied on the well-known cases of *Tharsis Sulphur & Copper Co. v. Morel Brothers & Co.* (32) and *Bulman & Dickson v. Fenwick & Co.* (33). In *Tharsis Sulphur & Copper Co. v. Morel Brothers & Co.* (32) (in which the court consisted of LORD D Esher, M.R., BOWEN, L.J., and KAY, L.J.) the vessel was chartered to proceed to the Mersey and deliver her cargo at any safe berth as ordered on arrival in the dock at Garston. On arrival a berth was ordered by the harbourmaster as customary but there was delay in unloading due to the crowded state of the dock which prevented the vessel being berthed for some time and the shipowners claimed demurrage. The actual decision was that the vessel did not become an arrived ship until she got into berth, but in BOWEN, L.J.'s judgment there is a valuable passage dealing with exercise of the option where the learned lord justice says (34):

F "Then we were told that an option was given to the charterer, and that it was not properly exercised unless a berth was chosen that was empty. But I think there was a confusion in this argument also. The option is given for the benefit of the person who has to exercise it. He is bound to exercise it in a reasonable time, but is not bound in exercising it to consider the benefit or otherwise of the other party. The option is to choose a port or berth or dock, that is one that is reasonably fit for the purpose of delivery. It will not do for instance to choose a dock the entrance to which is blocked— that would be practically no exercise at all of the option, and I think this is what BLACKBURN, J., meant in *Nelson v. Dahl* (35) and follows from the cases, which he there cited, of *Ogden v. Graham* (36) and *Samuel v. Royal Exchange Assurance Co.* (37). To limit the option of the charterer by saying that, in the choice of a berth, he is to consider the convenience of the shipowner, is to deprive him of the benefit of his option. The most that can be said is that the charterer does not exercise his option at all unless he chooses a berth that is free or is likely to be so in a reasonable time."

H I have compared this report with the reports in 65 L.T. 659 and 61 L.J.Q.B. 11, and I think that it is quite clear that BOWEN, L.J., was using the word "free" as opposed to physically obstructed. He was so understood by POLLOCK, B., in *Bulman & Dickson v. Fenwick & Co.* (38). In that case the vessel was to proceed to "London, either to the Pool, Regent's Canal, Victoria Docks, the Derricks, Beckton, or other safe berth as ordered". After the voyage commenced but before arrival of the vessel off the Thames, the charterers ordered her to

(30) (1881), 6 App. Cas. 38 at p. 59.

(31) [1958] 3 All E.R. at p. 596; [1959] 1 Q.B. at p. 252.

(32) [1891] 2 Q.B. 647.

(33) [1894] 1 Q.B. 179.

(34) [1891] 2 Q.B. at p. 652.

(35) (1881), 6 App. Cas. at p. 44.

(36) (1861), 1 B. & S. 773.

(37) (1828), 8 B. & C. 119.

(38) [1894] 1 Q.B. 179, see at p. 184.

Regent's Canal. After the order was given they became aware of the fact that there was a strike of coal-porters at Regent's Canal which did not extend to the other places named in the charterparty. It was argued on behalf of the ship that the charterers should have changed the order. The argument on behalf of the ship in the Court of Appeal based on the judgment of BOWEN, L.J., in *Tharsis v. Morel* (39), namely, that "the charterers must choose a berth where the commercial adventure can be carried out and ought not to send the ship to any place where there is a strike" was rejected. LORD ESHER, M.R. (in whose judgment LOPES, L.J., and KAY, L.J., concurred), said (40):

"This is as clear a case as can be. The question is whether the defendants did anything more than they were, by the terms of the charterparty, entitled to do in ordering the vessel to the Regent's Canal. The shipowner undertook that the vessel should proceed to London, either to the Pool, Regent's Canal, Victoria Docks, the Derricks, Beckton, or other safe berth as ordered. There is nothing from which any limitation can be implied on the power of the charterer as to the choice of the place to which the ship should go, unless perhaps there is an implied limitation in case something arises which makes the Regent's Canal one to which a ship of this kind cannot go, as, for instance, if the entrance were blocked. At the time when the charterers ordered the ship to the Regent's Canal there could be no objection to such an order, and there was nothing which happened afterwards to oblige the charterers to alter their order."

(In the report in 63 L.J.Q.B. 123 at p. 127 LORD ESHER is reported as having given a different illustration from the illustration of a blocked port, namely, the illustration of a port which had become unsafe by reason of the outbreak of war, but the principle is the same.)

In SCRUTTON ON CHARTERPARTIES (41) the comment is made that

"In *Bulman v. Fenwick* . . . [the Court of Appeal] appears to hold that the only limitation to the charterer's power to select a berth is that he must not choose one that is so blocked that the obstacle cannot be removed in a time consistent with the commercial adventure."

In both these cases the obligation was to name a safe berth or place. Counsel on behalf of the charterers was (as I understand his argument) prepared to accept for present purposes that even if, as in the present cases, the qualification of safety is not used, there would be an implied limitation to nominate a safe berth or place in the sense of berth or place to which the vessel could proceed without such delay as would defeat the commercial purpose. For my part I should wish to reserve this question, which does not arise for solution in the present case, as I do not feel that it is wholly covered by authority.

In my judgment it is impossible to derive from these cases any support for the proposition that the charterer is not entitled on a charterparty in the present form to nominate a loading port which is "strike-bound" as defined previously [see p. 447, letter G, ante] or is bound to make a fresh nomination when the originally nominated port becomes "strike-bound". I further consider that strong support for the contrary view is to be found in *Dobell & Co. v. Green & Co.* (42) (the argument in 5 Com. Cas. 161 showing that the alternative port point was argued). The facts of that case may be summarised as follows:—On Jan. 14, 1898, the vessel was chartered to load a cargo of South Wales coal from Cardiff for delivery at Iquique. By the charter the vessel was to proceed to such loading berth as the freighters may name and there load a cargo of steam coal as ordered by the charterers which they "bind themselves to ship (except

(39) [1891] 2 Q.B. 647.

(40) [1894] 1 Q.B. at p. 185.

(41) 11th Edn., p. 137, note (h); 16th Edn., p. 142, note (h).

(42) [1900] 1 Q.B. 526.

A in the event . . . of strike of shippers' pitmen): the vessel to be loaded as customary but subject in all respects to the colliery guarantee in . . . colliery working days . . .". On Feb. 3 the charterers purchased two cargoes, one intended for the vessel in question, from Hoods Colliery. On Apr. 6 the South Wales coal strike began lasting till Sept. 1. On Apr. 26 the charterers obtained from Hoods Colliery the usual colliery guarantee: this was rejected by the ship's agents who

B demanded a colliery guarantee from, and the nomination of, a colliery which was not on strike. The charterers refused to give way and the vessel, after proceeding to Cardiff, remained there throughout the strike when she loaded without undue delay. The argument advanced on behalf of the ship based on the judgment of BOWEN, L.J., in *Tharsis v. Morel* (43) was rejected. A. L. SMITH, L.J., says (44):

C " . . . where can be found in the charter any term to the effect that an order must be given to load the coal from a colliery which is not on strike? As I have already pointed out, the charterparty expressly provides that any loss from a strike is to fall upon the shipowners. I can find nothing in the charter which imports any such limitation of the charterers' right to select the colliery from which the coal is to be shipped as is contended for by the plaintiffs."

D COLLINS, L.J., says (45):

"It seems to me that by the terms of the charterparty, as between these two business firms, the risk of any difficulty arising from a strike was deliberately put upon the shipowners, and, that being so, that the very case contemplated by the exception as to strikes has arisen."

E (I have already referred to the passage from his judgment referring to "the uncertainty of the duration of strikes".)

If reinforcement for the view that the charterer's choice is unfettered is needed, it is to be found in the judgment of PARKER, L.J., in *Agrimpex Hungarian Trading Co. for Agricultural Products v. Sociedad Financiera de Bienes Raices S.A.* (46) where he says:

F "Having by the contract obtained the right to exercise different options, it seems to me that they [the charterers] can choose which to exercise regardless of how it may affect the owners. Otherwise one would be introducing a qualification into the exercise of what is by the contract an absolute right."

In my judgment, having regard to the authorities and to the express provision

G in cl. 31 dealing with delay by strikes, it is quite impossible to imply into these charterparties any such limitation on the charterers' rights as is contended for by the shipowners or to impose an obligation on the charterers to make a fresh nomination when the port originally nominated becomes strike-bound. From this point of view it is immaterial whether on the facts the charterer is or is not protected by the exceptions clause. I am reinforced in this view I have

H formed by the observations of DIPLOCK, J. (admittedly obiter though made after hearing full argument), in *South African Despatch Line v. Panamanian S.S. Niki (Owners)* (47), though part of his reasoning may not apply to the particular charterparties in these cases.

On this branch of the case no separate argument was addressed to me in support of the alleged warranty. It is sufficient for me to say that in my judgment this

I contention equally fails for substantially the same reasons. Further, the nomination when made was either good or bad. If good, no warranty is required; if bad, the shipowner's remedy lies elsewhere.

For completeness I should add that, though there was some evidence that the Ministry of Food might have been in some temporary difficulty in undertaking

(43) [1891] 2 Q.B. at p. 652.

(44) [1900] 1 Q.B. at p. 532.

(45) [1900] 1 Q.B. at p. 533.

(46) [1958] 2 All E.R. at p. 701; [1958] 2 Q.B. at p. 405.

(47) [1958] 3 All E.R. at p. 596; [1959] 1 Q.B. at p. 253.

the dollar commitments which would be involved in purchasing grain in the United States, there was evidence, which was not seriously challenged, that supplies were available in U.S. ports and could have been shipped without undue delay. A

I now turn to the second main branch of the argument in these cases which poses the question whether, accepting that Vancouver was and remained a properly nominated loading port, the charterers can bring themselves within the exceptions clause? This question primarily involves (1) the proper construction of the particular clause, and (2) the application of the clause so construed to the particular facts. B

On the question of construction it must first be observed that the clause in question is drawn in particularly wide terms—wider, I think, than in any corresponding clause in any of the many cases to which I have been referred. In the first place it deals not only with delay in loading the cargo or the intended cargo but also with delay in the supply or bringing down of the cargo. In *Pinch & Simpson v. Harrison, Whitfield & Co.* (48) DENNING, J., in commenting on a somewhat less extensive clause which included the phrase “provision of cargo”, says: C

“It seems to me that these words ‘provision of cargo’ are expressly put in to deal with the situation which has arisen in some cases whereby the word ‘loading’ has sometimes been construed as applying only to the bare operation of loading from the wharf or quay on to the ship. The words ‘provision of cargo’ were probably taken from LORD DUNEDIN’s judgment in the case of the *Arden S.S. Co., Ltd. v. Mathwin & Son* (49) and were put in to expand the scope given to the word ‘loading’.” D

Whether this is a legitimate method of approach, it undoubtedly emphasises what may be said to be a truism that the court is primarily concerned with the particular words in the charterparty before it and has to exercise caution in drawing inferences or principles from decisions on other types of clause. Secondly, the enumerated causes of delay are extremely varied and exhaustive. Thirdly, the concluding words “or any other hindrance of whatsoever nature beyond the charterers’ control” are not limited to causes ejusdem generis with the specified causes and must be given their literal meaning: see *Larsen v. Sylvester & Co.* (50). Fourthly, this clause, though expressed to be a clause which cuts out from the lay or working days the time during which the delays operate, is properly to be regarded as a qualification on the charterers’ absolute obligation to have the cargo or sufficient cargo ready at the loading port. See per LORD SUMNER in *Bunge Y Born Co. v. H. A. Brightman & Co.* (51), and also per LORD DUNEDIN (52). Fifthly, there is in my judgment, if I may respectfully say so, great force in the observation of FLETCHER MOULTON, L.J., in *Leonis S.S. Co., Ltd. v. Joseph Rank, Ltd.* (No. 2) (53) where he says: E

“We have had a very able argument from [counsel for the shipowners] in which he tried to make very refined distinctions as to the real scope of the several words used in the clause. In my opinion this is a business document, drawn up by business men to be used in a business sense, and there is no room for those very fine distinctions. We have to look at the question from the point of view of business men and ask: Was this a strike which stopped the cargo being delivered to the steamer?” F

See, too, *Larsen v. Sylvester* (50). Finally, it is well to bear in mind the essentially practical approach of LORD DUNEDIN in *Leyland Shipping Co. v. Norwich Union Fire Insurance Society* (54) in reference to the proper application of the *causa proxima* rule in policies of marine insurance, where he says: G

(48) (1948), 81 Lloyd’s Rep. at p. 273.

(51) [1925] A.C. at pp. 816, 817.

(53) (1908), 13 Com. Cas. at p. 297.

(49) 1912 S.C. 211. (50) [1908] A.C. 295.

(52) [1925] A.C. at p. 807.

(54) [1918] A.C. 350 at p. 362. H

A "My Lords, we have had a large citation of authority in this case, and much discussion on what is the true meaning of *causa proxima*. Yet I think the case turns on a pure question of fact to be determined by common-sense principles. What was the cause of the loss of the ship? I do not think that the ordinary man would have any difficulty in answering that she was lost because she was torpedoed."

B On the facts as I have so far found them, I have little doubt that the ordinary man would without hesitation say that the delay in bringing down the cargo or intended cargo and the loading of it on to these ships was caused by the strike which broke out on Feb. 17 and continued until May 7. I do not believe that the ordinary man, if he had reached the conclusion which I have reached that the policy decision of the Canadian Wheat Board to use the small quantity of wheat available for loading liners rather than tramps was a reasonable policy taken in the emergency created by the strike, would have had any hesitation in saying that looking at it from a "business point of view" or "on common-sense lines" it would be absurd to differentiate between the strike and the emergency action taken in view of the strike. Unless I am concluded by authority to the contrary (which I do not believe I am), I should come to the same conclusion and hold that on each of the cases with which I am concerned the cause of the delay was the strike.

C The first answer in logical order (though not in order of presentation) made by counsel for the shipowners was that by a well-settled rule of construction exceptions clauses in a charterparty should not be construed to apply to a state of facts which was in existence when the contract was made. In other words, the specified event in order to operate as an exception must be exceptional or abnormal and not one which was bound to be operative. The earliest case in which this doctrine was adumbrated appears to be *France, Fenwick & Co., Ltd. v. Philip Spackman & Sons* (55) in which BAILLACHE, J., obiter says:

E "If I had not found that the circumstances at the time of the discharge were exceptional, I should have acceded to [counsel for the shipowners'] argument that to bring themselves within the exceptions clause it is not enough for the defendants to say that they were prevented but that they must say that they were prevented by some cause which was exceptional. If a person contracts to discharge in thirty-six hours unless prevented by some cause beyond his control, and if the cause beyond his control always would prevent the discharge within that time then, in my opinion, it is not an exception at all, and, if in such a case he fails to discharge within the thirty-six hours, he is not within the exceptions clause."

G See also SCRUTTON ON CHARTERPARTIES (56) commenting on the phrase "other causes beyond charterers' control":

H "In any case the 'cause' must be something abnormal. If a charterer undertakes to do a thing (e.g. discharge in so many hours) which in all circumstances is impossible for him, the cause or causes which prevent his doing it cannot be within such a clause."

I Next, in *Ciampa v. British India Steam Navigation Co., Ltd.* (57) ROWLATT, J., acceded to Mr. Roche, K.C.'s argument based on *France, Fenwick & Co., Ltd. v. Philip Spackman & Sons* (58) and held that the ship, which after calling at a plague-contaminated port had loaded lemons at Naples for London, could not, when the lemons were damaged at Marseilles by a process of "dératisation" under the ordinary municipal law of France, rely on the exception of "restraint of princes". ROWLATT, J., says:

(55) (1912), 18 Com. Cas. 52, see at p. 57.

(57) [1915] 2 K.B. 774 at p. 779.

(56) 11th Edn., p. 240, note (b).

(58) (1912), 18 Com. Cas. 52.

"I am not deciding that the application of the ordinary law of a country may not in some circumstances constitute a 'restraint of princes', but I think the facts which bring that law into operation must be facts which have supervened after the ship has started on the voyage in question. When facts exist which show conclusively that the ship was inevitably doomed before the commencement of the voyage to become subject to a restraint, I do not think that there is a 'restraint of princes'."

In *Naamlooze Venootschap A.C. Lensens Stoomvaart Maatschappij v. Muller & Co. (London), Ltd.* (59), ROCHE, J., while accepting the correctness of BAILHACHE, J.'s dictum in the *France, Fenwick* case (60), refused to apply it to the facts of that case (which involved a delay in discharge through labour trouble over night work) on the ground that abstention from night work, at the time when the charterparty was entered into and at the time when the discharge began, was still quite an exceptional matter and not an established and ordinary matter. There is also rather an obscure reference to the same point in *Mitsubishi Shoji Kaisha, Ltd. v. S. Soskin & Co., Ltd.* (61).

The next appearance of the doctrine seems to be in the judgment of LORD HUNTER in *Taylor v. John Lewis, Ltd.* (62) in the Inner House of the Court of Session where the learned judge applied the reasoning of ROWLATT, J., in the *Ciampa* case (63) saying (64):

"In the present case both parties knew at the time when the contract was entered into that a permit to discharge at Aberdeen had to be obtained, and therefore I do not think that the delay occasioned in procuring a permit constituted 'a restraint of princes' within the meaning of the exceptions clause."

(The other four members of the court decided the case on other grounds.) In *Safadi v. Western Assurance Co.* (65) ROCHE, J., in construing the clause in a policy, "Trans-shipment, if any . . . arising from circumstances beyond the control of the assured", says:

"There is a good deal of doctrine and authority to the effect that you cannot apply language such as 'cause or circumstances and matters beyond the control of the assured' to excuse performance when those causes and circumstances and matters are represented by causes and circumstances and matters in existence and known to be in existence by the person relying upon them at the time he makes the contract from the performance of which he seeks to be excused . . . An illustration of the principle to which I am referring (it is only an illustration) is afforded by the decision of ROWLATT, J., in the case of *Ciampa* (63)."

Finally, in *Steamship "Induna" Co., Ltd. v. British Phosphate Comrs.* (66) SELLERS, J., after reference to the decisions of BAILHACHE, J., in *France, Fenwick & Co., Ltd. v. Philip Spackman & Sons* (67) and ROWLATT, J., in the *Ciampa* case (63) expressed the doubt "whether either learned judge was intending to lay down any general principle" and continued as follows (66):

"In the present charterparty the parties have made it clear that lay days are not to count where delay in discharging arises by reason of a cause beyond the charterers' control . . . The intention of the parties is clearly expressed. If both parties or one of the parties knew at the time of making the contract of existing circumstances which would or might occasion delay, other considerations would arise, but where neither party knew, as here, I

(59) (1921), 7 Lloyd's Rep. 248 at p. 249.

(60) (1912), 18 Com. Cas. 52.

(61) (1925), 23 Lloyd's Rep. 198. (62) 1927 S.C. 891. (63) [1915] 2 K.B. 774.

(64) 1927 S.C. at p. 900. (65) (1933), 46 Lloyd's Rep. 140 at p. 143.

(66) [1949] 1 All E.R. 522, at pp. 524, 525; [1949] 2 K.B. 430 at pp. 436, 437.

(67) (1912), 18 Com. Cas. 52.

- A see no reason why effect should not be given to that which they have made clear by their contract. If parties are contracting on the basis of a state of affairs known to them, or which it can be shown they were prepared to accept, then an exception relating to something outside their control would, no doubt, be construed to relate to some circumstances or event not so known or something outside the basis of their bargain, that is something exceptional or abnormal in comparison with the contemplated state of affairs."
- B

Having considered these authorities I have come to the conclusion that there is no settled rule of construction that a specific exception, such as strikes or war, cannot be relied on if the strike or war was operative at the time when the contract was made or the ship ordered to the affected port. Further, I find difficulty in seeing how knowledge of both or either parties can be material unless possibly on the ground that all contracts must be construed in the light of surrounding circumstances. At the most the authorities referred to decide that for a particular state of facts to amount to "restraint of princes" or "any cause beyond the charterer's control", they must be exceptional or abnormal. I do not regard these authorities as entitling me or compelling me to hold that in cl. 31 the word "strikes" must be read as "strikes coming into existence after the date of the charterparty". To do so would be to write into the charterparty words which are not there and which are not necessarily to be implied. Furthermore, in view of the peculiar nature of strikes, to which reference has been made in the cases cited earlier, it cannot be said in many cases, or indeed in any case, that the ship was doomed or that delay was inevitable. In addition, there are a great many cases, of which *Dobell & Co. v. Green & Co.* (68) (strike after charterparty but before nomination), *Leonis S.S. Co., Ltd. v. Joseph Rank, Ltd.* (No. 2) (69) (strike before charter) and *Matheos (Owners) v. Louis Dreyfus & Co.* (70) (onset of ice reasonably to be anticipated) where, though the point was not taken, the decision was contrary to the application of the doctrine. Furthermore, I can see no justification at all for applying the doctrine to the Queen City in which case the charterparty was entered into and the nomination made before the strike began or for extending the doctrine in the case of the Riverton and Cape Rodney (where the charterparties were entered into before the strike) merely because the nomination was made after the strike began. In the case of the Agostino Bertani, whose charterparty was made after the strike, it seems to me to be quite inconceivable that the parties would have intended and unreasonable that they should be deemed to have intended to exclude the existing strike which might have ended at any moment and did in fact end within nine days of the vessel's arrival; and in the case of the Moderator there is a special clause restricting the right to send to strike-bound ports which is inconsistent with the application of the doctrine.

I, accordingly, reject this first argument raised on behalf of the shipowners. The second main argument advanced on behalf of the ship was on the following lines, viz:—

(a) that charterers are under an absolute obligation (i) to have sufficient cargo alongside the ship to start loading when she gives her notice of readiness and to have made satisfactory arrangements for bringing the balance of the cargo down, and (ii) to load such cargo within the lay days subject to any relevant exceptions in the exceptions clause;

(b) that cl. 31 does not qualify the absolute obligation to provide cargo but merely takes out from the lay-time any time by which the provision of cargo is delayed or the actual loading is delayed;

(c) that even if cl. 31 is to be regarded as qualifying the obligation to provide cargo, then inasmuch as the charterers elected to fulfil their obligation to provide cargo by contracting with the Canadian Wheat Board, who then became their

(68) [1900] 1 Q.B. 526.

(69) (1908), 13 Com. Cas. 295.

(70) [1925] A.C. 654, see at p. 663.

agents or contractors, the charterers must show that they or the board were delayed by excepted causes which they cannot do as the delay was in fact caused by the action of the board as agent for the charterers in giving preference to liners and withholding wheat for full cargoes from tramps;

(d) that, if the action taken in pursuance of the policy decision of the board is to be considered as action taken by the board in its official or executive capacity and not as agent or contractor for the charterers, the charterers cannot rely on this policy decision as they took no steps to protest against it or to have it reversed;

(e) further or alternatively, that inasmuch as it was proved that there was at all times sufficient wheat in bulk in the non-strike-bound elevators to load any particular ship or (I think) all the ships with which these five actions are concerned, the charterers cannot bring themselves within the clause.

I have already held that on its true construction cl. 31 does qualify the obligation to furnish cargo and to load the cargo to the extent of the proved delay by exempted causes. Furthermore, on the facts which I have set out above as to the constitution of the board and the action taken by the board through Mr. Smith (71), I consider and so hold that it would be artificial in the extreme and wrong to hold that the policy decision of the board was an act done by the board in its capacity as agent for the charterers. I hold that it was an executive action taken by the board on behalf of Her Majesty in right of Canada and that accordingly the delay in bringing cargo down and in loading was from the point of view of the charterers delay caused by "force majeure" or "other hindrance of whatsoever nature beyond the charterers' control". I further hold that this action being reasonable, it would have been unreasonable for the charterers to have attempted to obtain its reversal or modification. It was faintly argued that the decision of the Ministry of Food not to protest against the preference being given to liners was dictated by the financial consideration that it would cost the Ministry more in dead freight and/or detention if the liners were not so far as possible cleared. It is sufficient to say, having considered the booking notes, that there was no evidence in support of this suggestion and I reject it.

The two cases mainly relied on by counsel for the shipowners on this branch of his argument, more particularly on head (e), were *Re Richardsons & M. Samuel & Co.* (72) and *Central Argentine Ry., Ltd. v. Marwood* (73). In *Re Richardsons & M. Samuel & Co.* (72) the ship was chartered to proceed to Batoum and there load case oil from a named factory owned by Bnito at a specified rate per day. The charter excepted (inter alia) "strikes, lock-outs, accidents to railway". The vessel was ready in berth to receive her cargo but owing to an accident on the railway by which oil was brought to Batoum, there was on that date no substantial quantity of oil at Bnito's factory or at Batoum. On Apr. 14 oil began to flow and by Apr. 16 there was sufficient oil at Bnito's factory for the work of filling the cases to be resumed on Apr. 17. Bnito had, however, for their own purposes discharged the men engaged in filling cases when the oil flow ceased. After the oil started to flow again delay took place in filling the cases with oil and the vessel was delayed. Furthermore, two vessels which had arrived earlier were loaded in front of her. The Court of Appeal held that the delay from Apr. 17 onward was not (i) caused by accident on railway as there was sufficient oil at Bnito on Apr. 17 and (ii) that the shortage of men for filling the cases was not within the expression "other causes beyond the charterers' control" as the phrase had to be construed as ejusdem generis with "strikes and lock-outs". As it seems to me, it is only on the latter point that case decides any point of principle.

In *Central Argentine Ry., Ltd. v. Marwood* (73) the vessel was chartered to carry coals to Villa Constitucion. The charter provided as follows:

(71) The board's manager at Vancouver.

(72) [1898] 1 Q.B. 261.

(73) [1915] A.C. 981.

- A "The cargo to be taken from alongside by consignees at port of discharge . . . at the average rate of two hundred tons per day . . . In case of strikes . . . or any other causes . . . beyond the control of the consignees which prevents or delays the discharging, such time is not to count . . ."

- B On the vessel's arrival all the berths were occupied and there was at the time a strike of stokers at the port. For the first fourteen days after the ship's arrival no discharging was done at all; for the next nineteen days there was a partial resumption of work and there were discharged from other ships 6,000 tons of coal equal to six and a half days' normal work. The charterers admitted that time started to count from the time when full working was resumed; the shipowners, however, claimed that they were entitled to count against the charterers the six and a half days above referred to which the charterers claimed were lost by the strike.
- C In the House of Lords the shipowners succeeded, and though the reasoning of their Lordships does not appear to me at least to be identical, I consider that the majority view was that inasmuch as the six and a half days would have been lost by reason of the occupation of the berths by other ships, whether there had been a strike or not, it could not be said that these six and a half days were time lost by the strike. It is also to be observed that in this case, as in
- D *Re Richardson & M. Samuel & Co.* (74) the concluding exception was "or any other causes or accidents beyond the control of [charterers]". It seems to me that the decision in *Central Argentine Ry., Ltd. v. Marwood* (75) turned almost wholly on the proper appreciation of the facts as set out in a rather confused statement of facts and that no general principle can be deduced from it except that the mere existence of a strike is not sufficient; it must have some causative effect on the
- E operations of the particular ship concerned.

- I cannot find in either of these authorities any support for the proposition that because work was going on in the port of Vancouver throughout the strike, the charterers cannot rely on or bring themselves within the exceptions clause. Furthermore, it seems to me to be contrary to common sense. Suppose the
- F charterer having ten ships on charter for loading at a particular port at about the same time the port facilities being such that with cargoes available ten ships could be loaded at or about the same time and without undue delay, and suppose the charterer makes in advance proper arrangements to have cargo brought down sufficient to load the ten ships in due time, but owing to exempted causes (e.g., accident on railways) only cargo sufficient for one ship can be made available.
- G Can it be said that each ship could maintain that, as the charterers had sufficient cargo down to load the particular ship, the charterers cannot bring themselves within an exception clause such as this? I venture to think not, though counsel for the shipowners in the present cases frankly and logically submitted that the answer should be in the affirmative.

- H In my judgment the answer to this apparent difficulty is to be found in the width of the exception clause in the present cases, and particularly the words "or any other hindrance of whatsoever nature beyond the charterers' control" and in the construction which the courts have placed on the words "hindering" or "hindrance".

- I In *Tennants (Lancashire), Ltd. v. C. S. Wilson & Co., Ltd.* (76) sellers who were importers of magnesium chloride agreed to sell to buyers their requirements of magnesium chloride over the year 1914 estimated at 400 to 600 tons. The contract provided that deliveries

"may be suspended pending any contingencies beyond the control of the sellers . . . (such as . . . war . . .) causing a short supply of . . . raw material, or manufactured produce, or otherwise preventing or hindering the manufacture or delivery of the article."

The greater part of the supplies of magnesium chloride came from Germany. A
On Aug. 4, 1914, on the outbreak of war, the sellers had seventeen running contracts and the German source of supply was cut off. The sellers, though able at an increased price to obtain sufficient magnesium chloride to satisfy the particular buyers' contracts if they disregarded their other contracts and the normal requirements of their business, suspended delivery to these buyers. It was held in the House of Lords that the suspension was justified. EARL LOREBURN B
said (77) that by hindering delivery was meant interposing obstacles which it would be really difficult to overcome and that

"To place a merchant in the position of being unable to deliver unless he dislocates his business and breaks his other contracts in order to fulfil one surely hinders delivery." C

LORD DUNEDIN says (78):

"They [the buyers] say, however, that if [the sellers] had supplied them in preference to all others there would have been sufficient for them. It is obvious that if this is a good answer each of the other contracting parties could have made it in turn, damages would have been due to all, and the clause would be no protection whatever." D

I was usefully referred to *Crawford & Rowat v. Wilson, Sons & Co.* (79) in which similar principles were applied to a charterparty case. The facts are complicated. It is sufficient to say that the ship in question was chartered to deliver coal at R. "all unavoidable accidents or hindrances in . . . discharging cargo excepted". When the ship arrived at R. a rebellion was in progress and the ship, together with a number of other ships chartered by the defendants, was delayed. It was argued on behalf of the ship that as they had succeeded in discharging 6,000 tons of cargo from other ships they could have discharged the ship in question. This argument was rejected. LORD ESHER, M.R., affirming the judgment of MATHEW, J., states the ruling principle as follows (79): E

"In my opinion, if, by something happening at the port of discharge which the defendants could not possibly avoid, they could not take delivery without doing something which it was wholly unreasonable that they should be called upon to do, they would be hindered, although by doing the unreasonable thing they might possibly have taken delivery." F

This principle was applied by SCRUTTON, L.J., in *Scheepvaart Maatschappij Gylsen v. North African Coaling Co.* (80) in a sale of goods case; and in *Phosphate Mining Co. v. Rankin, Gilmour & Co.* (81). BAILHACHE, J., paraphrased LORD ESHER's judgment to fit the case before him in the words G

"if owing to an excepted peril the defendants could not provide a steamer without doing something which it was wholly unreasonable they should be called upon to do, they would be prevented although by doing the unreasonable thing they might possibly have provided the steamer", H

and described LORD ESHER's principle as "the test which is now always applied by the court to the problem presented by such a case as this." I

Applying that test to the facts of these cases, the strike having occurred without the fault of the charterers or the Canadian Wheat Board, and the policy decision taken by the board having been found to be reasonable, there was in the case of each ship delay in bringing down the cargo and in loading the cargo by a hindrance outside their control notwithstanding that possibly the charterers

(77) [1917] A.C. at p. 510.

(78) [1917] A.C. at p. 515.

(79) (1896), 1 Com. Cas. 277 at p. 280. (80) (1916), 85 L.J.K.B. 1386 at p. 1389.

(81) (1916), 21 Com. Cas. 248 at p. 251.

- A by taking the unreasonable course of persuading the board to reverse their reasonable policy or, if the board are to be regarded as the charterers' agent, the board by reversing its reasonable policy, might have succeeded in loading all the wheat which was in fact loaded from the non-strike-bound elevators into the five vessels in question. As stated above, 63,435 tons of wheat in bulk were loaded from the two non-strike-bound elevators. If all this wheat had been loaded into tramps as full cargoes, seven tramps would have been released. Assuming an average parcel of 2,000 tons, the policy adopted released thirty-two liners.

- The conclusions that I have reached on this branch of the case are, accordingly, as follows: (1) that the charterers are protected by the exception of strikes; (2) that, whether or not the board is to be regarded as the charterers' agent, the charterers are protected by the exception of "any other hindrance of whatsoever nature beyond the charterers' control"; (3) that in fact the board was not the agent of the charterers in making and acting on the policy decision and that that policy being reasonable it would have been unreasonable for the charterers to attempt to have that decision modified and that they are protected by the exception of "force majeure" and the exception of "any other hindrance of whatsoever nature beyond the charterers' control".
- D I next turn to the question of the obligation to ship alternative cargoes if (contrary to the shipowners' submission) the charterers are entitled to the protection of cl. 31 as regards the loading of wheat in bulk.

- This question involves first, difficult questions of law, viz., (1) whether this court is bound by the decision of the Court of Appeal in *Brightman & Co. v. Bunge Y Born* (82) and (2) on whom does the onus lie of proving that alternative cargoes could have been shipped and within what time, and, secondly, the examination of the evidence as to the availability of alternative cargoes.

- E It must be remembered that in the case of the *Queen City* and the *Cape Rodney*, the options were limited to one third barley and one third flour in bags; in the case of the *Riverton* the options were one third barley and a full cargo of flour in bags; in the case of the *Agostino Bertani* and the *Moderator* there were no alternative cargo options. In no case was there an option to load wheat in bags beyond what was required for safe stowage.

- F In *Brightman & Co. v. Bunge Y Born* (82) the appeal arose under the Centrecon form of charter. The charterers undertook to load a "full and complete cargo of wheat and/or maize and/or rye" at a certain specified rate with an exception that

- G "If the cargo cannot be loaded by reason of riots, civil commotions, or a strike or lock-out of any class of workmen essential to the loading of the cargo or by reason of obstruction or stoppages beyond the control of the charterers on the railways or in the docks or other loading places . . . time for loading . . . shall not count during the continuance of such causes."

- H The charterers intended to load a cargo of wheat and had made arrangements to have it sent down from the interior by railway. A "go slow" movement on the railway delayed the flow of cargo and on the last day of the lay days a prohibition of export of wheat came into force. The Court of Appeal held (1) that the fact that the charterers had intended and made arrangements to load wheat did not amount to an election so as to convert the charter into a wheat charter; (2) that the charterers could not rely on delay in bringing the cargo down to the port by reason of a "go slow" movement on the railway bringing the cargo down, per *BANKES, L.J.*, on the ground that it was not an obstruction and per *SCRUTTON and ATKIN, L.JJ.*, on the grounds that the exception of "obstruction" was limited to an obstruction preventing the loading of the cargo as distinguished from an obstruction preventing the cargo being brought down, and, further, that the phrase "obstruction on the railways" must be read as referring to the

railways in the port directly connected with the process of loading; and (3) that though, when the prohibition of export of wheat came into force, the charterers became under an obligation to load maize or rye, they were not bound to load it immediately but were entitled to a reasonable time to see whether the prohibition would be lifted and to make arrangements for loading the substituted cargo and to that extent they were excused from paying demurrage. A

On *Brightman's* case (83) two points should be observed at the outset, viz., (1) that the exceptions clause there (corresponding to the present cl. 31) was limited to events preventing loading *stricto sensu*; and (2) that the expression "the cargo" is twice used in the clause and no reference is made to the "intended cargo". B

The clause with which I am concerned differs from that clause in three significant respects (84): (1) that it extends the ambit of the exceptions to the process of the supply or bringing . . . to the port of loading or alongside of the cargo or the intended cargo or any part thereof; (2) that it expressly deals with both the cargo and the intended cargo; and (3) that it deals with delay, not prevention. It may, of course, be said that the words "the intended cargo" were added merely to cover the extension of the exceptions to the process of supply and bringing down; but in that case the words "the cargo" would not be necessary (see per DIPLOCK, J., in *South African Despatch Line v. Panamanian S.S. Niki (Owners)* (85) where an attempt to distinguish *Brightman's* case (83) failed). But here, as I believe for the first time, the court has to construe a clause in which both expressions "the cargo" and "intended cargo" are used. In my judgment the clause in the present case covers two distinct events (subject to what is said below as to the effect of expressing the alternative cargo as an option) (1) delay affecting all kinds of contractual cargo and (2) delay affecting the intended cargo. The effect is in my judgment that, if either of these events occurs, time is not to count during its continuance. C D E

Furthermore, as it seems to me, there is a vital distinction between prevention by a prohibition of export, which for the time being at least involves a permanent and complete ban on loading, and delay by a strike which may or may not last long. Two further examples may be given (i) ship loading grain in bulk, bad weather sets in; assuming that there is an alternative option to ship a cargo not affected by rain: must the charterer change over as soon as he can? (ii) ship loading cargo goods by crane; crane breaks down but is repairable in ten days: must charterer, having the option, change over to loading bulk grain by elevator? F G

There is in my judgment a further valid point of distinction between the two cases. In *Brightman's* case (83) (as appears from the charterparty in the House of Lords record) the cargo obligations were expressed as follows: cl. 2:

"steamer . . . to proceed as ordered by the charterers . . . to the under-mentioned ports . . . and there receive from them a full and complete cargo of wheat and/or maize and/or rye in bags and/or in bulk." H

By cl. 5 the freight provided for was the same whatever the nature or composition of the cargo, though it varied with the place of loading and discharge. By cl. 6 (other cargo) it was provided that

"the charterers shall have the option of supplying other lawful merchandise . . . in which case freight to be paid on steamer deadweight capacity for wheat in bags." I

In the present case the provisions as to alternative cargoes or part cargoes are expressly stated to be options to be exercised by the charterer and the exercise

(83) [1924] 2 K.B. 619.

(84) The terms of the exceptions clause of the charterparties are at p. 440, letter I, to p. 441, letter A, ante.

(85) [1958] 3 All E.R. at p. 594; [1959] 1 Q.B. at p. 250.

- A of each of these options attracts an additional freight. For instance, the Riverton loaded 8,600 tons of wheat in bulk at 77s. 6d. per ton. There is no evidence either way to show whether if the flour option had been exercised, she could have stowed 8,600 tons of flour in bags. But if she could, this would involve an additional freight liability of some £4,000. I find great difficulty in believing that by any process of implication it would be right or proper to
- B impose this additional burden on a charterer who had decided in his own mind to ship and had made arrangements to ship wheat in bulk.

In my judgment for the reasons stated the ratio decidendi of *Brightman's* case (86) does not apply to the present cases, and not being bound by authority, I have reached the conclusion that once it is proved or admitted in each case (1) that the charterer did in fact intend to load wheat in bulk (as was admitted before me), and (2) that the supply or bringing to the port of loading or alongside the vessel or the loading of that intended cargo was delayed by the specific exceptions (as I have found), the clause operates and must be given its literal effect and that no obligation to exercise any of the alternative cargoes options is imposed on the charterers.

- C
- D If, however, I be wrong in this conclusion, the next question is on whom does the onus of proof lie to show that alternative cargoes could have been shipped and within what time. This problem is but lightly touched on in *Brightman's* case (86). ATKIN, L.J., alone uses words (87) which suggest that in his view the onus lies on the charterer to show what amount of time he requires to change over. A somewhat similar matter was discussed in *Matheos (Owners) v. Louis Dreyfus & Co.* (88) where LORD SUMNER says:

- E "It has been decided that, when a prima facie case of excepted perils is met by an allegation of negligence: *The Glendarrock* (89) or unseaworthiness: *The Northumbria* (90), the burden of proof shifts to the party interested in establishing this allegation affirmatively, and I do not see why the same rule should not apply to an allegation of the existence of a practicable
- F alternative mode of loading."

LORD DUNEDIN, however, as I read his speech, deals with the problem rather differently where he says (91):

- G "But further, I think that once the proper and usual mode of loading was negatived as rendered impossible by ice, it really fell on the owners to get from the umpire a finding of commercial possibility; seeing that that possibility could only rest on a novel and, so far as we can see, hitherto untried method [i.e. loading by manual labour] . . . It is not as if the alternative method to the usual method, which ex hypothesi is found impracticable, was a usual one. Given impossibility by crane, I do not doubt that it would be incumbent on the charterer to prove impossibility by lighter.
- H But this is quite a different thing, unused, untried, and problematical. In such a case it seems to me the onus shifts, and the owners on whom the shifted onus falls have not discharged it."

- I On the whole, seeing that I am considering this problem on the hypothesis that the charterers have only succeeded for the time being in bringing themselves within the protection of the clause and remained under the burden of fulfilling their original obligation of loading a full and complete cargo, in my judgment the onus would remain on them to show (1) that they required a reasonable time to change over and (2) that if they had changed over, the delay would have been the same.

(86) [1924] 2 K.B. 619.

(87) [1924] 2 K.B. at p. 637.

(88) [1925] A.C. 654, see at p. 666.

(89) [1894] P. 226.

(90) [1906] P. 292.

(91) [1925] A.C. at p. 662.

I now turn to the facts. [In the case of the *Riverton*, where the option was to load a full cargo of flour, HIS LORDSHIP found on the evidence that 9,000 tons of flour, viz., a full cargo, could have been made available at Vancouver thirty days after the placing of the order by the charterers with the Canadian Wheat Board. The loading of flour was done by longshoremen who were not on strike at the material times, and the parties were agreed that it would have taken four weather working days to load 9,000 tons of flour. If HIS LORDSHIP's findings as to the likely duration of the strike at the time when the *Riverton* was ordered to Vancouver on Mar. 22 and when she arrived there on Mar. 25, were accurate (see p. 444, letter I, ante), it would have been unreasonable to require the charterers to arrange to procure a full cargo of flour which at best could not have been made available for a month. On the other hand, if the proper view was that on Mar. 22 the strike was bound to last a long time, the charterers should have started to make alternative arrangements to load a flour cargo at least by that date: see per DIPLOCK, J., in *South African Despatch Line v. Panamanian S.S. Niki (Owners)* (92). In the case of the *Queen City* and the *Cape Rodney* the cargo options were one third barley and one third flour. On the balance of evidence, a parcel of flour equivalent to one third of a full cargo could have been made available at Vancouver within ten or twelve days of the placing of the order. As regarded barley, although one of the non-strike bound elevators had stocks of barley amounting to about 340 tons on Feb. 17, which rose to about 11,000 tons by May 8, the evidence was that this barley had been sold elsewhere; accordingly, no barley was in fact available for the charterers and any request by them to the board for a part cargo of barley would not have been complied with. Further, in accordance with the board's policy during the strike (see p. 443, letter H, ante), the Canadian government would not have permitted the loading of parcel shipments of wheat to complete tramps which had tendered for full cargoes of wheat but which had succeeded in getting part cargoes of barley or flour. HIS LORDSHIP also found that it would not have been possible for the charterers to ship at Vancouver wheat in bulk which was produced in the areas of British Columbia lying outside the designated areas. HIS LORDSHIP continued:] Before considering the case of the *Moderator*, which in some respects stands by itself, it is convenient that I should deal with two independent points on the calculation of demurrage and despatch common to all the four other cases which turn on (a) the meaning of "working" day and (b) the treatment of Saturdays.

As to (a), so far as this court is concerned it is agreed that by reason of the decision of the Court of Appeal in *Alvion Steamship Corp'n. of Panama v. Galban Lobo Trading Co. S.A. of Havana* (93) (to which I shall refer as the *Alvion* case) affirming a decision of my own, a "working day" is a length of time consisting of a number of hours which, according to the custom of the port, are usually worked at the port of discharge or loading, as the case may be, and the presence of the word "weather" qualifies "working day" so that from the number of hours which would be the ordinary hours of the port is to be deducted the length of time during which weather interferes with the "work". See per LORD GODDARD, C.J. (94). In the *Alvion* case (93) it was found that there was an established custom of the ports at Cardenas and Havana that the normal working periods were eight hours on weekdays other than Saturdays and four hours on Saturdays. On the facts here it is agreed that for Vancouver the normal working hours on weekdays other than Saturdays were eight hours. Accordingly, weekdays other than Saturdays must be taken as periods of eight hours each, from which must be deducted the number of hours, if any, during those working periods during which weather interferes with loading or I think would have

(92) [1958] 3 All E.R. at p. 596; [1959] 1 Q.B. at p. 253.

(93) [1955] 1 All E.R. 457; [1955] 1 Q.B. 430.

(94) [1955] 1 All E.R. at p. 462; [1955] 1 Q.B. at p. 449.

A interfered with loading if loading had been in operation. (See the exception (95) of "rainy days" in cl. 15).

As to (b), the treatment of Saturdays, the position requires more detailed examination. By cl. 15 of the charterparties (or cl. 9 in the case of the Moderator) it was provided that six weather working lay-days (Sundays, holidays and rainy days not to be counted as lay or working days) were to be allowed charterers B for loading.

Next as to the facts: By letters dated Mar. 2 and Apr. 9, 1959, passing between the solicitors for the parties it was agreed after the evidence had been taken at Vancouver that at all material times the normal working hours in the port of Vancouver for grain elevator operators were a five day Monday to Friday, forty C hour week, and for the longshoremen were a five and a half day Monday to Saturday morning inclusive, forty-four hour week, and that the labour of both these classes of employees was essential for the operation of loading grain (scilicet) grain in bulk. For loading flour in bags the elevator men are not required, the work being performed by longshoremen working their normal week of forty-four hours. There was also evidence that elevator men do work on Saturday when required, D being paid overtime or premium pay of one and a half times the normal rate, but that they do not normally work on Saturdays. In fact in the five cases with which I am immediately concerned, no work was done on Saturday. If work had been done on Saturday, then by cl. 37 of the charterparties (96), in the cases other than the Moderator, the overtime would be for the account of the party ordering it. In the case of the Moderator it was provided by cl. 25 as follows: E "Overtime to be paid by the party ordering it, but in any case any overtime services rendered by ship's personnel to be for ship's account". For the ship-owners it was argued first, that ordinarily Saturday is not counted a holiday; see *Dollar & Co. v. Blood Holman & Co.* per McCARDIE, J. (97). Secondly, it was argued on their behalf that on the facts Saturday in Vancouver is "a working F day" and must be counted as such or, alternatively, must be counted as half a day. On the other hand, it was argued on behalf of the charterers that so far as the loading of grain in bulk was concerned, Saturday is not a working day and should not be counted as a whole or part of a day. The relevant authorities to which I was referred were as follows. In *Dollar & Co. v. Holman* (98) McCARDIE, J., on a claim for discharge demurrage at Sharpness under a charter which provided that the vessel should "discharge afloat with despatch according to the custom G at port of discharge but at the rate of not less than 300 tons per working day" found that at Sharpness the usual working day was eight hours but only four hours were worked on Saturday, and held that Saturdays, though in practice only half days, counted as working days, citing in support LORD SUMNER's speech in *Love & Stewart v. Rowtor* (99) where, however, there was an exception of Sundays, general or local holidays. In *Z. Steamship Co., Ltd. v. Amtorg H New York* (100) GODDARD, J., on a charterparty which provided for discharge "at the average rate of 800 tons per weather working day, Sundays, official and local holidays excepted", held obiter that Saturday on which men worked at time and a half rates, was not an official or local holiday.

In addition, reference was made to the *Alvion* case (101) where the umpire had I left to the court the question whether on the true construction of the charter-party and the weight of evidence, the charterers were correct in applying the principle of a day of eight hours and four hours on Saturday to their computation of laytime; but in that case the question I have to consider was not in issue in view of the exception of "Saturday afternoon".

(95) Cf., p. 440, letter F, ante.

(96) See p. 441, letter B, ante.

(97) (1920), 4 Lloyd's Rep. at p. 349.

(98) (1920), 4 Lloyd's Rep. 345.

(99) [1916] 2 A.C. at p. 536.

(100) (1938), 54 T.L.R. 849 at p. 850.

(101) [1955] 1 All E.R. 457; [1955] 1 Q.B. 430.

In my judgment on the facts herè proved and admitted, Saturday does not count either as a whole or half a working day. The issue must be determined with reference to the particular trade involved—in this case the loading of bulk grain from elevators. In that trade for one essential class, viz., the elevator men, Saturday did not form any part of their usual working hours any more than night work, for which time and a half was paid, or Sunday work, for which double time was paid, and the fact that, if required, they did in fact work on Saturday at time and a half rates, did not make Saturday part of their normal working week. I decide this point not by reason of the fact that Saturday is a holiday but on the ground that it is not a day which formed part of the usual working week of forty hours. Had I been of the contrary opinion on this point I should have held that Saturday morning should be counted as half a working day and that if there had been rain for two hours during the working hours of Saturday morning, only a quarter of a weather working day would count. I would reject the contention that, if Saturday counted at all, the working week was a week of six working days consisting of eight hours each on Monday to Friday and four hours on Saturdays. Neither the language used nor any authority cited leads to that result. A B C

I now turn to the case of the Moderator. It will be recalled that this vessel was chartered by the Government of South Africa on Apr. 2, 1953, viz., at a time when the strike, which had started on Feb. 17, was still continuing. She gave notice of readiness on Saturday, June 6 at 11.15 a.m., commenced loading on June 12 and completed loading on June 18. In the case of this vessel the range of loading ports was Vancouver/New Westminster or Victoria B.C., and the cargo to be loaded was a full and complete cargo of wheat, with no alternative cargo option. This charter did not, as did the others, contain the words "whether in berth or not" and it was not contended by the ship that this being a berth charter, time could begin to count before twenty-four hours after she got into berth and gave notice of readiness. This she did at 8.20 a.m. on Friday, June 12. The charterparty did, however, contain two relevant special clauses not present in the other cases, viz.: Clause 26: D E F

"Any time lost to the vessel by bad weather preventing discharge . . . to be calculated on the basis of twenty-four hours at the ratio which the actual time lost bears to the normal working hours of the port";

and cl. 36:

"If the grain elevators at Vancouver or New Westminster or Victoria B.C. are strike-bound when vessel is seven days off Vancouver, this charterparty to be null and void." G

Though in paras. 8 to 11 of the amended points of claim it was alleged that a fresh nomination of a loading port within the range should have been made in view of the fact that the port of Vancouver was congested, it was agreed before me by counsel for the shipowner that he could not claim that the nomination of Vancouver as a loading port was bad or that the vessel should have been switched to Victoria or New Westminster and that paras. 8 to 11 of the amended points of claim should be treated as withdrawn while still (as I understood him) relying on the post-strike congestion as a material fact to be considered on other branches of the case. H

The main point taken on behalf of the ship is to be found in para. 12 of the amended points of claim, which is in the following terms: I

"In further breach of their obligations under the charterparty the defendants had no cargo available for the vessel at any material time prior to June 11 or 12 and did not make any contract for the acquisition of cargo until on or about June 11 or 12, 1953. Further or in the alternative the defendants knew at the time they ordered the vessel to Vancouver and at all material times thereafter that they had no cargo and no contract for the

- A acquisition thereof and no reasonable prospects of obtaining the necessary cargo at Vancouver within a reasonable time."

In effect the ship claimed that by reason of the charterers' failure to have cargo available on the ship's arrival, they prevented the ship from getting into berth at once. They relied in particular on the two decisions of *Ardan S.S. Co. v. Andrew Weir & Co.* (102) and *Agrimex Hungarian Trading Co. for Agricultural Products v. Sociedad Financiera de Bienes Raices S.A.* (to which I shall refer as *The Aello* case (103)). The charterers by way of defence relied on cl. 18, which is in identical terms to cl. 31 of the charterparty in the other cases, and on the facts which I have already dealt with in relation to the purchase of cargo from and control of cargo by the Canadian Wheat Board and the policy decision of the board as to the use of the available wheat for the loading of parcels into liners and the postponement of tramp vessels tendering for full cargoes of wheat until the cessation of the strike which resulted in the congestion of the port with tramp vessels waiting to load wheat in bulk in the order of their arrival. [His LORDSHIP then referred to the facts regarding the provision of cargo and the nomination of a loading berth, and found that the master agreement of June 2, 1952, made on behalf of the charterers with the Canadian Wheat Board, constituted a reasonable arrangement for making cargo available; that no wheat in bulk was available from any source other than the board, and that the board controlled and nominated the loading berths. His LORDSHIP also found that the charterers' application to the board's agent, Mr. Smith, for cargo and for a loading berth (see p. 444, letter E, ante) was a reasonable step for the charterers to take under the master agreement, indeed it was the only step that they could take in the circumstances. His LORDSHIP referred to the state of congestion at Vancouver caused by the strike (see p. 444, letter G, ante), and continued:] I now turn to *Ardan S.S. Co. v. Andrew Weir & Co.* (104). In that case the vessel was chartered to load a full and complete cargo of coals as ordered by charterers, which they

- F "bind themselves to ship (except in the event of riot, commotion by keelmen, strike, or lock-out of shippers' pitmen, or any hands striking work, frosts or floods, or any other accident or causes beyond the control of the charterers which may delay the loading)..."

There was no provision as to the time within which the ship was to be loaded. In other words, the time for loading was a reasonable time. On June 9 the charterers ordered a cargo of coal from Lambton Colliery, Newcastle, intending to ship this on the chartered vessel. The chartered vessel arrived on July 14, two other vessels, having coaling orders from the same colliery, had arrived before her but did not complete until Aug. 13 when the chartered vessel went into berth and began to load; but twice she had to leave berth, no coal being available and she did not complete until Aug. 23. The House of Lords, reversing the unanimous decision of the Inner House, restored the judgment of the lord ordinary (LORD PEARSON), who had held that the delay complained of was caused not by the exceptional congestion of ships but by the failure of the charterers to perform their primary duty of providing a cargo and that there were no clauses in the charterparty which on a sound construction would excuse the respondent for the delay. The EARL OF HALSBURY, L.C., refers (105) to "the absolute obligation to furnish the stipulated cargo" and observes that, "delay in the loading is one thing, and the failure to provide a cargo to load is another and a very different thing". So, too, LORD DAVEY says (106):

"There is nothing to be found in the charterparty in the present case which, in my opinion, should be held to qualify this absolute obligation of

(102) [1905] A.C. 501.

(103) [1958] 2 All E.R. 695; [1958] 2 Q.B. 385.

(104) [1905] A.C. 501.

(105) [1905] A.C. at p. 510.

(106) [1905] A.C. at p. 512.

[the charterers]. The exception of riot, etc. 'and other causes beyond the control of the charterers which may delay her loading', in my opinion applies only to the process of loading the cargo when ready, and not to delay in providing the cargo."

I have already observed earlier that the exception clause in these charter-parties, including that of the *Moderator*, quite clearly applies to delay in the supply or bringing down of the cargo and that properly construed the clause qualifies the absolute obligation to supply cargo for loading on the vessel's arrival to the extent of the delay arising from the excepted causes. See the observation of DENNING, J., in *Pinch & Simpson v. Harrison, Whitfield & Co.* (107).

In my judgment *Ardan S.S. Co. v. Andrew Weir & Co.* (108) is no authority for the proposition that the charterers, having made proper arrangements for the supply and bringing down of the cargo, were in breach of their obligation as to the provision of cargo for the vessel.

In *The Aello* (109) the one point which may be material in the present case was whether the charter being a "port" charter and the entry of the ship into the commercial area of the port so as to be an "arrived ship" not being possible until a cargo or part cargo was known to be available, the charterers were to be held liable for the failure of the ship to get into the commercial area of the port by not having cargo available. On this point PARKER, L.J., says this:

"Now it is true that in [*Ardan S.S. Co. v. Andrew Weir & Co.* (108)] the ship had undoubtedly got to the commercial area of the port, and was only prevented by the absence of cargo from getting a berth. Further, as counsel for the charterers points out, there is no case in which it has been held that a cargo must be ready to enable a ship to get into the commercial area. However, bearing in mind that the charterparty in *Ardan S.S. Co. v. Andrew Weir & Co.* (108) was a berth charterparty, I should have thought that the principle was plain, namely, that if the provision of a cargo is necessary to enable the ship to perform its obligation, viz., to become an arrived ship, the absolute obligation of the shipper is to provide the cargo, or at any rate a reasonable part of it, in time to enable the ship to perform its obligation."

It is to be observed, however, that the clause in *The Aello* which corresponds to the present cl. 18 is cl. 30 which reads as follows (110): "If the cargo cannot be loaded by reason of . . . obstruction or stoppages beyond the control of the charterers". There is no exception relating to the supply or bringing down of cargo. Furthermore, in both these cases it was the fact that, if cargo had been available, the ship could have become an "arrived ship" at once. But quite apart from these rather refined arguments I should have thought that the ordinary man approaching the problem "in a business sense" or "on common-sense lines" would, if asked what prevented the *Moderator* starting to load on the date of her arrival, have said, and said truly, "The strike which, though it ended on May 7, still had the result that the berths were congested by ships held up by the strike and that cargo from the only available source could not be made available to the ship until the earlier ships had loaded".

I, accordingly, hold that the charterers were not in breach in either of the respects alleged in para. 12 of the re-amended points of claim.

If I had been of the contrary view, the damages on the authority of *The Aello* (111) would apparently have been assessed on the following basis: (1) the ship-owners would be entitled to recover (a) any despatch money to which they were liable on the facts as they existed, and (b) the demurrage to which they would

(107) (1948), 81 Lloyd's Rep. 268 at p. 273.

(108) [1905] A.C. 501.

(109) [1958] 2 All E.R. 695 at p. 701; [1958] 2 Q.B. 385 at p. 404.

(110) See [1957] 3 All E.R. at pp. 628, 629.

(111) [1957] 3 All E.R. 626, *affd.* [1958] 2 All E.R. 695; [1958] 2 Q.B. 385.

A have been entitled if the vessel had been able to get into berth on June 8. See amended particulars of damage claimed under para. 12 of the re-amended points of claim.

B There still remain certain points of detail as to the proper calculation of demurrage and despatch in the case of the *Moderator*. First, as to the meaning of "working day". The working day at Vancouver has on the authority of the *Alvion* case (112) to be calculated as a working day of eight hours for week-days other than Saturdays. As regards Saturdays at Vancouver what I have said previously applies equally and Saturday does not count. As regards the working day at the discharging port of East London, the position is complicated by the existence of cl. 26 which is as follows:

C "Any time lost to the vessel by bad weather preventing discharge or the shifting as above to be calculated on the basis of twenty-four hours at the ratio which the actual time lost bears to the normal working hours of the port."

This clause was introduced into this charterparty before the date of my decision in the *Alvion* case (112), namely, Oct. 20, 1954, and is based on the assumption, D held by me and the Court of Appeal to be erroneous, that a working day is a period of twenty-four hours commencing either from the commencement of the work or from midnight on the first day. Though this assumption must now be taken to be erroneous in the absence of express or implied provision to that effect in the charterparty, I do not consider that it would be proper to disregard cl. 26 altogether. In my judgment the effect of cl. 26 is that by agreement between E the parties the working day at the port of discharge is to be taken as a period of twenty-four hours running uninterruptedly from the moment when the time starts to count with the following exceptions, viz.: (i) those contained in cl. 22, i.e. (a) Sundays, (b) holidays, (c) "from noon on Saturday to 7.20 a.m. on the following working day", and (ii) the exceptions contained in cl. 26, i.e., (d) "any time lost to the vessel by bad weather preventing discharge" or (e) "by shifting as above". F As regards (d) and (e) the time lost is to be calculated at the ratio which the actual time lost bears to the normal working hours of the port. The normal working hours of the port on Monday to Friday are agreed to be eight hours forty minutes and on Saturdays four hours forty minutes. Accordingly, if four hours twenty minutes is lost by bad weather or by shifting on a weekday, twelve hours only would be counted; if two hours twenty minutes are similarly G lost by bad weather or by shifting on a Saturday, six hours only would be counted.

Finally, I have to consider the effect of cl. 27 which provides that "loading and discharging time shall be reversible" and cl. 17 which provides that "if charterers elect to treat lay days in loading and discharging as per cl. 17, despatch or alternatively demurrage to be settled on completion of discharge..." It is common ground that the charterers did so elect. The effect of making lay days H reversible has been considered in *Love & Stewart, Ltd. v. Rowtor S.S. Co., Ltd.* (113) by LORD SUMNER; in *Verren v. Anglo-Dutch Brick Co. (1927), Ltd.* (114) per ROCHE, J.; and in *Z. Steamship Co., Ltd. v. Amtorg New York* (115) per GODDARD, J. In *Rederiakt. Transatlantic v. Compagnie Francaise des Phosphates de l'Océanie* (116), a clause to the effect that

I "any day or parts of days not consumed in loading may be added to the time for discharging, and any extra time consumed in loading may be deducted from the time for discharging"

was under consideration, and finally in *Alma Shipping Co. S.A. v. V.M. Salgaoncar E. Irmaos, Ltda.* (117) DEVLIN, J., had to consider the effect of a clause

(112) [1955] 1 All E.R. 457; [1955] 1 Q.B. 430.

(113) [1916] 2 A.C. 527, see at p. 536. (114) (1929), 45 T.L.R. 404 at p. 406.

(115) (1938), 54 T.L.R. 849. (116) (1926), 32 Com. Cas. 126.

(117) [1954] 2 All E.R. 92; [1954] 2 Q.B. 94.

giving charterers the right "to average days allowed for loading and discharging". In the present case I have only to consider the effect of making the lay days reversible and need not express any opinion whether the same or different effect is produced by either of the other formulae. A

On the authorities cited as to reversible lay days and in principle it seems to me that where, as here, despatch is payable on "time saved including Sundays and holidays", the result is as follows: First you ascertain the number of days of the particular quality specified in the charter which are allowed for loading and for discharging, which days so ascertained form a pool. For example, eight weather working days for loading; twelve weather working days for discharging; total twenty weather working days. If at the loading port less than the quantity of days allowed for loading has been used, the balance of the days of that quality, say three weather working days, is carried forward to the discharging port or if more than the number of such days have been used for loading, you draw on the days of that quality available for discharge to meet the excess, with the result that there are fewer days of that quality (say twelve days less five) left for discharging. Finally you ascertain how many days of the specified quality have been used at the discharging port; if the days so used exceed the number of days available for discharge whether that number has been increased (i.e., twelve plus three) or diminished (i.e., twelve minus five) demurrage is payable on such excess; but, if the days so used are less than the number of days available for discharge, whether that number has been increased or diminished, despatch money is payable on the number of days of that quality by which the days used is less than the number of days of that quality available. For the purpose of this calculation the factor that the working day is a period of eight hours at the loading port and a period of twenty-four hours at the discharging port is only brought into play in determining how many working days or parts have been used at the loading and discharging port respectively. What is carried forward or drawn on is a number of weather working days or parts of such days. B C D E

I have not attempted in this judgment to quantify the result of my findings in any of the cases in terms of demurrage or despatch money, it having been agreed before me by counsel that the parties would attempt to reach agreement on the question of quantification on the basis of my findings. F

Finally, while I am conscious that I have not in this judgment—already overlong—dealt with all the arguments addressed to me with their numerous supporting authorities in addition to those to which I have referred, I desire to express to counsel my great indebtedness for the assistance I have received and for their readiness to agree certain facts where agreement has been possible. G

Judgment for the charterers, the defendants.

Solicitors: *Richards, Butler & Co.* (for the shipowners, the plaintiffs, in all five actions); *Treasury Solicitor* (for the Ministry of Agriculture, Fisheries and Food); *William A. Crump & Son* (for the President of India); *Jaques & Co.* (for the Government of the Union of South Africa).

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

A

PRACTICE DIRECTION.

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Ashworth and Edmund Davies, JJ.), October 19, 1959.]

Criminal Law—Costs—Acquittal—Discretion.

B

[As to costs in criminal cases, see 10 HALSBURY'S LAWS (3rd Edn.) 546, paras. 1004, 1005.

For the Costs in Criminal Cases Act, 1952, see 32 HALSBURY'S STATUTES (2nd Edn.) 61.]

LORD PARKER, C.J.: The court desires to make a statement on costs in criminal cases.

C

The court's attention has been drawn to the difficult question as to the lines on which the discretion to award costs to an acquitted person should be exercised. This discretion, so far as courts of assize and quarter sessions are concerned, is now given by s. 1 (1) (b) of the Costs in Criminal Cases Act, 1952, (1) under which the court "may, if the accused is acquitted, order the payment out of local funds of the costs of the defence". The discretion is in terms completely

D

unfettered, and there is no presumption one way or the other as to the manner of its exercise.

In a statement issued on Mar. 24, 1952, (2), this court, while emphasising that every case should be considered on its merits, said that it was only in exceptional cases that costs should be awarded. That statement referred to a circular issued by the Lord Chief Justice, after consultation with the judges of the Queen's Bench Division, approving a Home Office circular issued in connexion with s. 44 of the Criminal Justice Act, 1948, (3), now replaced by the section above referred to. While no attempt was there made to catalogue the exceptional cases in which costs might be awarded, such illustrations as were given were cases where the prosecution could be said to be in some way at fault. On the other hand a suggestion has been canvassed that the mere fact of an acquittal should carry with it the expectation that the discretion would be exercised in favour of the acquitted person. Were either of these views correct, the effect would be to impose a fetter on the exercise of the absolute discretion conferred by the statute. As we have said, there is no presumption one way or the other as to its exercise. Each case must be considered on its own facts as a whole

E

F

G

H

and costs may and should be awarded in all cases where the court thinks it right to do so (4). It is impossible to catalogue all the factors which should be weighed. Clearly, however, matters such as whether the prosecution have acted unreasonably in starting or continuing proceedings and whether the accused by his conduct has in effect brought the proceedings, or their continuation, on himself, are among the matters to be taken into consideration. On the other hand the court desires to make it plain that they entirely dissociate themselves from the view that the judge is entitled to base his refusal to award costs on the ground that he thinks that the verdict of the jury was perverse or unduly benevolent. The mere fact that the judge disagrees with the verdict of the jury is no more a ground for refusing to award costs to the acquitted person than the mere fact of his acquittal is a ground for awarding them.

[Reported by N. P. METCALFE, ESQ., Barrister-at-Law.]

(1) 32 HALSBURY'S STATUTES (2nd Edn.) 62.

(2) (1952), 36 Cr. App. Rep. 13; [1952] 1 T.L.R. 1131.

(3) 28 HALSBURY'S STATUTES (2nd Edn.) 383.

(4) See, e.g., *R. v. Sansbury*, p. 472, post.

NOTE.**R. v. SANSBURY.**

[SOMERSET ASSIZES (Devlin, J.), October 21, 1959.]

Criminal Law—Costs—Acquittal—Discretion.

[As to costs of defence in criminal cases out of local funds, see 10 HALSBURY'S LAWS (3rd Edn.) 546, para. 1005.

For the Costs in Criminal Cases Act, 1952, see 32 HALSBURY'S STATUTES (2nd Edn.) 61.]

Case referred to:

Practice Direction, p. 471, ante.**Trial.**

The accused, Roger Leonard Sansbury, was tried on Oct. 21, 1959, and acquitted of a criminal charge, viz., causing death on June 25, 1959, by driving a motor vehicle on a road in a manner dangerous to the public contrary to s. 8 of the Road Traffic Act, 1956*. The jury returned a verdict of "Not Guilty" at the conclusion of the case for the prosecution and without hearing evidence for the defence. The prosecution was one that was properly brought. Application was made on behalf of the accused for payment of costs out of local funds. The case is reported solely for the decision of DEVLIN, J., on the application for costs.

N. J. Skelhorn, Q.C., and *F. C. Williams* for the accused.

L. H. Collins for the prosecution.

DEVLIN, J.: I have had to consider an application by learned counsel for the defence that the costs of the defence should be paid out of local funds. In this case the jury returned a verdict of Not Guilty after they had heard all the relevant evidence for the prosecution but before they had heard any evidence for the defence. In my view there was not sufficient evidence on which the jury could have convicted even if they had been disposed to do so, and I indicated that that would probably be my view, but I desired in a case of this sort to be fortified by ascertaining the view of the jury, which they gave me. The question is whether in these circumstances it would be proper to make the order for which learned counsel for the defence has asked.

The recent pronouncement by the Lord Chief Justice in the Court of Criminal Appeal on this subject (1) has not, I think, laid down any new law, but it has perhaps made it clear that the judge's discretion to award costs is rather wider than has hitherto been thought; and, in particular, I think that it has now been made quite clear that the notion, which was very generally entertained, that an award of costs against the prosecution necessarily involved some reflection on the conduct of the prosecution or on the propriety of its being brought is quite wrong.

In this case the prosecution was properly brought. The investigations made by the police revealed what was apparently a *prima facie* case. But after a thorough and careful cross-examination by learned counsel for the defence it became clear that there was no reliable evidence that at the time of the collision the accused was on his wrong side of the road, and counsel for the prosecution rightly conceded that without such evidence he could not ask for a conviction.

Counsel for the prosecution in resisting the application for costs has argued that the police would be put in an impossible position if they had to constitute themselves as arbiters or quasi-judges in deciding whether to prosecute or not. They would be put in an impossible position if that were really their duty, but it is quite wrong to think that they are placed in that position. If the order

* 36 HALSBURY'S STATUTES (2nd Edn.) 808.

(1) *Practice Direction*, p. 471, ante.

A which I am being invited to make involved any censure or criticism on the police, then they might be. But, as I have said, it is not so, and I expect the police to continue to prosecute in this type of case, as in any other type of case, wherever they think it right to do so in the future just as they have done in the past. I think that it would be wrong if, in making their decision whether to prosecute or not, they were to be influenced by any speculation about how the judge at the trial might be likely to exercise his discretion on this question of costs.

B I am not dealing with the facts as a reasonable police officer would see them at the time of the decision to prosecute, but as they have emerged after the trial or so much of the trial as has been found necessary to bring about a verdict of Not Guilty. I am satisfied not only that the accused was not guilty of the offence with which he was charged but that he did not in the circumstances of this case in fact give just cause for the belief that he was, however it may have appeared to the police at the beginning of the proceedings.

C In those circumstances I think that it would be an undeserved hardship if he had to pay a heavy bill of costs, and one in respect of which the statute (2) is designed in a proper case to give relief. I do not like the phrase "costs against the police". The order that I propose to make is that the costs of the defence, just like the costs of the police, should be paid out of local funds.

D There are two other points which I should perhaps mention. First, it has not been suggested in this case that the conduct of the accused before, after or at the time of the alleged offence contributed in any way to his being placed in the dock. It has been suggested, however, that although the evidence might fall short of proving dangerous driving, it might be sufficient proof of careless driving. I say nothing at all about that. Careless driving is an offence with which the accused man can or could have been charged, and he would then have an opportunity of making his defence to it. But I think it would be wrong if I were to allow the fact, the bare fact without more, that the accused man might be guilty of an offence with which he is not charged to influence my mind, and I have not done so.

E The other point is this. Counsel for the prosecution at the end of his submission rightly, I think, presented his apologies on behalf of the prosecution for some vicissitudes, as he described them, in the course of the presentation of the case. If I regarded this order as in any sense a penalty imposed on the prosecution, then no doubt it might be right for me to have regard to them. But I do not so regard it; and as, whatever the shortcomings of the prosecution, and although they caused some inconvenience which might have been greater than it turned out to be in fact, they did not in any way add to the burden of the costs which have to be borne either by the prosecution or by the defence, I have disregarded them entirely. The order, therefore, will be as I have indicated.

Costs of defence to be paid out of local funds.

Solicitors: *Wansbroughs, Robinson, Tayler & Taylor*, Bristol (for the accused); *Fryer, Bennett & Deal*, Weston-super-Mare (for the prosecution).

[Reported by DEIRDRE McKINNEY, Barrister-at-Law.]

NOTE.

Re JOSEPH'S WILL TRUSTS.

[CHANCERY DIVISION (Vaisey, J.), October 7, 1959.]

Trust and Trustee—Variation of trusts by the court—Practice—Order—Direction that variation should be carried into effect—New trusts operating subject to subsisting life interest—Variation of Trusts Act, 1958 (6 & 7 Eliz. 2 c. 53), s. 1.

[For the Variation of Trusts Act, 1958, s. 1, see 38 HALSBURY'S STATUTES (2nd Edn.) 1130.]

Cases referred to:

Derby's Settlement, Re, (July 13, 1959), unreported.

Saville's Will Trusts, Re, (July 24, 1959), unreported.

Adjourned Summons.

This summons was issued by one of the trustees of and a beneficiary under the will of Sir Samuel George Joseph, Bart., deceased, for an order approving on behalf of the infant children of the applicant and his unborn children and remoter issue and all other persons who might have any discretionary interest under any protective trust declared by the said will for the benefit of the applicant, an arrangement for varying the trusts of the said will in accordance with the terms of arrangement intended to be exhibited to an affidavit to be sworn in the proceedings, and that the terms of arrangement might be ordered to be carried into effect accordingly.

The terms of arrangement are not material to this report. The variations of which approval was sought related to testamentary dispositions taking effect after the death of Edna, Lady Joseph, who was still living and was life tenant of the testator's residuary estate.

K. J. T. Elphinstone for the applicant, one of the trustees.

Raymond Walton for the testator's widow, the present life tenant and the other trustee, and also for the wife of the applicant.

E. J. A. Freeman for the infants and unborn children.

D. C. Potter for the legatee in reversion.

VAISEY, J., said that it was a simple case. There was no doubt that he could make an order under the Variation of Trusts Act, 1958, to do what the Act contemplated, i.e., to approve the arrangement. It was also suggested that he should direct that the arrangement should be carried into effect, thereby precluding its being raised on any future occasion. The Act itself did not contemplate an order in that form; but he was told that LORD JENKINS, sitting as a judge of the Chancery Division, was asked to and did in *Re Derby's Settlement* (1) direct that such an addition be made to the order which he was making in that case.

In another case, *Re Saville's Will Trusts* (2), LORD JENKINS thought that he ought not to make such a direction.

Here the special point was that under this scheme nothing was to be done immediately except to pay costs. HIS LORDSHIP thought it undesirable for the matter to be left in the air as it would be if the approval of the variation were not followed by any direction that effect should be given to the variation.

Quite apart from what the position would be if there were immediate variations to be carried into effect, HIS LORDSHIP considered that in this case, in which there were no variations having immediate operation, it was desirable that he should add to his order approving the variation a direction that the variation so approved

(1) July 13, 1959, unreported.

(2) July 24, 1959, unreported.

A should be carried into effect. In this case, such an addition was proper, and, although not expressly authorised by the Act of 1958, it followed, inevitably, from the jurisdiction which was given that such an addition could and should be made to the form of the order.

Order accordingly.

B Solicitors: *Linklaters & Paines* (for all parties other than the legatee in reversion); *The Comptroller and City Solicitor* (for the legatee in reversion).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

C

GLADSTONE v. BOWER.

[QUEEN'S BENCH DIVISION (Diplock, J.), October 8, 9, 1959.]

D *Agriculture—Agricultural holding—Agreement to let land for fixed period of eighteen months—Whether land let for an interest less than a “tenancy from year to year”—Whether tenant entitled to benefit—Agricultural Holdings Act, 1948 (11 & 12 Geo. 6 c. 63), s. 2 (1).*

E By an agreement in writing dated Mar. 29, 1956, the plaintiff let a farm to the defendant “for the term of eighteen months”, from Nov. 1, 1955, to May 1, 1957. The farm was an agricultural holding within s. 1 (1) of the Agricultural Holdings Act, 1948. The defendant failed to give up possession of the farm on May 1, 1957. The plaintiff did not serve any notice to quit on the defendant. In an action by the plaintiff claiming possession of the farm the defendant contended that the letting for a fixed period of eighteen months was, within the meaning of s. 2 (1)* of the Agricultural Holdings Act, 1948, a letting for “an interest less than a tenancy from year to year”, since a tenancy from year to year could not (by virtue of s. 23 (1)) be determined before the expiration of the second year; and that therefore under s. 2 (1) the letting took effect as a tenancy from year to year and had not terminated by effluxion of time.

F **Held:** the defendant's tenancy for a fixed period of eighteen months was an interest greater than a tenancy from year to year within s. 2 (1) of the Agricultural Holdings Act, 1948, since the words “tenancy from year to year” in sub-s. (1) meant a tenancy creating an interest which had the invariable characteristics common to all tenancies from year to year at common law, one of which was that the tenancy might be determined at the end of the first year (see p. 479, letter E, post); therefore s. 2 (1) did not apply to the defendant's tenancy which accordingly had expired, by effluxion of time, on May 1, 1957.

G [As to the minimum term that may be created in respect of an agricultural holding, see 1 HALSBURY'S LAWS (3rd Edn.) 256, para. 556.

H For the Agricultural Holdings Act, 1948, s. 2 (1), see 28 HALSBURY'S STATUTES (2nd Edn.) 29.]

I Cases referred to:

Edell v. Dulieu, [1924] A.C. 38; 93 L.J.K.B. 286; 130 L.T. 390; 2 Digest (Repl.) 13, 52.

Goldsack v. Shore, [1950] 1 All E.R. 276; [1950] 1 K.B. 708; 2 Digest (Repl.) 7, 12.

Land Settlement Assn., Ltd. v. Carr, [1944] 2 All E.R. 126; [1944] K.B. 657; 114 L.J.K.B. 33; 171 L.T. 121; 2 Digest (Repl.) 7, 15.

* For the terms of s. 2 (1), see p. 478, letter B, post.

Reid v. Dawson, [1954] 3 All E.R. 498; [1955] 1 Q.B. 214; [1954] 3 W.L.R. 810; 2 Digest (Repl.) 7, 14. A

Action.

In this action by specially indorsed writ, dated July 4, 1958, the plaintiff, Erskine William Gladstone, claimed possession of a farm let to the defendant, Alice Mary Bower, widow, under an agreement in writing dated Mar. 29, 1956; the plaintiff also claimed mesne profits. By the terms of that agreement the plaintiff let to the defendant the messuage, buildings, gardens, land and premises called the Manor Farm, situated in the parishes of Hawarden and Saltney, in the county of Flint, B

"for the term of eighteen months from the 1st day of November, 1955 (which shall be deemed to be the commencement of the term) and terminating on the 1st day of May, 1957, at the rent of £550 for the said term." C

The defendant denied that her tenancy of the farm had expired by effluxion of time, on May 1, 1957, and contended that by virtue of the Agricultural Holdings Act, 1948, s. 2 (1), the agreement for the tenancy took effect as an agreement for a tenancy from year to year, with the result that the defendant was entitled to the security of tenure provided by the Act of 1948 for tenants from year to year of agricultural land. Alternatively, the defendant contended that Part 2 of the Landlord and Tenant Act, 1954, applied to her tenancy and that the tenancy had not been terminated in accordance with the provisions of that Act. D

R. H. Blundell, Q.C., for the plaintiff.

Anthony Cripps, Q.C., and *N. H. Curtis-Raleigh* for the defendant. E

Cur. adv. vult.

Oct. 9. **DIPLOCK, J.**, read the following judgment: This case raises a point as to the true construction of s. 2 (1) of the Agricultural Holdings Act, 1948. By an agreement in writing, dated Mar. 29, 1956, the plaintiff let to the defendant a farm and land in Flintshire F

"for the term of eighteen months from the 1st day of November, 1955 . . . and terminating on the 1st day of May, 1957, at the rent of £550 for the said term."

It is common ground and indeed apparent from the other terms of the tenancy agreement, which are those usual in agricultural leases, that the land was used for agriculture and thus was "agricultural land" within the meaning of s. 1 (2) of the Act. The plaintiff does not contend that it was not an "agricultural holding" within s. 1 (1). He concedes that the tenancy is a tenancy for a term of years and that, so far as concerns such rights as freedom of cropping, compensation for improvements and tenant right etc., as are conferred on tenants of agricultural holdings by the Act, the defendant is entitled to the benefit of the provisions of the Act which relate to these matters. The sole questions are: (1) whether this tenancy agreement falls within s. 2 (1) of the Act so as to give to the defendant greater security of tenure than she would have at common law by virtue of her tenancy; and (2), if not, whether Part 2 of the Landlord and Tenant Act, 1954, applies to the tenancy. G H

The tenancy agreement on its face created a tenancy for a term certain, that is to say eighteen months, which expired on May 1, 1957. At common law the defendant's interest terminated on that date without any necessity for a notice to quit. The claim in the action is for possession and mesne profits. The principal ground of the defence is that by virtue of s. 2 (1) of the Agricultural Holdings Act, 1948, the tenancy took effect as a tenancy from year to year and that, since—as is common ground—no notice to quit has been given, the defendant's tenancy is still continuing and the plaintiff has no right to possession. I

A The fixed term of eighteen months, which is unusual and, indeed, normally quite inappropriate for a farming tenancy, was admittedly chosen with the object of avoiding bestowing on the tenant the security of tenure which the Act confers on most tenants of agricultural holdings, but it is right that I should say—
B although it cannot affect the matter of construction which I have to determine—that the circumstances were unusual and it is not suggested that there was anything discreditable in the plaintiff's desire to achieve this object, if the law so permits. Whether he has done so is the sole matter which I have to decide.

The Agricultural Holdings Act, 1948, is a consolidation Act and it will be necessary at some stage, and is convenient now, to look briefly at its legislative history. The two principal Acts which it consolidated were the Agricultural Holdings Act, 1923, and Part 3 of the Agriculture Act, 1947, the latter of which
C added to and amended the former. As the former consolidated the previous enactments, it is unnecessary to go back further. The Act of 1923 dealt with three classes of agricultural tenants, that is to say, (1) tenancies for a fixed term, (2) tenancies for lives or for lives and years, and (3) periodic tenancies. This is the result of the definition section, s. 57 (1), which, so far as is relevant, is reproduced in s. 94 (1) of the Act of 1948. The Act of 1923, however, did not, at any
D rate as respects termination of their interest, alter the common law rights of tenants and landlords of all agricultural holdings which fell within these classes. Tenancies in the first class, that is tenancies for a fixed term, were dealt with by providing in s. 23, now substantially reproduced in s. 3 of the Act of 1948, that a tenancy for a term of two years or upwards should not terminate on the expiration of the term for which it was granted, unless not less than one or more
E than two years' notice were given, and that, in the absence of such notice, the tenancy should continue as a tenancy from year to year. Tenancies in the second class, that is tenancies for lives or lives and years, now modified by the provisions of s. 149 (6) of the Law of Property Act, 1925, were dealt with by s. 24 of the Act of 1923 (reproduced substantially in s. 4 of the Act of 1948) by granting to the tenant in lieu of emblements a right to continue in occupation until given
F twelve months' notice to quit, expiring at the end of a year of the tenancy. The only tenancies in the third class, that is periodic tenancies, dealt with were "tenancies from year to year". It was provided by s. 25 (1), now reproduced in s. 23 of the Act of 1948, that a notice to quit in the case of such a tenancy should be invalid if it purported "to terminate the tenancy before the expiration of twelve months from the end of the then current year of tenancy". Sub-
G section (2) of s. 25 created a number of exceptions to the general provisions; those in para. (c), viz. "any notice given in pursuance of a provision in the contract of tenancy authorising the resumption of possession of the holding or some part thereof for some specified purpose" other than the use of the land for agriculture, and para. (d), "any notice given by a tenant to a sub-tenant", are the most relevant.

H The Act of 1923, therefore, did not purport to affect the common law rights of the parties to all tenancies of agricultural holdings as regards the termination of their interests. It left untouched (a) tenancies for a fixed term of less than two years, and (b) some tenancies from year to year and, in particular, sub-tenancies from year to year, although the tenants of such tenancies fell within
I the Act of 1923 and benefited from its other provisions. In 1944, however, it was held by the Court of Appeal in *Land Settlement Assn., Ltd. v. Carr* (1), that a periodic tenancy from 364 days to 364 days was not a tenancy from year to year. It did not therefore fall within the definition of a "contract of tenancy" in s. 57 (1) of the Act of 1923, with the consequence not only that the tenant could not benefit from the provisions as regards notice to quit in s. 25 of the Act, but was wholly excluded from the provisions of the Act including

the provisions regarding freedom of cropping, compensation for improvements and disturbance, etc. A

Such was the state of the law when Part 3 of the Agriculture Act, 1947, was passed. Section 40 of that Act is reproduced in s. 2 of the Act of 1948 and it is convenient that I should turn to it in its present wording. It reads as follows:

“(1) Subject to the provisions of this section, where under an agreement made on or after Mar. 1, 1948, any land is let to a person for use as agricultural land for an interest less than a tenancy from year to year, or a person is granted a licence to occupy land for use as agricultural land, and the circumstances are such that if his interest were a tenancy from year to year he would in respect of that land be the tenant of an agricultural holding, then, unless the letting or grant was approved by the Minister before the agreement was entered into, the agreement shall take effect, with the necessary modifications, as if it were an agreement for the letting of the land for a tenancy from year to year: Provided that . . .” B C

and then there follows a proviso excluding certain types of occupation of land from the provisions of sub-s. (1). Subsection (2) reads as follows:

“Any dispute arising as to the operation of the foregoing subsection in relation to any agreement shall be determined by arbitration under this Act.” D

Subsection (1) thus assimilates to tenancies from year to year and so brings within the scope of the Act as a whole two kinds of occupation of agricultural land, neither of which was previously within the Act at all, namely: (1) lettings for an interest less than a tenancy from year to year, and (2) licences to occupy land for use as agricultural land. E

The question which I have to determine is whether this tenancy for a fixed period of eighteen months or one and a half years is a letting for an interest less than a tenancy from year to year. It is thus a question of the applicability of sub-s. (1) of s. 2 of the Act of 1948 to the agreement between the parties as distinct from its operation in relation to that agreement, a distinction which counsel on both sides contend. This court has jurisdiction to determine that matter, notwithstanding the arbitration provisions in sub-s. (2); see the decision of the Court of Appeal in *Goldsack v. Shore* (2). F

At common law a tenancy for a fixed period of one and a half years clearly creates an interest not less than a tenancy from year to year. This is because the tenant's interest under such a tenancy must continue for more than one year, whereas his interest under a tenancy from year to year may determine at the end of one year. The fact that under a tenancy from year to year it may continue for more than one year must be irrelevant to the test laid down in sub-s. (1) of s. 2, otherwise any lease for a fixed term, however long, would create an interest less than a tenancy from year to year, and take effect by virtue of s. 2 as a tenancy from year to year, which is inconsistent with the provisions of s. 3 of the Act of 1948. Counsel for the defendant, while conceding that this is so at common law, says that it is not so in the case of land occupied for use as agricultural land, to which alone s. 2 relates, for a tenancy from year to year of such land cannot, by virtue of s. 23 (1) of the Act, be determined before the expiration of the second year. Any letting of land for use as agricultural land for a fixed period of less than two years is therefore for an interest less than a tenancy from year to year of such land. G H I

There is, I think, a fallacy in this attractive argument. It is in the first place to be observed that s. 23 is not in terms dealing with tenancies from year to year. It has been held that it applies to any tenancy where the tenant's leasehold interest is determinable by notice, such as determination under a “break” clause in a lease for a fixed term, see *Edell v. Dulieu* (3). Furthermore, as the

A provisos show, it does not apply to all tenancies from year to year, see provisos (c) and (d), nor to all notices to quit under tenancies from year to year, see proviso (b). What the section does is to invalidate certain notices which would otherwise determine a tenant's interest in agricultural land, whether under a tenancy from year to year or some other form of tenancy, and one of its consequences is that in the case of most—but not all—tenancies from year to year, the tenant's interest must continue for at least two years.

The expression “an interest less than a tenancy from year to year” in sub-s. (1) of s. 2 is quite general. The expression “tenancy from year to year” was used by the draftsman to describe an interest which had certain invariable characteristics which would enable one to say that other interests are greater or less than it. A tenancy from year to year at common law is an interest which does possess certain invariable characteristics without which it is not a tenancy from year to year and which constitute a standard by which the magnitude of other interests may be judged: it must last for one year and, unless determined at the end of the first year by notice (either six months' notice or whatever other length of notice, if any, is expressly provided for in the contract of tenancy), will be renewed by operation of law for successive periods of one year each, until determined at the end one of such yearly period by such a notice.

If counsel for the defendant is right, the “tenancy from year to year” referred to in the subsection has no such invariable characteristics. Whether it can be determined at the end of the first year depends not only on who are the parties (see paras. (c) and (d) of the proviso to s. 23 (1) of the Act) but also on the purpose for which it is determined (see para. (b)). What he is really seeking to do is to read the words “tenancy from year to year” in s. 2 (1) as if they were “a tenancy from year to year of agricultural land which is not terminable by a notice to quit, to which the proviso to s. 23 (1) of this Act applies”.

In my view the expression “tenancy from year to year” in s. 2 (1) must mean a tenancy which creates an interest which has invariable characteristics, namely, those which I have indicated are common to all tenancies from year to year at common law. Furthermore, I do not think that s. 23 can properly be said to transform the interest created by a tenancy from year to year of an agricultural holding into an interest greater than that created by a tenancy from year to year at common law. The subsection modifies the way in which the parties to such a tenancy may exercise some of the rights incidental to that interest. The lease in the present case, being for eighteen months, is, in my view, for an interest greater than a tenancy from year to year.

Counsel for the defendant naturally relies strongly in support of his construction on the fact that the construction I have adopted will have some odd consequences. For instance, a licence to occupy land for use as agricultural land, he points out, is caught by sub-s. (1) of s. 2 even if it is for a fixed period longer than a year, but it is no less odd, if one of the purposes of the Act is to give greater security of tenure to tenants of agricultural land, that the subsection should cut down the security of tenure of a licensee under a licence for a fixed period greater than two years. For another oddity see *Reid v. Dawson* (4).

Counsel for the defendant also relies on what he contends is the plain scheme of the Act as respects security of tenure, namely, that all occupiers of agricultural land, save those included in the proviso to s. 2 (1), shall be entitled to remain in possession until their occupation is determined by a notice to quit, subject to the qualifications and restrictions laid down in s. 23 and s. 24. If it were permissible to speculate at large as to the intentions of Parliament, I should be tempted to guess that Parliament simply overlooked the case of a lease for a fixed term of between one and two years. If it had considered such tenancies and thought that tenants thereunder should be given greater security of tenure, the obvious way to do so would be to amend s. 23 of the Act of 1923, now s. 3 of

the Act of 1948, by removing the restriction of its application to tenancies for a term of two years and upwards. But I cannot speculate as to Parliament's intention. A

The legislative history to which I have referred does not point conclusively to a neat scheme such as counsel for the defendant postulates. The Act of 1923 unambiguously omitted from its provisions relating to security of tenure all leases for a fixed term of less than two years. It also omitted from these provisions and from all other provisions of the Act—although this was not determined by the courts until 1944—all periodic tenancies for periods less than one year. The fact that the Act of 1947 (a) brought the latter class of tenancies within the provisions of the Act, including those relating to security of tenure, and (b) greatly enhanced, by what is now s. 24 of the Act of 1948, the security of tenure of those tenants to whose tenancy the security of tenure provisions of the Act do apply, is no conclusive reason for holding, contrary to what I have held to be the natural construction of an Act which cuts down the common law rights of the subject, that it must have intended to bring within its provisions relating to security of tenure leases for a fixed term of more than one, but less than two years, which were already within the other provisions of the Act of 1923. B C D

I hold therefore that s. 2 (1) of the Act of 1948 does not apply to the tenancy agreement made between the plaintiff and the defendant and that, so far as this Act is concerned, the defendant's tenancy determined by effluxion of time on May 1, 1957.

Counsel for the defendant's alternative defence under Part 2 of the Landlord and Tenant Act, 1954, I can deal with shortly. Section 43 (1) (a) expressly excludes from the provisions of Part 2 "a tenancy of an agricultural holding". By s. 69 (1) an "agricultural holding" has the same meaning as in the Agricultural Holdings Act, 1948. This holding, being a holding of agricultural land comprised in the contract of tenancy for a term of years, is an agricultural holding in the meaning ascribed to it in s. 1 of the Agricultural Holdings Act, 1948, and thus excluded from the operation of Part 2 of the Landlord and Tenant Act, 1954. Section 8 and para. 29 of Sch. 1 to the Agriculture Act, 1958, on which counsel for the defendant also relies, amends para. (a) of s. 43 (1) of the Landlord and Tenant Act, 1954, by inserting at the end of the paragraph the words E F

"or a tenancy which would be a tenancy of an agricultural holding if the proviso to sub-s. (1) of s. 2 of the Agricultural Holdings Act, 1948, did not have effect or, in a case where the approval of the Minister of Agriculture, Fisheries and Food was given as mentioned in the said sub-s. (1), if that approval had not been given." G

This amendment, which merely adds an additional exclusion from the operation of Part 2 of the Landlord and Tenant Act, 1954, of land which is occupied for use as agricultural land, although not an agricultural holding within the meaning of the Agricultural Holdings Act, 1948, is irrelevant to the case of a tenancy agreement between plaintiff and defendant which creates a tenancy of an agricultural holding within the meaning of that Act. The plaintiff is accordingly entitled to judgment for possession and mesne profits as prayed. H

Judgment for the plaintiff.

Solicitors: *Theodore Goddard & Co.* (for the plaintiff); *Ellis & Fairbairn* (for the defendant).

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

A

Re SHUTER (No. 2).

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Ashworth and Hinchcliffe, J.J.),
October 6, 1959.]

B

Extradition—Discharge of fugitive—Not returned within one month after committal—“May”, unless “sufficient cause” is shown to the contrary, order the fugitive to be discharged—“May” construed to mean “shall”—What amounts to “sufficient cause”—Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 7.

C

Section 7 of the Fugitive Offenders Act, 1881, provides: “If a fugitive who, in pursuance of this Part* of this Act, has been committed to prison in any part of Her Majesty’s dominions to await his return, is not conveyed out of that part within one month after such committal, a superior court, upon application by or on behalf of the fugitive . . . may, unless sufficient cause is shown to the contrary, order the fugitive to be discharged out of custody.”

D

On July 15, 1959, the applicant was committed to prison by the chief metropolitan magistrate, under the Fugitive Offenders Act, 1881, to await his return to Kenya. The offences which he was alleged to have committed were serious offences. It was arranged that he should be escorted back to Kenya by two officers of the Kenya Police who were in the United Kingdom on leave and were due to return to Kenya, one on Aug. 12 and the other on Aug. 16. An air passage to Kenya was booked on July 21 by the Colonial Office for the applicant and the two officers on an aircraft leaving England on Aug. 16. The applicant’s solicitor was informed of these arrangements and no objection was made. The air passage for Aug. 16 was, however, cancelled by the British Overseas Airways Corporation†. On an application by the applicant to be discharged under s. 7 of the Act of 1881, because he was not conveyed out of the United Kingdom within one month of committal,

E

F

Held: (i) on the true construction of s. 7 of the Fugitive Offenders Act, 1881, the word “may”, in its context, should be read as “shall”, and, therefore, s. 7 prohibited a fugitive being detained for more than a month unless sufficient cause were shown to the contrary.

G

(ii) in considering whether “sufficient cause”, within the meaning of s. 7, was shown the court was entitled to consider the reasonableness of what was being done; in the circumstances the applicant was not being detained unreasonably, particularly having regard to the provisions of s. 6‡ of the Act of 1881, and the application for discharge would be refused.

[As to the discharge of a fugitive by order of a superior court, see 16 HALSBURY’S LAWS (3rd Edn.) 589, para. 1225.

H

For the Fugitive Offenders Act, 1881, s. 7, see 9 HALSBURY’S STATUTES (2nd Edn.) 900.]

Motion.

I

Pursuant to a committal order made by the chief magistrate at the Metropolitan Magistrate’s Court at Bow Street on July 15, 1959, under s. 5 of the Fugitive Offenders Act, 1881, the applicant, Victor Charles Shuter, was committed to Brixton Prison on that date to await his return to Kenya. Counsel for the applicant now moved for an order for his discharge pursuant to s. 7 of the Act of 1881, on the ground that he had not been conveyed out of the United Kingdom within one month of the committal.

* Part 1, which is headed “Return of Fugitives” and consists of s. 2-s. 11, inclusive.

† The passage for Aug. 16 was cancelled on Aug. 12 by British Overseas Airways Corporation, who substituted therefor a passage on an aircraft due to leave on Aug. 17.

‡ The material terms of s. 6 of the Fugitive Offenders Act, 1881, are printed at p. 484, letter E, post.

On June 17, 1959, the chief magistrate had made a committal order against the applicant, under s. 5 of the Act of 1881, in respect of the same alleged offences, but, on an application to a Divisional Court of the Queen's Bench Division for a writ of habeas corpus, the case was remitted to the chief magistrate to receive evidence as to the law of Kenya on the question whether the alleged offences came within s. 9 of the Act of 1881. The previous proceedings are reported [1959] 2 All E.R. 782.

Neil Butter for the applicant.

J. C. Mathew for the Secretary of State for the Colonies.

M. D. L. Worsley for the Governor of Brixton Prison.

LORD PARKER, C.J.: This is an application made on behalf of one Victor Charles Shuter, now detained in Brixton Prison, for an order that he be discharged pursuant to s. 7 of the Fugitive Offenders Act, 1881. The matter arises in this way. As long ago now as June 17, 1959, the applicant appeared before the chief magistrate at Bow Street on a warrant issued by the Kenya Government in respect of some eleven alleged offences said to have been committed by the applicant in Nairobi, Kenya, at the end of 1958 and the beginning of 1959. The chief magistrate, having heard the evidence, committed him to Brixton Prison to await his removal to Kenya, and, from the schedule to the warrant, it is perfectly clear that the offences alleged were very serious offences. On June 30 an application was made to this court for habeas corpus on the ground that the chief magistrate had committed the applicant without any evidence, or any sufficient evidence, as to the law of Kenya which would bring into operation the Fugitive Offenders Act, 1881, and application in the alternative was made under s. 10 of the Act. This court, having heard the application (1) on July 7, refused any relief under s. 10, but came to the conclusion that no satisfactory evidence had been called before the magistrate as to the law of Kenya, and they thereupon remitted the matter to the magistrate to hear evidence as to that law. He did so on July 15, and on that date, which is the important date in these proceedings, the applicant was committed to Brixton Prison to await his return to Kenya under a fresh warrant. What has given rise to this application is that, the committal order being dated July 15, when Aug. 17 came, which was over a month from the date of the committal order, the applicant had not been conveyed out of the United Kingdom (he was still in prison), and he applies now to this court saying that in those circumstances he ought to be released.

Section 7 of the Fugitive Offenders Act, 1881, is in these terms:

"If a fugitive who, in pursuance of this Part of this Act, has been committed to prison in any part of Her Majesty's dominions to await his return, is not conveyed out of that part within one month after such committal, a superior court, upon application by or on behalf of the fugitive, and upon proof that reasonable notice of the intention to make such application has been given, if the said part is the United Kingdom to a Secretary of State, and if the said part is a British possession to the governor of the possession, may, unless sufficient cause is shown to the contrary, order the fugitive to be discharged out of custody."

The application is made on the basis that there is not shown in this case any sufficient cause to the contrary and, accordingly, it is said that this court should order the applicant's immediate discharge out of custody. What apparently happened is stated in an affidavit of Mr. Rushford, a senior legal assistant in the Colonial Office. It appears that on July 15, the date of committal, the applicant's solicitor got in touch with Mr. Rushford and suggested that it would be convenient to the applicant if he was sent back to Kenya at as late a date as possible,

(1) The decision is reported [1959] 2 All E.R. 782.

A because of the possibility of recriminations as a result of views which he had expressed while in Kenya. However, on the same day the solicitor told Mr. Rushford, in effect, to forget about that, and that the applicant did not want any special arrangements made. Mr. Rushford then sought an escort, and he found that two Kenya police officers, Mr. Haddick and Mr. Halliday, were due to return from leave on Aug. 12 and 16 respectively; and on July 21 he booked a
B passage with British Overseas Airways Corporation for the applicant and for his two escorts, for Aug. 16. That air passage was later cancelled (2), and, in fact, the aircraft on which they would have left went on Aug. 17. By that time, however, this application was being made and, accordingly, the passage for Aug. 17 was cancelled. In regard to booking the passage for Aug. 16, Mr. Rushford said:

C "In so doing I was aware that this would mean that the time limit laid down in s. 7 of the Fugitive Offenders Act, 1881, would just be exceeded. I considered, however, that this was preferable to curtailing the leave of an officer of the Kenya Police, a force which I was aware had been working under conditions of great stress for a long time. I was also influenced in this decision by the request originally made to me by the [applicant's solicitor]
D [i.e., the request that the applicant should be sent out as late as possible] and by the fact that I considered that even if the [applicant] were to leave the United Kingdom on Aug. 14 or 15, 1959, he would not come before a magistrate in Kenya before Monday, Aug. 17, 1959."

Mr. Rushford went on to point out that he wrote to the solicitor for the applicant stating what the arrangements were (namely, for Aug. 16), and that there was
E no objection at all.

The first matter which arises here is as to the true construction of s. 7. Counsel for the applicant maintains that it is a section which does not permit the detention of a fugitive for more than one month unless sufficient cause is shown to the contrary. As against that, two arguments are put forward. First, it is said that that
F is not the effect of the section, and that the reference there to one month is merely a reference to the time when an application may first be made, i.e., the application can be made at any time after a month. It is also said that the words "may, unless sufficient cause is shown to the contrary, order the fugitive to be discharged out of custody" are not to be read as counsel for the applicant would have them read, namely, as "shall, unless sufficient cause is shown to the contrary, order the fugitive to be discharged". It is submitted that there is a
G complete discretion: anything may be taken into consideration, save only that, if sufficient cause is shown to the contrary, then the discretion is cut down to that extent. I can well see the force of those two arguments, the argument in regard to the month and the argument as to the words "may, unless"; but I have come to the conclusion that by far the most natural interpretation of this section is the interpretation for which counsel for the applicant contends.

H We were referred also to s. 5 and s. 6 of the Act of 1881. I need not refer in detail to those sections, but, reading them with s. 7, I can see no reason for reading the period of one month in s. 7 as referring merely to the time when the application can be made. It seems to me that, in ordinary language, s. 7 is saying that there is no jurisdiction for holding a man beyond one month unless sufficient cause is shown. As regards the meaning of the word "may", I confess
I that at one time I was influenced by the argument of counsel for the Governor of Brixton Prison, but, if the discretion is completely at large and "may" means "may", then it would be quite unnecessary to have the words "unless sufficient cause is shown to the contrary". Secondly, it is a case where what is sufficient cause in any particular case may well depend on opinion and discretion. I think that the natural meaning is "shall, unless sufficient cause is shown to the contrary, order the fugitive to be discharged out of custody".

(2) See footnote† p. 481, ante.

The question then remains whether the facts disclosed by Mr. Rushford's affidavit and the circumstances of the case amount to a "sufficient cause . . . to the contrary". As regards that, counsel for the applicant maintains that "sufficient cause", in s. 7, can only relate to something which is quite outside the control of the relevant authorities: the cancellation of the flight of the aircraft on the last day might be a sufficient cause, or the illness of the fugitive and matters of that sort which are wholly outside the control of the relevant authorities. If that is right, says counsel, it is perfectly plain here that everything that was done, except for the cancellation of the aircraft which was to leave on Aug. 16, were matters within the control of the authorities, and he points out that Mr. Rushford in fact well knew that he was going against the section but found that it was convenient to do so.

For my part, I think that that interpretation of "sufficient cause to the contrary" is too narrow. It seems to me that within those words can be brought matters of reasonableness. If one looks back to s. 6, it becomes perfectly clear that the escort or the authorities who are going to receive the fugitive may themselves require the governor of the prison where he is detained to detain him for a reasonable time. I say that because, by s. 6, provision is made for a second warrant being issued, namely, a warrant by the Secretary of State in a case such as this, handing the fugitive over to the escort, and the section goes on to provide, in the last paragraph:

"The governor or other chief officer of any prison, on request of any person having the custody of a fugitive under any such warrant, and on payment or tender of a reasonable amount for expenses, shall receive such fugitive and detain him for such reasonable time as may be requested by the said person for the purpose of the proper execution of the warrant."

It is true that as far as this court knows, no such warrant has been issued in this case and that the applicant is still held under the original committal order. But it is to be observed that, if such a warrant had been issued in this case, the Colonial Office acting for the Kenya Government or the police officers, the escort, could themselves, as I understand that section, have produced the warrant to the Governor of Brixton Prison and said to him, in effect: "Please hold this man for a reasonable time". Accordingly, it seems to me that, when one is construing the words in s. 7, "unless sufficient cause is shown to the contrary", one is entitled to take into account questions such as reasonableness in all the circumstances. Once one gets as far as that, as a matter of construction, it seems to me quite plain that, on the facts disclosed in Mr. Rushford's affidavit, no one could say that he was not acting perfectly reasonably in making the arrangements which he did. One cannot shut one's eyes to the fact that this is only a matter of a day or two's delay and that the alleged offences are serious offences. There is also the fact that the applicant's own solicitor was informed of the arrangements and took no objection. That latter observation is subject to the comment that he might well not have had s. 7 in mind, but, when one is thinking of this matter in terms of reasonableness, it is some evidence that what was being done was perfectly reasonable and that the applicant was not being detained for an unreasonable time. In these circumstances, I would refuse the application.

ASHWORTH, J.: I agree, and there is nothing that I can usefully add.

HINCHCLIFFE, J.: I also agree.

Application refused.

Solicitors: *Hopwood, Hilbery, Mote & Leedham-Green* (for the applicant); *Charles Russell & Co.* (for the Secretary of State for the Colonies); *Director of Public Prosecutions* (for the Governor of Brixton Prison).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

A AKERHIELM AND ANOTHER v. DE MARE AND OTHERS.

[PRIVY COUNCIL (Lord Keith of Avonholm, Lord Jenkins and Mr. L. M. D. de Silva), April 7, 8, 9, 13, 14, 15, June 1, 1959.]

Misrepresentation—Fraudulent misrepresentation—Belief in truth of representation as understood by representor—Circular letter inducing purchase of shares.

In an action for deceit in respect of alleged fraudulent misrepresentation made in writing the question is not whether the defendant honestly believed the representation to be true in the sense assigned to it by the court on an objective consideration of its truth or falsity, but whether he honestly believed the representation to be true in the sense (being a sense in which the representation might reasonably be understood) in which he in fact understood it, albeit erroneously, when it was made (see p. 503, letter C, post).

Arnison v. Smith ((1889), 41 Ch.D. 348) criticised (see p. 503, letter F, post).

Dictum of COTTON, L.J., in *Glasier v. Rolls* ((1889), 42 Ch.D. at p. 458) applied. Appeal allowed.

[As to the fraudulent element of misrepresentation in an action of deceit, see 26 HALSBURY'S LAWS (3rd Edn.) 845, para. 1571; and for cases on the subject, see 35 DIGEST 42, 43, 364-377.]

Cases referred to:

Angus v. Clifford, [1891] 2 Ch. 449; 60 L.J.Ch. 443; 65 L.T. 274; 35 Digest 54, 488.

Arnison v. Smith, (1889), 41 Ch.D. 98, 348; Digest (Practice) 465, 1503.

Benmax v. Austin Motor Co., Ltd., [1955] 1 All E.R. 326; [1955] A.C. 370; [1955] 2 W.L.R. 418; 3rd Digest Supp.

Derry v. Peek, (1889), 14 App. Cas. 337; 58 L.J.Ch. 864; 61 L.T. 265; 54 J.P. 148; 35 Digest 27, 185.

Glasier v. Rolls, (1889), 42 Ch.D. 436; 58 L.J.Ch. 820; 62 L.T. 133; 9 Digest (Repl.) 126, 684.

Hontestroom (S.S.) v. Sagaporack (S.S.), Hontestroom (S.S.) v. Durham Castle (S.S.), [1927] A.C. 37, 47; 95 L.J.P. 153; 136 L.T. 33; Digest (Practice) 770, 3353.

Lees v. Tod, (1882), 9 R. (Ct. of Sess.) 807.

O'Rourke v. Darbishire, [1920] A.C. 581; 89 L.J.Ch. 162; 123 L.T. 68; 18 Digest (Repl.) 49, 392.

Watt (or Thomas) v. Thomas, [1947] 1 All E.R. 582; [1947] A.C. 484; 1947 S.C. (H.L.) 45; [1947] L.J.R. 585; 176 L.T. 498; 2nd Digest Supp.

Yuill v. Yuill, [1945] 1 All E.R. 183; [1945] P. 15; 114 L.J.P. 1; 172 L.T. 114; 2nd Digest Supp.

Appeal.

Appeal by Baron Uno Carl Samuel Akerhielm and Ole Beyer from a judgment of the Court of Appeal for Eastern Africa (SINCLAIR, V.P., BRIGGS, J.A., and BACON, J.A.), dated July 4, 1956, reversing a judgment of the Supreme Court of Kenya (CORRIE, J.), dated May 18, 1955, in action for damages for deceit by the respondents, Rolf de Mare, Guy Magnus Alexander Faugust and Barbro Wilhelmina Elisabeth Faugust, against the appellants and Eric Von Huth (who died after action brought). The facts are set out in the judgment of the Board.

H. A. P. Fisher for the appellants.

R. B. Willis for the respondents.

LORD JENKINS: In this case, the present respondents (hereinafter called the plaintiffs) brought an action in the Supreme Court of Kenya against the present appellants (hereinafter called the defendants) and one Eric Von Huth

(who died after action brought) claiming damages in respect of certain alleged false and fraudulent misrepresentations contained in a circular letter dated Feb. 24, 1948, and signed by the defendants and Von Huth, whereby the plaintiffs alleged themselves to have been induced to subscribe for shares in Dantile, Ltd. (a company incorporated in Kenya on Mar. 20, 1948) and by so subscribing to have suffered damage. The plaintiff Rolf de Mare subscribed in cash for five hundred ordinary shares of the company of 20s. each. The plaintiff Guy Magnus Alexander Faugust subscribed for 1,500 ordinary shares and 250 preference shares of 20s. each, and made over five hundred of his ordinary shares by way of gift to his wife, the plaintiff Barbro Wilhelmina Elisabeth Faugust, who did not herself subscribe for any shares. A B

The company was formed with a view to the manufacture and sale in Kenya and elsewhere of tiles for use in bathrooms, etc., of a type known as "cold process tiles" as distinct from the conventional baked or heat-treated type of tile. There appears to be no doubt that, at the date of the circular letter, "cold process" tiles were being successfully made and marketed in Denmark by way of substitute for the conventional type of tile, which since the war had been difficult or impossible to obtain, and that a method of making "cold process tiles" was the subject of protection under a patent application in Denmark the benefit of which was vested in a Danish company called Muritas A/S. Unfortunately, the company was not a success, its failure being mainly attributable to the reappearance on the market within a short time after its formation of adequate quantities of the conventional type of tile, and the consequent cessation of the demand which had previously existed for "cold process" tiles, which were, in truth, no more than a war-time or post-war substitute for the normal article. In August, 1950, a Mr. Erik Seex (who gave evidence at the trial) was appointed as an inspector to investigate the affairs of the company under the Kenya Companies Ordinance. His report led to the prosecution of the defendants and Von Huth for certain offences (not involving dishonesty) under the ordinance. Later the company went into liquidation, and it was found that the whole of the shareholders' money had been lost. In such circumstances it was natural that persons in the plaintiffs' position should look back with a somewhat jealous eye at any statements in regard to the company's position and prospects made to them at the time when they subscribed for its shares. C D E F

The statements in the circular letter alleged by the plaintiffs in their plaint to constitute the false and fraudulent misrepresentations on which they relied were three in number, viz.:—(a) "The tile has been produced and sold successfully in Denmark"; (b) "We have procured the patent rights for most countries in Africa, India and Pakistan"; and (c) "About a third of the capital has already been subscribed in Denmark." The plaint also charged the defendants with omitting to state in the circular letter that free shares were to be issued to the defendants as well as to other persons. G H

At the trial before CORRIE, J., representation (a) was admitted to be true and the complaint concerning the non-disclosure of the issue of "free shares" was found to have been based on a misunderstanding of the position as to shares issued for a consideration other than cash, and was dropped. There thus remained to be dealt with by the learned judge representation (b) as to the patent rights and representation (c) as to "about a third of the capital" having "already been subscribed in Denmark". The learned judge held that these representations were both untrue but that the defendants honestly believed them both to be true at the time when they were made. Accordingly, directing himself correctly as to the law applicable to these findings by reference to the principles stated in *Derry v. Peek* (1), he held that the plaintiffs had failed to make good their charges of fraudulent misrepresentation and, by his judgment I

- A dated May 18, 1955, dismissed the action. From that judgment the plaintiffs appealed to the Court of Appeal for Eastern Africa. In a judgment delivered by BRIGGS, J.A., and concurred in by SINCLAIR, V.P., and BACON, J.A., that court as to representation (b) hesitated to hold that it was false and declined to hold that it was made fraudulently; and as to representation (c) concurred with CORRIE, J.'s finding that it was untrue, but reversed his finding to the effect that the defendants honestly believed it to be true. Accordingly, by the judgment of the Court of Appeal dated July 4, 1956, the appeal was allowed, and judgment was directed to be entered for the plaintiffs for damages assessed at the full amounts paid up on the shares subscribed for by them, on the footing that, at the date of their allotment, such shares were valueless. The defendants now appeal from that judgment.
- C The appeal has been fully and elaborately argued, but the essential issues fall within a relatively small compass, and may be thus summarised:—The first question is whether the Court of Appeal were warranted in reopening CORRIE, J.'s finding to the effect that the defendants honestly believed representation (c) to be true; and, if so, whether the Court of Appeal, treating the matter as at large, were justified in concluding as they did that the defendants did not honestly so believe. A distinction is here to be observed between the first defendant Baron Akerhielm who gave evidence at the trial and the second defendant Mr. Ole Beyer who did not. The second branch of this first question only arises if the defendants fail to secure a negative answer to the first. The second question is whether the circumstances of the case are, as the plaintiffs contend, such as to warrant their Lordships in reopening the concurrent findings of the trial judge and the Court of Appeal to the effect that the defendants honestly believed representation (b) to be true; and, if so, whether a finding to the effect that they did not honestly so believe would be justified on the facts. If the defendants succeed on the first question in either of its branches, then the appeal must be allowed unless the plaintiffs succeed on both branches of the second question. All else failing, it is still open to the defendants to contend that the representations complained of were true or that they were immaterial and did not induce the plaintiffs' purchases of shares. Finally, the defendants contend that, even if the decision of the Court of Appeal is held to have been right in other respects, the damages awarded by that court are excessive.
- F

- G As to the facts, the plaintiffs and the defendants are, and Von Huth was, of Scandinavian origin. In 1947 the plaintiffs and defendants were resident in Kenya. Von Huth who had formerly been so resident was living in Denmark where he had been for some years. In 1947 Von Huth conceived the idea that the manufacture of cold process tiles might be profitably carried on in Kenya. He enlisted the co-operation of Mr. D. G. Stewart an accountant practising in Nairobi and opened negotiations with Muritas A/S with a view to obtaining from them the requisite interest in their patent rights under the Danish patent application referred to above. These negotiations resulted in an agreement between Muritas A/S and Von Huth which must be referred to in some detail. By this agreement, which was dated Nov. 29, 1947, and expressed to be made between Muritas A/S (thereinafter called "the vendor") and Dantile East Africa, Ltd., by Erik Von Huth (thereinafter called "the purchaser") it was agreed (so far as material for present purposes) as follows:—
- I

"I.

"The vendor agrees to assign unto the purchaser the sole right of exploitation within the territories (the countries, the governmental districts) of Kenya and Uganda in East Africa of the manufacturing of Muritas tiles which is patented in this country, with priority right, by the vendor's application for Danish Letters Patent of Nov. 5, 1946, No. 4330.

" II.

" The purchaser's right of exploitation shall be limited to the aforesaid two territories, within which he shall be entitled to manufacture, sell and advertise Murit glazing powder or Murit products of any kind, while the purchaser must not in any other territory (country or governmental district) undertake any of the above mentioned acts before a special agreement concerning such exploitation has been entered into with the vendor in regard to each territory (country or governmental district).

" However, the purchaser shall be entitled to sell a quantity not exceeding 20,000 Murit tiles for the purpose of introducing the article in any other territory in which the vendor has not advised the purchaser that he has, by a final agreement, assigned the right of exploitation to a third party.

" III.

" By an option on the right of exploitation of the Muritas patent in (1) Abyssinia, (2) Belgian Congo, (3) Madagascar, (4) Mozambique, (5) Nyasaland, (6) North Rhodesia, (7) South Rhodesia, (8) Southwest Africa, (9) Natal, (10) Transvaal-Oranje, (11) Cape Colony, (12) Tanganyika, (13) Zanzibar and (14) the Indian Empire with Ceylon, already given to a third party, the vendor is, until further, prevented from assigning to the purchaser the right of exploitation in the aforesaid fourteen territories. However, the vendor declares himself to be willing, if the third party has not on or before June 30, 1948, alternatively Oct. 1, 1948, carried out his option by concluding a final agreement of exploitation, to give the purchaser an option on the right of exploitation in all, respectively the remaining part of the fourteen countries, for a consideration of £500 for each of the eleven countries mentioned above under (3)-(13) and £1,000 for each of the countries mentioned under (1) and (2), and £5,000 for No. (14), the Indian Empire and Ceylon together.

" However, in the event that a third party should acquire the right of exploitation for all, respectively part of the fourteen countries, the vendor shall bind himself to include in the final agreement drawn up in this respect, stipulations concerning a definite limitation of the right of exploitation within the countries in question, and concerning liquidated damages to be paid by such third party for manufacturing, selling or advertising the Murit products of such third party outside the countries in question, such liquidation damages to be not less than £250 for each of the thirteen countries first mentioned, and £1,500 for (14) the Indian Empire and Ceylon; and to assign to the purchaser the right to the said liquidated damages when the purchaser to the vendor establishes the possibility of the third party having exceeded his right of exploitation, and undertakes for his own account to collect the liquidated damages.

" In this connexion, however, reservation shall also be made as to the right of effecting an introductory sale of not more than 20,000 tiles as outlined under II, par. 2.

" VII.

" As consideration for the right of exploitation in the two countries mentioned in section II, the purchaser shall (A) on signing this agreement pay to the vendor a sum of Kroner 6,500.00 say six thousand five hundred kroner, the receipt whereof the vendor hereby acknowledges, and (B) pay a corresponding amount of Kr.6,500.00 in shares in Dantile East Africa, Ltd., converted into £ at the rate of Kr.20.00 to £1.

" VIII.

" The company of Dantile East Africa, Ltd., is established by the purchasers with a nominal capital of £10,000 say ten thousand pounds, of which amount £3,325 shall be paid in cash, or as far as concerns the amount

A due the vendor according to section VII (Kr.6,500.00 or £325) in other values.

"Dantile East Africa. Ltd., shall be registered in Kenya, and the board of directors shall comprise Eric Von Huth, Ole Beyer, Danish Vice Consul and Baron Uno Akerhielm, the latter of whom, being the attorney of the vendor on the board, shall represent the vendor's voting power.

B "The said three members of the board shall jointly, and inclusive of the vendor's £325 shares mentioned in section VII, hold sixty per cent. of the capital subscribed in Dantile East Africa, Ltd.

"The remaining forty per cent. shall be subscribed by chartered accountant D. G. Stewart, who shall himself be a member of the board of directors of the company together with his nominee.

C "X.

"On receipt of the first instalment of the consideration for the countries concerned, the vendor shall bind himself immediately to extend the protection of his patent acquired by the application for Danish patent of Nov. 5, 1946, No. 4330, which is immediately valid for one year in all countries, to be valid for another year in all countries for which the said payment has been made by applying for a patent and thereupon expedite as much as possible the acquisition of the final patents in the same manner as the vendor is already endeavouring to obtain a final Danish patent.

D "All expenses incurred in connexion with such extension must be borne by the purchaser."

E Having secured this agreement, Von Huth returned to Kenya and succeeded in interesting the defendants in his proposed tile-making company. It should be emphasised that this company had not yet been formed and that "Dantile East Africa. Ltd." referred to in the agreement of Nov. 29, 1947, was merely the name provisionally given by Von Huth to the proposed new company, ultimately formed as "Dantile, Ltd.", with which the present case is concerned.

F Points to note about this agreement are (i) that the sole right of exploitation given by cl. I was limited to Kenya and Uganda, (ii) that as regards the fourteen other countries mentioned in cl. III all the purchaser was given was an option to take up the right of exploitation in all or any of these countries on payment of the prices therein mentioned, totalling £12,500 in the event of the right being taken up in all of them, in addition to the payments in cash and shares provided for by cl. VII; and (iii) that the fourteen countries mentioned in cl. III

G were subject to a prior option outstanding in a third party. The third party referred to in the singular was primarily Mr. Stewart, but a Mr. Alber appears to have been to some extent interested jointly with him. It appears that Mr. Stewart's prior option was cleared off by an agreement under which he was to retain the option for South Africa to the exclusion of Von Huth and Dantile,

H Ltd., while Dantile, Ltd. was to take over his option for the rest of the fourteen countries mentioned in the agreement of Nov. 29, 1947. This arrangement would seem to have been made before the date of the circular letter by letters dated Jan. 26 and 27, 1948, passing between the second defendant Ole Beyer and Mr. Stewart to the production of which the plaintiffs objected, but the existence of which is not now open to doubt. Mr. Alber's interest was also got in,

I but it is not clear whether this transaction was actually completed before or after the date of the circular letter. Von Huth appears to have agreed orally with the defendants before the date of the circular letter to make over his interest to the company when formed, and to have confirmed this later in writing. It is unnecessary to investigate these transactions in detail, as it is now reasonably plain that, at the date of the circular letter, the defendants and Von Huth had either got in or were satisfied that they were in a position to get in these prior interests so as to be able to make over to the company when formed the unencumbered benefit of the agreement of Nov. 29, 1947.

Reference should next be made to the circular letter of Feb. 24, 1948. The defendants and Von Huth appear to have collaborated in the production of this document and to have been assisted, to an extent not easy to assess, by a Mr. Hollister, a solicitor, who later became solicitor to the company when it had been formed. The circular letter was not an invitation to the public to subscribe for shares but was sent out to individuals by name. It was, therefore, not subject to the statutory requirements applicable to a prospectus. So far as material for the present purpose, the circular letter was in these terms:

- "DANTILE, LTD. (IN FORMATION),
P.O. Box 412,
Nairobi.
24/2/48.

"Dear

"The undersigned are forming a private limited company in Kenya for the purpose of producing a cold process tile used for bathrooms, etc. The tile has been produced and sold successfully in Denmark. We have procured the patent rights for most countries in Africa, India and Pakistan. About a third of the capital has already been subscribed in Denmark and the necessary machinery for the first unit has been purchased and is already on its way to Kenya and the machinery for the second unit is on order. We have realised from conversations that most of our Scandinavian friends are very interested in this project and anxious to subscribe some capital. For your information we enclose herewith a memorandum showing the proposed formation of the company and a statement of expected profit and loss account for the first year. Will you please let us know at your early convenience whether you wish to take up any shares. Any further information you may like to have will gladly be given by us at our offices—c/o Beyer's (Kenya) Corporation, Kingsway Street, Nairobi. With kind regards,

Sgd. Baron Akerhielm.
Sgd. Ole Beyer.
Sgd. E. Von Huth.

"MEMORANDUM ON DANTILE, LTD.
(annexed to Circular Letter)

STRICTLY PRIVATE AND CONFIDENTIAL NOT FOR PUBLICATION

Suggested Share Capital	Shs. 220,000.00
To be divided into:	
2,500 6% Preference Shares at 20/- each	50,000.00
8,500 Ordinary Shares	170,000.00
	Shs. 220,000.00
Already subscribed	70,000.00
To be subscribed	150,000.00

"DIRECTORS:

"Eric Von Huth (Danish) Nairobi.
"Baron Uno Akerhielm (Swedish) Nairobi.
"Ole Beyer (Danish) Nairobi.

"SECRETARY:

"Registered Office: Box 412, Nairobi.

"OBJECTS AND PROSPECTS:

"We further enclose a form of subscription of the shares, and should be grateful for your reply at an early date, as only a limited number of

- A shares still are available. The company has a contract with the patent holders in Denmark for the production rights of a tile used for bathrooms, kitchens, breweries, bakeries, fire places etc. Several factories are already existing in Denmark and paying a good dividend. The production of this tile is an entirely new invention, as the tiles are not burnt, but made by a cold process as specified in the contract with the patent holders. The tiles are sold in Denmark at 52 Ore per tile, whereas here in Kenya the suggested price has been put as low as 36 cents. This price can most likely be raised considerably. The purpose of the company is further to produce anything as specified in the memorandum and articles of association, (these are at your disposal in our office) but in principal the production of the above-mentioned tile. Besides the patent right for Kenya and Uganda, the company holds the option for several other countries in Africa, India and Pakistan. These patent rights can either be taken up by the company, or sold to other parties at considerable profit. Should the company consider it advisable to start production in other countries, further capital would naturally be required and old shareholders will have priority in taking up these shares in proportion to shares already held.

D "MANAGEMENT

"The company will be managed by the Directors, with Eric Von Huth as Manager and Accountant.

"CONTRACT:

- E "A contract is held with the patent holders, A/S Muritas, Copenhagen, in the name of Dantile, Ltd.

Signed Uno Akerhielm.

Eric Von Huth.

Ole Beyer."

- F It will be convenient to deal first with representation (b)—"We have procured the patent rights for most countries in Africa, India and Pakistan." This statement in the circular itself should be read in conjunction with the following passage in the attached memorandum:

- G "Besides the patent right for Kenya and Uganda, the company holds the option for several other countries in Africa, India and Pakistan. These patent rights can either be taken up by the company, or sold to other parties at considerable profit."

Reference should also be made to the section headed "Contract".

"CONTRACT:

"A contract is held with the patent holders, A/S Muritas, Copenhagen, in the name of Dantile, Ltd."

- H On the question whether representation (b) was true or false, the trial judge said this:

- I "The position at the time when the circular letter was issued was that under the agreement made on Nov. 29, 1947, between Muritas A/S and Dantile East Africa, Ltd., (Exhibit E) Muritas had agreed to assign to Dantile the sole right of exploitation within the territories of Kenya and Uganda. There is no evidence that any attempt had then been made to register the patent rights in Kenya and Uganda; or indeed, to take the necessary preliminary step of registration in the United Kingdom. As far, therefore, as Kenya and Uganda are concerned, it was untrue to say that the defendants had procured the patent rights. No patent rights for Kenya or Uganda were then in existence. As regards the other African Territories and as regards India and Pakistan, according to the uncontradicted evidence of the first defendant, the option held by Mr. Von Huth and Mr. D. G. Stewart

had been split; Mr. D. G. Stewart retained the sole right to exercise the option in respect of the South African provinces mentioned in cl. III of the agreement, and surrendered his right as regards the remaining territories mentioned in that clause to Dantile, Ltd., to whom also Mr. Von Huth had transferred his interests in the option. Assuming that this is a correct statement of the position at the time when the circular letter was issued, while it was clearly not the fact that the defendants had 'Procured the patent rights for most countries in Africa, India and Pakistan' as stated in the circular letter, it was not untrue to say, as was stated in the attached memorandum, 'The company hold the option for several other countries in Africa, India and Pakistan'."

In the Court of Appeal, BRIGGS, J.A., reached a conclusion more favourable to the defendants on the question whether representation (b) was true or false. He said in regard to it:

"I turn now to the patent rights. As I have said, Muritas had filed an application for Danish letters patent in 1946. I presume that under the international convention this would have enabled them to register in the United Kingdom and so to obtain provisional protection in Kenya and Uganda. There is some evidence that they did instruct agents to apply for registration in the United Kingdom. There is no reason to suppose that letters patent were ever issued in Denmark or that registration was ever completed in the United Kingdom. There was certainly no registration at any material time in Kenya or Uganda. It is of course necessary to distinguish between 'patent rights' and 'letters patent' or 'a patent'. The [defendants] never claimed the latter: but the former phrase, though vague, must have some validity and meaning. If A says, 'I have the patent rights for Kenya', I think he must mean at least, 'There is somewhere a patent, or an application for patent, which I believe to be valid, and to be capable, by registration in the United Kingdom and Kenya, of being valid in Kenya: to this I hold by licence, or agreement or option for licence, the exclusive rights in respect of Kenya'. It may be objected that he means much more, in particular, that the original patent or application has already by registration been validated as regards Kenya and Uganda. This was the view which commended itself to the learned trial judge."

After a quotation from CORRIE, J.'s judgment on this point, BRIGGS, J.A., continued:

"Under the rule in *Benmax v. Austin Motor Co., Ltd.* (2) I think we must form our own opinions on this question. Speaking for myself, I think that in a case of alleged fraud I might have been inclined to take a view more generous to the defendants, and to have found that the statement 'We have procured the patent rights for most countries in Africa, India and Pakistan' was not proved to be untrue as regards Kenya and Uganda, but on the view which I take of other issues it is not necessary finally to answer this question. As regards other countries, the position is more complex."

Then, after discussing the company's title to Mr. Stewart's and Von Huth's interests, BRIGGS, J.A., said this:

"The general effect of all this is, however, that there is good prima facie reason to suppose that all rights of Von Huth and Stewart under the prior option, except those in respect of South Africa, had become vested in Dantile, Ltd. Without saying for a moment that that was proved, I think it is so probable that it would be impossible to say that the [defendants] did not honestly believe it to be the case, whether or not they so swore."

- A For these reasons I should hesitate to hold that the second statement was false, and I should decline to hold that it was made fraudulently."

Their Lordships will return later in this judgment to CORRIE, J.'s conclusion to the effect that the defendants honestly believed representation (b) to be true and the evidence on which that conclusion was based; but assuming, without deciding, that representation (b) was not wholly true, they may say at once that they see no sufficient reason for disturbing the concurrent findings of CORRIE, J., and the Court of Appeal in favour of the defendants on this point.

- B Before passing to the question whether representation (c) was true or false, it will be convenient to state the position at the date of the circular letter in regard to the shares to the nominal amount of 70,000/- referred to as "capital already subscribed" in the "specification of capital required" annexed to the circular letter, which obviously constituted the capital referred to as having "already been subscribed in Denmark" in the letter itself. It appears that a Danish resident named Dan Christensen had promised to subscribe in cash for shares to the nominal amount of 25,000/-; that the defendants and Von Huth had promised him an allotment of shares to the nominal amount of 3,500/- credited as fully paid up for services rendered in the formation of the company:
- C and that under the agreement of Nov. 29, 1947, the defendants and Von Huth had promised to allot Muritas A/S shares to the nominal amount of 6,500/- in part payment for the patent rights in respect of Kenya and Uganda. As to the total cost of 18,000/- attributed to the patent rights, Mr. Seex in his report schedule II breaks this down into 6,500/- in cash and 6,500/- in shares (making 13,000/- in all) for Muritas A/S; 2,000/- in cash and 2,000/- in shares
- E for Von Huth in respect of his interests in the patent rights; and 1,000/- in cash for Mr. Alber, which last item suggests Mr. Alber's interest had been got in by the date of the circular letter, though the letter of Mar. 23, 1948, hereafter referred to suggests the contrary. In schedule I of his report, Mr. Seex gives "Particulars of preliminary expenses" which show allotments of the following amounts in shares credited as fully paid up:—to Von Huth (20,000/-), to the Baron (5,000/-) and to Ole Beyer (5,000/-), besides the allotment to Christensen of shares to the nominal amount of 3,500/- already referred to. Mr. Seex thus shows a total of shares to a nominal amount of 33,500/- issued to Von Huth and the defendants credited as fully paid up as part of the preliminary expenses, this figure being not far short of the 37,000/- for formation expenses included in the schedule of capital required annexed to the circular letter. The figures
- G in the case are by no means easy to follow, but it appears plain that the statement that about one-third of the capital in the shape of the 70,000/- worth of shares referred to in the "schedule of capital required" had already been subscribed in Denmark can only be justified as a statement of truth on the footing that the fully paid shares to be taken by Von Huth and the defendants could truly be so described.

- H On the question whether representation (c) was true or false, the plaintiffs' main argument was to the effect that the word "subscribed" in the circular letter meant "subscribed in cash", and in support of this proposition they relied on *Arnison v. Smith* (3). The learned trial judge rejected this contention in these words:

- I "If the phrase: 'About a third of the capital has already been subscribed in Denmark' stood alone, a reader might reasonably infer that this meant subscribed in cash. When, however, he turned to the second page of the 'Memorandum on Dantile, Ltd.' attached to the circular letter, he would find the following under the heading 'Specification of Capital Required.'"

Then, after reading the items totalling 70,000/- under that heading, the learned judge continued:

"From this it is clear that the 'Capital already Subscribed' included shares issued for considerations other than cash; indeed upon the face of it, it would appear that it consisted entirely of such shares. If the plaintiffs had any doubt as to the meaning of these items they had only to inquire at the company's offices. Actually, the second plaintiff did go to the office and make inquiries before he signed his cheque for the purchase of shares in the company, but there is no evidence that he then made inquiries as to the capital subscribed in Denmark. The proposed capital of the company was Shs. 220,000.00 of which, as shown in the memorandum, Shs. 70,000.00 had already been subscribed. Thus the statement to which the plaintiffs object would be true, provided that the whole Shs. 70,000.00 had, in fact, been subscribed in Denmark. This is an aspect of the matter upon which Mr. Salter has not laid any stress, but it is clearly important. The register of shareholders in Dantile, Ltd. has been put in evidence as part of Exhibit 5. In this register the names and addresses of all shareholders are entered, with the value in pounds of the shares allotted to them respectively. Upon examination of the register it will be noted that the only shareholders with addresses in Denmark are as follows:

NAME	TOTAL VALUE OF SHARES HELD
HAROLD DAN CHRISTENSEN	£1,425
A/S MURITAS	325
	£1,750

"If to this amount there be added the value of the shares registered in the name of Eric Von Huth for services rendered by him in Denmark: £1,100, we arrive at a total of £2,850, that is to say Shs. 57,000/- which falls short by more than Shs. 16,000.00 of a third of the total capital of the company. On this ground I hold that the statement that 'About a third of the capital has already been subscribed in Denmark' was untrue."

BRIGGS, J.A., in the Court of Appeal agreed that representation (c) did not mean that one-third of the capital had already been subscribed in cash, so that it could not be held false on the ground that the 70,000/- of capital referred to in the "specification of capital required", or some part of it, was in fact to be issued for consideration other than cash, but also agreed that it could not be said that the whole of this 70,000/- of capital was in fact to be subscribed "in Denmark". Representation (c) was thus held false on the narrow ground that, while the representation as to the amount of capital already subscribed was correct, the representation that this amount had already been subscribed "in Denmark" was untrue.

Their Lordships agree on both points. It seems to them impossible to maintain that the defendants and Von Huth could not consistently with the representation pay (for example) the formation expenses by allotting fully paid shares of the appropriate nominal amount to the persons to whom the expenses were payable instead of issuing shares to a like nominal amount for cash and paying the cash so raised to those persons, or by allotting fully paid shares to the appropriate nominal amounts to Muritas A/S or Von Huth in respect of the patent rights. On the other hand, their Lordships cannot regard the words "subscribed in Denmark" as apt, according to their ordinary meaning, to include shares allotted as fully paid to persons resident in Kenya for services rendered in Denmark in connexion with the formation of the company.

The only witness called on the defendants' side was the Baron, and, accordingly, the question whether the defendants honestly believed representations (b) and (c) or either of them to be true depended before the learned trial judge not only on the content of the Baron's evidence but also in great measure on the view formed by the learned trial judge of the Baron's credibility as a witness and

A honesty as a man, after seeing and hearing him give his evidence. The Baron was examined and cross-examined at considerable length, and references to his evidence must perforce be selective.

The following passages are taken from his examination-in-chief:

B "Q.—Now before we do anything else, I want you to tell My Lord the exchange rate between Kroner and the East African shilling or pound in 1947 and explain fully what you say? A.—In 1947 or 1948 the exchange rate was 19·38 to the pound.

"Q.—Now what does that mean in terms of per cent.? A.—3·1 per cent. It depends if you are buying or selling. 19·38 buyers 19·36 sellers.

C "Q.—And an exchange rate of 1,500 kroner at 3·1 per cent. A.—Approximately 48,500 kroner carries an exchange rate for East African shillings of 1,500/-. Those two figures added together make a total of Shs. 50,000/-.

"Q.—And if one adds another Shs. 20,000/- on to that the sum becomes Shs. 70,000/-? A.—Agreed.

D "Q.—Now would you tell His Lordship why Shs. 20,000/- carried no exchange? A.—I know Eric Von Huth asked for 20,000 kroner for his work in Denmark. Mr. Eric Von Huth was given Shs. 20,000 in shares; the work was done in Denmark, so the company saved the exchange.

"Q.—And this Shs. 48,500/- which carried the exchange was that money or services in Denmark? A.—It was machinery and money invested in Denmark.

E "Q.—What did he [i.e., Von Huth] tell you, if anything, about licences and patents? A.—He showed me all the different contracts and licences; and also showed me an application from Muritas written to the English Patent, some bureau . . .

"Q.—Now before you sent out the letters, had you received any financial support from anywhere? A.—From a person or the company?

F "Q.—Either. A.—Yes, the company had received payment from Mr. Dan Christensen in Denmark.

"Q.—Was it the company in formation? A.—Yes.

"Q.—And perhaps you might tell us at this stage, did you yourself invest money in this concern? A.—Yes.

G "Q.—I again think it is admitted by a plaintiff witness; it was £500. A.—It is only £400 in the books, but I actually paid £500 in cash.

"Q.—Did you do any work in connexion with this company or did you leave it to others? A.—I did all the work myself.

"Q.—And we know that you did in fact receive a certain allotment of shares without cash consideration? A.—I did.

H "Q.—Did you get any cash payment for the work which you told His Lordship you did? A.—No.

"Q.—And the letters as you call them; were the letters sent out to friends? A.—That is correct.

"Q.—Were they all Scandinavians? A.—Yes.

I "Q.— . . . Now this letter to the subscribers did you draft it yourself, or who? A.—It was very likely drafted by us and I gave it to Mr. Hollister for his final draft.

"Q.—You did a rough draft and passed it on to Mr. Hollister and he did the final draft? A.—Yes. He did all the contracts, all the letters and everything.

"Q.—And why did Mr. Hollister do this thing and not someone else? A.—They wanted to be sure the letter was correct. Mr. Hollister was appointed the company's lawyer.

"Q.—And when he put this thing in final draft, I suppose you and the other two read it over and signed it? A.—Yes. A

"Q.—And it did consist as we have heard of about five pages? A.—Yes.

"Q.—And at the time when you signed it and sent it to these people, did you consider that anything in it was untrue? A.—I did not.

"Q.—Do you even now consider that anything is untrue? A.—There is nothing untrue. B

"Q.—Did Mr. Ole Beyer get any shares for a consideration other than cash? A.—He did, for his work done for the company.

"Q.—What sort of work did he do? Was it small, insignificant, substantial, easy or hard? A.—He did all the secretarial work; there was quite a lot of it. C

"Q.—And you heard Mr. Seex say that if Mr. Eric Von Huth spent a year in Denmark travelling around looking for factories and coming to Kenya, that Shs. 20,000/-worth of shares was a reasonable remuneration? A.—I certainly agree with that.

"Q.—And do you agree that you got too much for the work you did? A.—I do not think so. D

"Q.—Now these three statements which are complained of in the plaintiffs' plaint para. 4. (a) 'The tile has been produced and sold successfully in Denmark'. Now what is your honest opinion about that statement? A.—That it is quite true, My Lord. E

"Q.—When you say you believe it to be true, do you mean then or now, or both? A.—Then and now.

"Q.—(b) 'We have procured the patent rights for most countries in Africa, India and Pakistan'. What is your honest opinion about that statement? A.—Quite true statements, according to the information I had.

"Q.—(c) 'About a third of the capital has already been subscribed in Denmark'; What do you say about that statement? A.—That is also quite true. F

"COURT: There is one point which I think arises at this stage. The witness has just said that the statement: (b) 'We have procured the patent rights for most countries in Africa, India and Pakistan', is perfectly true. So far, all I have seen with regard to the acquisition of patent rights is Exhibit 'E' which relates only to Kenya and Uganda. I presume they are covered by the agreement with Mr. Eric Von Huth which I have not seen. A.—It was, of course, the occasion of the patent rights. Exhibit 'E' sets out the amounts which Dantile would have to pay for the patent rights. G

"MR. MORGAN: Was anything said on the other pages of the circular letter? A.—It was mentioned on the second page that we had the option of these patent rights. H

"Q.—Whose wording was the wording of this circular; was it yours? A.—It was the solicitor's, I should think. It was drafted by us, but properly written by our solicitor, Mr. Hollister.

"MR. MORGAN: Your mother tongue, although you speak English is Swedish, isn't it? A.—Yes. Swedish, My Lord. I

"Q.—Do you remember the expression 'About one-third of the capital has been subscribed in Denmark'? A.—I do.

"Q.—From memory, and without looking at the memorandum does it say what sum was about one-third of the capital? A.—About Shs. 70,000.00.

"Q.—And again from memory, can you recall how that Shs. 70,000.00

A is made up? A.—Roughly, I can. Part was for machinery and patent rights and part was Mr. Dan Christensen's money; part work done by Mr. Eric Von Huth and part was exchange from money invested in Denmark.

“Q.—Now to assist the court, is there any English or East African coin which is the approximate equivalent to Kroner? What is the value of one Kroner? A.—I think it is 97 cents: about three per cent. difference for one shilling.

“Q.—So Shs. 25,000/- would be about 25,000 Kroner? A.—Yes, there is about three per cent. difference.

“Q.—And when you use the expression ‘about one-third of the capital has been subscribed in Denmark’ what did you intend to convey? A.—To convey that that money was actually subscribed. We had bought machinery; paid for services rendered and had cash for it; it was actually invested or subscribed in Denmark.

“Q.—For what purpose did you go to Mr. Hollister? A.—For the purpose of getting everything straight before starting the company.

“Q.—Were you in fact relying upon your co-directors or upon Mr. Hollister, or upon whom? A.—I was relying on Mr. Hollister.

“Q.—Now do you see on the next page ‘Amount of Capital required’? A.—Yes.

“Q.—Do you know who prepared that particular page? A.—It was prepared by Mr. Hollister.

“Q.—Do you know if he had any assistance from anyone? A.—He might have had.

“Q.—And from whom do you think he would have had assistance? A.—He would have figures from the books of the company.

“Q.—And who provided the books? A.—Mr. Eric Von Huth.”

F The following passages are from the Baron's cross-examination:

“Q.—When was Mr. Hollister appointed to act as legal adviser to the company? A.—As early as possible the company started in formation.

“Q.—When was that? A.—I can't remember the exact date but the first time we visited him was the end of the year 1947.

“Q.—Is Mr. Hollister in Nairobi now? A.—As far as I know, yes.

G “Q.—Now, I think you told My Lord in your evidence-in-chief, you said ‘I should think the wording of the circular was Mr. Hollister's’. A.—I can only take it that it came from Mr. Hollister's office and we drafted what should be included in the circular, and then we sent it to him.

H “Q.—So you, Mr. (name inaudible to shorthand writer) and Mr. Eric Von Huth sent a draft of what the circular should contain. A.—We visited him and discussed the whole matter with him, after we had drafted certain points.

“Q.—Of course, Mr. Hollister could act only upon information and instructions received from you and the other two? A.—No, he had all the papers, relevant patent rights, contracts and everything.

“Q.—What was the object of the draft? A.—To get everything correctly.

I “Q.—And did you tell Mr. Hollister that this tile had been produced and sold successfully in Denmark? A.—Most likely.

“Q.—I want to know. A.—He might have taken it from me or from the letters he received.

“Q.—Did you tell him that: ‘We have procured the patent rights for most countries in Africa, India and Pakistan’? A.—I can't tell for certain; he must have got that from the contracts.

“Q.—Do you say that you did not tell him that? A.—I did not say so; I may have done so.

"Q.—Did you tell him: 'About a third of the capital has already been subscribed in Denmark'? A.—I might have done so. A

"Q.—'and the necessary machinery for the first unit has been purchased and is already on its way to Kenya'? A.—I might have done so.

"Q.—'and the machinery for the second unit is on order'? A.—I might have done so.

"Q.—'We have realised from conversations that most of our Scandinavian friends are very interested in this project and anxious to subscribe some capital'? A.—I might have done so. B

"Q.—Well, he could not have got that from any document, could he? Are you trying to hide and shield yourself behind Mr. Hollister? A.—I was only one of the parties at his office.

"Q.—But you have accepted responsibility for every single word written in this document? A.—I have, My Lord. C

"Q.—I see. Now would you look at this letter dated Mar. 23, 1948; the second paragraph; does he say this; part of it, of course, deals with the patent register which I will come to later on; Exhibit 8, a letter dated Mar. 23, 1948, Mr. E. J. Hollister (of Dacre A. Shaw, Buckley & Hollister) to The Secretary, Dantile, Ltd. (in formation), the second paragraph reads: 'We have searched the patent register here and the search revealed that so far no Muritas patents have been registered in this country, and we would suggest that you communicate with Muritas at the earliest possible moment and ask them to register their patents in England since English registration is essential prior to registration here'. Did you do that? A.—It had already been registered in England. D E

"Q.—This is your own advocate. 'It is also necessary for Mr. Von Huth to write a letter to Dantile, Ltd., whereby he agrees to transfer all or any of his rights with Muritas to Dantile, Ltd. in consideration for shares in the company and his employment as a salaried manager. Also you should get in touch with Mr. Alber and he should write a letter to Dantile, Ltd., agreeing to transfer any rights he may have with Muritas to the company in return for the shares he will receive of the purchase money paid on the transfer of the South African rights to Mr. Stewart'. A.—That, as far as I remember is only a confirmation of a conversation we had already had. F

"MR. SALTER: This letter Exhibit 'H' was written presumably in pursuance of the advice in this letter of Mar. 23? A.—He transferred to Mr. Stewart previous to that letter. G

"Q.—I see. So your own advocate, upon your instructions and after discussions with him, was unaware of that? A.—He might have been; I can't say.

"MR. SALTER: You have seen this letter?

"MR. MORGAN: He has already elicited the fact that Mr. Hollister was in Nairobi, and this is a letter from a man whom we all know. Can it be admissible? H

"COURT: Presumably the witness as a director saw this letter?

"WITNESS: I do not think I have seen it previously; I have seen it now.

"MR. MORGAN: The 100 per cent. method of proving this would have been to call Mr. Hollister for the plaintiffs; he gave evidence for the prosecution in the criminal case. If Mr. Hollister is not going to be called how . . . I

"MR. SALTER: It is, in my submission, wholly relevant.

"MR. MORGAN: Yes, but it is not admissible.

"MR. MORGAN: Although we may still think it is inadmissible we do not object to it going in.

"Exhibit 8: Letter dated Mar. 23, 1948, Mr. E. J. Hollister to Dantile, Ltd. (in formation) handed in and accepted by court as Ex. 8.

A "Q.— . . . From your circular, exhibit 2, did you not give the impression that you were forming a company to make and market an entirely new type of tile and that you had obtained the rights to enable you to do so? A.—In my opinion we did have the right."

Their Lordships would conclude their citations from the evidence by observing, first, that there was no cross-examination of the Baron as to the honesty of his belief in the truth of representation (c) that "about a third of the capital" had "already been subscribed in Denmark", or the sense in which according to his evidence-in-chief he understood that statement; and, secondly, that, on a perusal of the Baron's evidence as a whole, it is, in their Lordships' judgment, impossible to hold that there was no evidence on which the trial judge and the Court of Appeal could find, as they did concurrently find, that the Baron honestly believed representation (b) as to the patent rights to be true, whether or not objectively considered it was wholly true.

The learned trial judge summarised the effect of the Baron's evidence thus:

"The first defendant Baron Akerhielm has given evidence and has been examined and cross-examined at considerable length. He stated: 'We prepared the rough draft of the circular letter which was finally settled by Mr. Hollister, the company's lawyer. We then signed it and I did not consider that anything in it was untrue' . . . 'It was quite true that the tile had been produced and sold in Denmark. As regards the patent rights, that was a true statement according to my information. It was also true that one third of the capital had been subscribed in Denmark' . . . 'I think the wording of the circular letter was settled by Mr. Hollister. We prepared the first draft' . . . 'I saw figures as to production costs and sales figures for one factory in Denmark' . . . 'I was relying upon Mr. Hollister to get everything straight. I knew nothing of patent procedure. Before the circular letter went out Mr. Hollister had all contracts, letters and agreements before him. The wording of the circular letter was Mr. Hollister's and I was satisfied with it' . . . 'The "Specification of Capital Required" was prepared by Mr. Hollister with assistance from Mr. Von Huth.'"

The learned judge went on to observe that the plaintiffs had put in evidence the letter of Mar. 23, 1948, from Mr. Hollister which had been put to the Baron in cross-examination, as set out above, read the material part of that letter and continued:

"In view of the terms of this paragraph it is somewhat surprising that rather more than a month earlier Mr. Hollister, an advocate, should have approved of the terms of the circular letter. Mr. Hollister however, has not been called to say that he did not approve and the evidence of Baron Akerhielm in this respect stands uncontradicted. Having heard the evidence of Baron Akerhielm, I am satisfied that he signed the circular letter in good faith, honestly believing that the terms of that letter and of the documents attached to it were true. The case as regards the third defendant Mr. Ole Beyer stands upon a different footing, as Mr. Beyer, though stated to be in Kenya at the time of the hearing of the action, has not seen fit to give evidence. There was, of course, no obligation upon Mr. Beyer to do so. It is for a plaintiff to prove his case and there is, in general, no reason for a defendant who is satisfied that the plaintiff's case must fail, to give evidence on his own behalf. The circumstances of this action, however, are somewhat unusual. This is an action of deceit, which involves an allegation by the plaintiffs of fraud on the part of the defendants; and fraud in such a case, has no mere technical meaning, but involves moral turpitude. In such circumstances, it is surprising that Mr. Beyer who occupied an official position, should not have been eager to come forward and deny the charges against him. In the absence of his evidence, the court has to determine

whether the plaintiffs have made good their case against him. The case established by the plaintiffs is that two statements contained in the circular letter have been held by this court to be untrue. As against this, there is in favour of Mr. Beyer, Baron Akerhielm's evidence that the terms of this circular letter and annexures were finally settled by Mr. Hollister, the company's lawyer, who had all the contracts, letters and agreements before him. In such circumstances, Mr. Beyer was entitled to rely upon the accuracy of the wording of the circular letter and annexures as settled by Mr. Hollister, and honestly to believe that the statements contained in them were true; and the plaintiffs have failed to prove that he did not, in fact do so. The plaintiffs' claim therefore, fails as against both defendants, and their action must be dismissed."

In the Court of Appeal, BRIGGS, J.A., said this with reference to the learned judge's comment on the letter of Mar. 23, 1948:

"It seems to have been accepted as true by the [plaintiffs] that the [defendants] did consult Mr. Hollister as to the form of the letter and memorandum before sending them out, though there is no evidence of this other than the first [defendant's]. It is remarkable that the minute book does not indicate this, though Mr. Hollister is frequently mentioned in other connexions. The evidence of Mr. Seex, the accountant who was appointed by the court as an inspector to investigate the affairs of the company, is equivocal and may only mean that Mr. Hollister was consulted afterwards. However, I must accept that Mr. Hollister was consulted, and I shall assume that he did his duty in the matter as an honest and competent solicitor. There is no slightest reason to suppose the contrary, and even if there were it would be grossly unjust to act on any other assumption when Mr. Hollister has not given, and presumably has not had the opportunity to give evidence. It must be noted at once that the [plaintiffs] could not usefully have called Mr. Hollister, since all the evidence they would have wished to obtain from him would have been excluded by privilege. The learned trial judge appears to have overlooked this and to have assumed that the [plaintiffs] could have called Mr. Hollister, if they wished, to show that he was not responsible for the substance of the documents. I think with respect that this was a serious misdirection which goes to the root of the learned trial judge's finding that the [defendants] acted innocently. In my view, it was for the [defendants] to call Mr. Hollister to support their case. They made no allegations against him, and if their case was true he would obviously have accepted responsibility for the form of the documents, and might have been able to show that the untrue statement resulted from some mistake or misunderstanding. He was available, and I think an inference unfavourable to the [defendants] could and should have been drawn from their failure to call him. In his absence, the evidence is that the [defendants] submitted a draft to him and he settled the final form. I am driven to the conclusion that the facts stated in the documents were facts supplied by the [defendants] and accepted by Mr. Hollister as their instructions to him. As regards the statement which I have found to be untrue, it is inconceivable to me that Mr. Hollister should have originated it. It was so clearly a matter which either was, or should have been within the clients' knowledge that humanly speaking he must have relied on them for it. It was never expressly alleged that Mr. Hollister was the source of that statement, and I find as a fact that he was not, but that the [defendants] were the source of the statement and responsible for it. In fact this was practically admitted, for when asked, 'Did you tell him: "About a third of the capital has already been subscribed in Denmark?"', the first [defendant] replied, 'I might have done so'. In cross-examination the first [defendant] further said that he accepted responsibility for the whole of the documents, that he was not trying to shelter

- A behind Mr. Hollister, and that in his opinion and belief the statements of fact in the documents were true. Although the learned trial judge accepted this last statement and in the ordinary way I should be loath to differ from him, I think the validity of his finding is gravely impaired by his view of the issue concerning Mr. Hollister. I think we must form our own opinions of the [defendants'] mental state when they issued the false statement."
- B Accordingly, the Court of Appeal, considering themselves as free on these grounds to go behind the learned judge's conclusion that the defendants honestly believed representation (c) to be true, based though it was (so far at all events as the Baron was concerned) essentially on his acceptance of the Baron as an honest man and a witness of truth after hearing and seeing the Baron give his evidence, proceeded without these advantages to form their own opinion on this vital issue.
- C

In their Lordships' view, the Court of Appeal erred in taking this course. Their Lordships cannot accept the view of the Court of Appeal that the trial judge's comment to the effect that Mr. Hollister had "not been called to say that he did not approve" and that "the evidence of" the Baron stood "uncontradicted" was a "serious misdirection" which went "to the root of the learned judge's finding that the respondents [i.e., the defendants] acted innocently".

- D It must be remembered that the letter of Mar. 23, 1948, had been put to the Baron in cross-examination with a view to destroying the Baron's evidence that Mr. Hollister had approved the circular, on the ground that he could not have been writing like this on Mar. 23, if he had in February approved what was said in the circular about the patent rights. A discussion arose as to the admissibility of the letter of Mar. 23, in the course of which Mr. Morgan, for the defendants, said that "The 100 per cent. method of proving this would have been to call Mr. Hollister for the plaintiffs", adding that Mr. Hollister "gave evidence for the prosecution in the criminal case". The upshot of the discussion was that Mr.
- E Morgan withdrew the objection to the letter being put in, "although we may still think it inadmissible". Read in conjunction with this passage, the learned judge's comment, on reading the letter of Mar. 23, 1948, in the course of his judgment, really came to no more than this:
- F

- G "It is surprising that Mr. Hollister should have written this letter in March if he had really approved what was said about the patent rights in the circular when it was settled in February; but if the plaintiffs were seeking to prove as part of their case that Mr. Hollister did not in fact approve the circular, their proper course was to call him to say he did not, and as they did not take that course the evidence of the Baron to the effect that Mr. Hollister did approve stands uncontradicted."

- H Their Lordships see no misdirection here. It remained, of course, to consider, and the learned judge went on to consider, whether the uncontradicted evidence of the Baron should be accepted. Their Lordships see no reason for assuming against the learned judge that, in considering that question, he failed to take into account the fact that the Baron's evidence, though uncontradicted, stood alone, whereas if his story was true there was no apparent reason why he should not have called Mr. Hollister to confirm it. If, taking this fact into consideration, which he can hardly have failed to do, the learned judge nevertheless came to the conclusion that the Baron was an honest man and a witness of truth, it was his duty to find accordingly. Their Lordships cannot accept the view that because Mr. Hollister was not called therefore the learned judge could not reasonably accept the evidence of the Baron as true, or the Baron as an honest man and a credible witness.
- I

The view expressed by BARGES, J.A., to the effect that if Mr. Hollister had been called by the plaintiffs all the evidence they would have wished to obtain

from him would have been excluded by privilege was not seriously maintained before their Lordships. Counsel for the plaintiffs in the course of his argument conceded that the charge of fraud in this case would probably destroy the privilege (see *O'Rourke v. Darbishire* (4)). Moreover, the privilege might have been waived by the defendants had Mr. Hollister been called by the plaintiffs; and over and above that, it seems to their Lordships unrealistic to suppose that the privilege would have been insisted on by the defendants having regard to the suggestion made by their counsel in the course of the Baron's cross-examination that Mr. Hollister should be called. A B

Their Lordships find the reasoning of the Court of Appeal on this part of the case difficult to follow. First, it is to be observed that the passage in the learned trial judge's judgment in which he comments on Mr. Hollister's letter of Mar. 23, 1948, is primarily related, by the context afforded by the letter itself, to the position in regard to the patent rights, and that the Court of Appeal (concurring in this respect with the learned judge) had themselves held earlier in their judgment that the representation regarding the patent rights, i.e., representation (b), was not made fraudulently, or, in other words, was made by the defendants in the honest belief that it was true. It seems strange that the stigma of dishonesty held by the Court of Appeal to attach to the Baron through his failure to call Mr. Hollister should apply to representation (c) but not to representation (b). C D

BRIGGS, J.A., said that he "must accept that Mr. Hollister was consulted", and that he should "assume that he did his duty in the matter as an honest and competent solicitor". But surely these assumptions tended to support the defendants' case rather than destroy it. An honest and competent solicitor consulted in the preparation of a document such as the circular letter in the present case would do his best to see that its contents were accurate. BRIGGS, J.A., after expressing the opinion that it was for the defendants to call Mr. Hollister to support their case, went on to say, a little later in his judgment, that he thought an inference unfavourable to the defendants could and should have been drawn from their failure to call him. What adverse inference had BRIGGS, J.A., in mind? It appears to their Lordships that he can only have meant one of two things; either that the defendants went on and issued the circular containing representation (c) in the teeth of objections by Mr. Hollister, or that they misled Mr. Hollister by giving him the information comprised in representation (c) fraudulently and without any honest belief in its truth. Neither of these inferences appears to their Lordships to be warranted. BRIGGS, J.A., further said that the defendants and not Mr. Hollister must have been the source of and responsible for representation (c) (that about one third of the capital had already been subscribed in Denmark). But it was no part of the defendants' case that Mr. Hollister was responsible for this representation. Their case was that they, the defendants, made it, honestly believing when they made it that it was true. E F G

Accordingly, their Lordships are of opinion that neither the learned judge's comment on the plaintiffs' omission to call Mr. Hollister nor the fact that Mr. Hollister was not called by the defendants afforded sufficient ground to justify the Court of Appeal in reversing the trial judge's view formed after seeing and hearing the Baron give his evidence, that the Baron did honestly believe representation (c) to be true. H

The conclusion which the Court of Appeal, on the footing that the matter was at large, thought fit to substitute for the conclusion reached by the learned judge is thus expressed in the judgment of BRIGGS, J.A.: I

"I find that both [defendants] were well aware in February, 1948, that the only subscribers in view in Denmark were Christensen and Muritas, and that their subscriptions would not nearly cover the Shs.70,000 mentioned, or amount to about one-third of the capital of Shs.220,000. I find that the untrue statement was made by both of them with knowledge that it

(4) [1920] A.C. at p. 604.

- A was untrue. If, however, I am wrong in this, and in some remarkable way which I cannot envisage the [defendants] remained in ignorance of some of the relevant facts, I am of opinion that, having regard to their positions and opportunities of knowledge, they must have made the statement recklessly and careless whether it was true or false. That neither of them ever believed it to be true I consider impossible."
- B On the assumption that, contrary to their Lordships' opinion, the Court of Appeal were justified in substituting their own conclusion for that of the learned judge on the question of honest belief, the conclusion so substituted appears to their Lordships to be open to the criticism that the Court of Appeal construed the language of representation (c) as they thought it should be construed according to the ordinary meaning of the words used, and, having done so, went on to hold
- C that on the facts known to the defendants it was impossible that either of them could ever have believed the representation, as so construed, to be true. Their Lordships regard this as a wrong method of approach. The question is not whether the defendant in any given case honestly believed the representation to be true in the sense assigned to it by the court on an objective consideration of its truth or falsity, but whether he honestly believed the representation to be true
- D in the sense in which he understood it, albeit erroneously, when it was made. This general proposition is, no doubt, subject to limitations. For instance the meaning placed by the defendant on the representation made may be so far removed from the sense in which it would be understood by any reasonable person as to make it impossible to hold that the defendant honestly understood the representation to bear the meaning claimed by him and honestly believe it in
- E that sense to be true. But that is not this case. It cannot be said that representation (c) could not have been understood by any reasonable person in the sense attributed to it by the Baron in his evidence, or that it was impossible that he should honestly have understood it in that sense, and honestly believed it in that sense to be true. He gave evidence to the effect that he did understand representation (c) in that sense, and did honestly understand it in that sense to be
- F true, and was not cross-examined in either of those points. (For the general proposition that regard must be had to the sense in which a representation is understood by the person making it, see *Derry v. Peek* (5), *Angus v. Clifford* (6), *Lees v. Tod* (7), which authorities must, in their Lordships' view, be preferred to *Arnison v. Smith* (8) so far as inconsistent with them.)
- G But this aspect of the matter need be pursued no further. Suffice it to say that their Lordships are satisfied that this is not one of those exceptional cases in which an appellate court is justified in reversing the decision of a judge at first instance when the decision under review is founded on the judge's opinion of the credibility of a witness formed after seeing and hearing him give his evidence (see as to this *S.S. Hontestroom v. S.S. Sagaporack*, *S.S. Hontestroom v. S.S. Durham Castle* (9), *Watt (or Thomas) v. Thomas* (10), *Ywill v. Ywill* (11), *Benmac v. Austin Motor Co., Ltd.* (12). Their Lordships can hardly imagine a case in which the credibility of a witness could be more vital than a case like the present where the claim is based on deceit, and the witness in question is one of the defendants charged with deceit. Their Lordships would add that they accept, and would apply in the present case, the principle that, where a defendant has been acquitted of fraud in a court of first instance, the decision in his favour should
- I not be displaced on appeal except on the clearest grounds (see *Glasier v. Rolls* (13)).
- For all these reasons their Lordships are of opinion that the Baron should succeed in this appeal.

(5) (1889), 14 App. Cas. 337.

(6) [1891] 2 Ch. 449.

(7) (1882), 9 R. (Ct. of Sess.) at p. 854. (8) (1889), 41 Ch.D. 348.

(9) [1927] A.C. 37.

(10) [1947] 1 All E.R. 582; [1947] A.C. 484.

(11) [1945] 1 All E.R. at p. 188; [1945] P. at p. 19.

(12) [1955] 1 All E.R. 326; [1955] A.C. 370.

(13) (1889), 42 Ch.D. at p. 458, per COTTON, L.J.

The case against the second defendant, Mr. Ole Beyer, is, as the learned judge pointed out, on a different footing, in that he did not give evidence. He is, however, entitled to rely on the evidence of the Baron and its acceptance as establishing the Baron's honest belief in the truth of representation (c). He is also entitled to rely on the fact that Mr. Hollister was consulted. It is improbable that, if the Baron was honest, Mr. Beyer was fraudulent in the common enterprise in which they were both engaged. The Baron signed the circular honestly believing its contents to be true, and the reasonable inference is that Mr. Beyer signed it in the same frame of mind. It is improbable that, if Mr. Beyer had any fraudulent intent in this matter, he, any more than the Baron, would have employed a solicitor, unless, indeed, he had it in mind to deceive the solicitor as well as the recipients of the circular. Moreover, according to the Baron's evidence, the figures were supplied by Von Huth. In all the circumstances their Lordships see no sufficient reason for differing from the learned judge in his conclusion that the case against Mr. Beyer had not been made out. Accordingly, their Lordships are of opinion that in his case also the appeal should succeed.

The views their Lordships have formed on the other aspect of the case make it unnecessary for them to express any opinion on the question whether representation (c) was a material representation whereby the plaintiffs were induced to subscribe for shares in the company. But they should, perhaps, add that the words "in Denmark" in representation (c) are, in their view, on the very fringe of materiality, and that they would hesitate to hold on the evidence that either of the first two plaintiffs should be taken to have been induced by those words to subscribe for shares in the absence of any statement to that effect in their evidence. The third plaintiff who said that she did attach importance to those words did not, in fact, subscribe, but received her shares by way of gift from her husband the second plaintiff.

For the reasons above stated, their Lordships will humbly advise Her Majesty that this appeal should be allowed, the judgment of the Court of Appeal for Eastern Africa set aside and the judgment of the Supreme Court of Kenya restored. The respondents must pay the costs of this appeal and the appeal to the Court of Appeal for Eastern Africa.

Appeal allowed.

Solicitors: *Clifford-Turner & Co.* (for the appellants); *Gordon, Dadds & Co.* (for the respondents).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

A

R. v. BURNHAM JUSTICES, *Ex parte* ANSORGE.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Ashworth and Hinchcliffe, JJ.),
October 5, 6, 1959.]

B

Certiorari—Conviction—Quashing—Plea of guilty—Two informations relating to same circumstances—Notice of plea of guilty referring to one information—Conviction on both informations—Magistrates' Courts Act, 1957 (5 & 6 Eliz. 2 c. 29), s. 1 (1).

Magistrates—Information—Two informations relating to same facts—Conviction on one information.

C

Road Traffic—Obstruction—Waiting regulations—Convictions of two separate offences on same facts—One conviction quashed—Motor Vehicles (Construction and Use) Regulations, 1955 (S.I. 1955 No. 482), reg. 89—London Traffic (Restriction of Waiting) (Station Parade, Gerrards Cross) Regulations, 1952 (S.I. 1952 No. 1294), reg. 3.

Where two informations, though alleging offences under different enactments, relate to the same facts and a plea of guilty to one information is accepted, the magistrates' court has jurisdiction to inquire into the matter but, if they find that the facts are the very facts that gave rise to the first conviction, should proceed no further; if the court does proceed further and convicts, appeal lies (see p. 507, letter D, post).

D

E

The applicant was summoned to appear before a magistrates' court to answer two informations, the first charging her with causing a motor car to stand on a certain road so as to cause unnecessary obstruction thereof, the second charging her with contravening certain parking regulations. Both informations related to the same facts. The summons when served on the applicant was accompanied by a statement of facts and a notice of plea of guilty. In the statement of facts it was stated that if the applicant wished to plead guilty to the charge of "motor car (a) causing unnecessary obstruction (b) waiting in a restricted area" the facts therein set out would be read to the court. The applicant completed and returned to the court the notice of plea of guilty, which then read: "I have read the statement(s) of facts relating to the charge(s) of motor car waiting in a restricted area . . . I plead guilty to the charge(s)". The applicant then set out mitigating circumstances which could have been common to both informations. The magistrates' court treated the applicant's plea as a plea of guilty to both informations and fined her in her absence £5 and £2 respectively. On a motion for certiorari to quash both convictions,

F

G

Held: (i) the conviction on the first information would be quashed since the only express plea of guilty before the court related to the second information,

H

(ii) the conviction on the second information would stand because (a) the magistrates had jurisdiction to inquire into the facts relating to the second information, so that certiorari for want of jurisdiction did not lie and

(b) if certiorari did lie, the court, as a matter of discretion, would not grant it in the circumstances of this case.

I

Observations of LORD GODDARD, C.J., in *R. v. Campbell, Ex p. Nomikos* ([1956] 2 All E.R. at p. 283) applied.

[As to two charges of driving offences in respect of same facts, see 31 HALSBURY'S LAWS (2nd Edn.) 669, para. 979, note (p); and for cases on the subject, see 42 DIGEST 873, 214.

As to the discretion of the court in respect of orders for certiorari, see 11 HALSBURY'S LAWS (3rd Edn.) 140, para. 264 and para. 265, note (l); and for cases on the subject, see DIGEST Supps.

For the Magistrates' Courts Act, 1957, s. 1 (1), see 37 HALSBURY'S STATUTES A
(2nd Edn.) 627.]

Cases referred to:

R. v. Campbell, Ex p. Nomikos, [1956] 2 All E.R. 280; 120 J.P. 320; [1956]
1 W.L.R. 622; 3rd Digest Supp.

R. v. Stafford JJ., Ex p. Stafford Corpn., [1940] 2 K.B. 33; 109 L.J.K.B. 584;
162 L.T. 393; 104 J.P. 266; 2nd Digest Supp. B

Welton v. Taneborne, (1908), 99 L.T. 668; 72 J.P. 419; 42 Digest 873, 214.

Motion for certiorari.

In this case the applicant, Lady Wenonah Hardwick Anson, was summoned to appear before the magistrates' court for the petty sessional division of Burnham, sitting at Beaconsfield, to answer two informations (i) that on Sept. 1, 1958, she unlawfully used a motor car on a road called Station Parade, at Gerrards Cross, in contravention of the Motor Vehicles (Construction and Use) Regulations, 1955, reg. 89* in that being the person in charge of the motor car she caused it to stand on the road so as to cause unnecessary obstruction thereof contrary to reg. 104, and (ii) that on the same date and at the same place she contravened the London Traffic (Restriction of Waiting) (Station Parade, Gerrards Cross) Regulations, 1952† in that she did otherwise than on the direction or with the permission of a police officer in uniform cause a motor car to wait at a time between 10 a.m. and 8 p.m. on part of Station Parade, contrary to reg. 3. The summonses, when served on the applicant were, pursuant to the Magistrates' Courts Act, 1957, s. 1 (1) (ii), accompanied by a statement of facts in which the applicant was informed that if she wished to plead guilty to the charge of "motor car (a) causing unnecessary obstruction (b) waiting in a restricted area" without appearing before the court, the facts therein set out would be read out in open court. The applicant filled in a form headed notice of plea of guilty so that it read as follows:

"Plea of Guilty

"I have read the statement(s) of facts relating to the charge(s) of motor car waiting in a restricted area‡ which is/are to be heard by the magistrates' court on Oct. 14, 1958‡. I plead guilty to the charge(s) and I desire that the court should dispose of the case in my absence. I wish to bring to the court's attention the mitigating circumstances set out below."

The mitigating circumstances were circumstances common to both informations.

The magistrates' court treated the applicant's plea as a plea of guilty to both charges and fined her £5 on the first information and £2 on the second information.

Henry Summerfield for the applicant.

LORD PARKER, C.J., stated the facts and continued: While I have every sympathy with the magistrates, the fact of the matter is that the provisions of s. 1 of the Magistrates' Courts Act, 1957, have to be complied with strictly, as this court has already said on more than one occasion; and here the only express plea of guilty before them was in regard to the second information. Accordingly, it seems to me, so far as the first information is concerned that they in fact found her guilty and fined her in her absence and without any evidence whatsoever, and in my judgment the conviction on the first information must be quashed.

The matter does not, however, rest there because counsel goes further and urges that the second conviction ought also to be quashed. He puts it in this way: True these are two separate offences; they are in different terms; they attract different penalties; they are under different statutory provisions, but here if one convicted on the first information and then went on to deal with and

* S.I. 1955 No. 482.

† S.I. 1952 No. 1294.

‡ The words "motor car waiting in a restricted area" and the date "Oct. 14, 1958" were in the applicant's handwriting.

- A convict on the second information, it would on the facts of this case be putting the applicant in peril twice. I say "on the facts of this case" because it seems clear here that the offence with which she was charged under the parking regulations would also amount to unreasonable obstruction under the construction and use regulations. Accordingly, counsel strongly relies on the general principle which, I think, in the case of a conviction otherwise than on indictment is really
- B to be found in the *nemo bis vexari debet* principle; and he referred the court to *Welton v. Taneborne* (1). In that case the respondent was convicted of driving a motor car in a manner dangerous to the public, and he was fined. It was then sought to charge him with an offence against what was then s. 9 (1) of the Motor Car Act, 1903, (2), which was driving the car at over twenty miles an hour. It appeared that the magistrates in convicting of the dangerous driving had taken
- C the speed into consideration, and accordingly in those circumstances the court by a majority decision held that it would be wrong to try the respondent again on the same facts, albeit under a different statute.

The matter, however, does not rest there because broadly speaking certiorari only lies where there is lack of jurisdiction or where there is an error of law on the face of the record. Before the magistrates can decide whether to convict or not

D to convict on the second information they must inquire into the matter to see what are the facts. If, having inquired into the matter, they find that the facts are the very facts which have given rise to the conviction on the first information, their proper course would be to proceed no further and, if they did proceed to convict and sentence, an appeal would lie to quarter sessions. That they have jurisdiction to enter into the matter and ascertain what are the facts there can be

E no doubt, and accordingly certiorari would not lie for want of jurisdiction. If and so far as they went wrong in law, certiorari would only lie if there was an error of law on the face of the record and, looking at the record in this case, the two offences under the two different regulations might, for all this court could tell, have taken place at quite different times albeit on the same day.

- In addition to that there remains the question whether this is a case in which
- F the court should exercise its discretion to grant an order. A very similar situation arose in *R. v. Campbell, Ex p. Nomikos* (3), to which counsel referred the court. In that case it was said that the master of a cargo ship had contravened certain timber carrying regulations in regard to the height of the stowage on deck. In fact two informations were preferred, one in regard to the timber on the fore deck and one in regard to the timber on the quarterdeck. The court
- G held that there was only one offence; you could not divide it up according to the different parts of the ship. It was argued that that being so the conviction and the fine on the second information should be quashed. In dealing with that, LORD GODDARD, C.J., refers (4) specifically to this question whether certiorari would lie in such a case, and points to the fact that the magistrates there, as I think here, would have had to go into the matter to ascertain that the
- H same offence was involved in both cases. As regards discretion, he said this (4):

- "Another ground for refusing certiorari in this case is that I know of no case where a plea of guilty has been entered and certiorari has been granted. No one can suggest that in this case the magistrate did anything wrong. She has filed an affidavit explaining exactly what happened. Competent counsel being before her and entering a plea of guilty for his client, she naturally proceeded to record a conviction and consider what penalty should be imposed. In my opinion it would be quite wrong to issue certiorari in this case after that has been done, and also in my view the court has no power to order certiorari in this case. Certiorari is always, it should be remembered, a discretionary remedy. Although in the history of that writ the courts were inclined at one time rather to depart from the fact of its being
- I

(1) (1908), 99 L.T. 668.

(3) [1956] 2 All E.R. 280.

(2) 3 Edw. 7 c. 36.

(4) [1956] 2 All E.R. at p. 283.

a discretionary remedy, *R. v. Stafford JJ., Ex p. Stafford Corpn.* (5), to which counsel for the applicant referred, shows that the Court of Appeal were, if I may say so, on the right lines in getting certiorari back to a matter of discretion. It may very often be that the facts are such that the discretion can be exercised in only one way, that is to say, it would not be a judicial exercise of discretion to decide against the person by whom the exercise of the discretion is sought. That is sometimes misunderstood." A

It seems to me that every word that LORD GODDARD said there applies in the present case. It would be very novel to grant certiorari in a case where an applicant has deliberately pleaded guilty, and for those reasons I have come to the conclusion that the second conviction should stand. Accordingly, the effect of this momentous case is that the first conviction will be quashed, the second will remain, and the applicant will only be fined £2. B

ASHWORTH, J.: I agree.

HINCHCLIFFE, J.: I also agree.

Order accordingly.

Solicitors: *Amery-Parkes & Co.* (for the applicant).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.] D

EAST HAM CORPORATION v. MINISTRY OF HOUSING AND LOCAL GOVERNMENT.

[CHANCERY DIVISION (Danckwerts, J.), October 6, 1959.] E

Housing—Requisitioned premises—Release from requisition—Contribution towards local authority's expenses by way of compensation—Rate of contribution by Ministry of Housing and Local Government—Requisitioned Houses and Housing (Amendment) Act, 1955 (3 & 4 Eliz. 2 c. 24), s. 10 (1). F

Requisition—Compensation—Release from requisition—Compensation to owner for accepting licensee as statutory tenant—Date when compensation becomes payable—Requisitioned Houses and Housing (Amendment) Act, 1955 (3 & 4 Eliz. 2 c. 24), s. 4 (2) (c). G

Where premises are being de-requisitioned under s. 4 of the Requisitioned Houses and Housing (Amendment) Act, 1955, compensation to the owner for loss of the right to vacant possession by according to the licensee the status of a statutory tenant is payable under s. 4 (2) (c)* at the date when the owner accepts the local authority's invitation to accord that status to the licensee, although the licensee has not yet become a statutory tenant; accordingly the date of the acceptance of the invitation is the date when payment of the compensation falls to be made for the purposes of s. 10 (1), which regulates the percentage rate at which the Minister of Housing and Local Government contributes to the expenses of the local authority. H

On Jan. 28, 1956, a local authority gave notice, in accordance with s. 4 (1)* of the Requisitioned Houses and Housing (Amendment) Act, 1955, inviting an owner of requisitioned premises to accept the licensee as statutory tenant. The owner accepted the invitation on Mar. 23, 1956. The local authority's right to possession terminated on Apr. 2, 1956, on which date the licensee became statutory tenant. If the compensation to the owner for loss I

(5) [1940] 2 K.B. 33.

* The relevant terms of s. 4 (1) and s. 4 (2) are printed at p. 509, letter I, to p. 510, letter F, post.

- A of his right to vacant possession on release of the premises from requisition were payable before April, 1956, the rate of the Minister's contribution under s. 10 (1)* to the local authority's expenses would be one hundred per cent., but if the compensation were payable after March, 1956, the rate would be seventy-five per cent.

- B **Held:** the compensation to the owner was payable on Mar. 23, 1956, and therefore the Minister's contribution should be at the rate of one hundred per cent.

[As to an owner accepting a licensee as statutory tenant and as to compensation thereon, see 19 HALSBURY'S LAWS (3rd Edn.) 712, 713, para. 1143.

- C For the Requisitioned Houses and Housing (Amendment) Act, 1955, ss. 1, 4, 10, see 35 HALSBURY'S STATUTES (2nd Edn.) 262, 266 and 276.]

Originating Summons.

- D This was an application by East Ham Corporation for the determination of the question whether, on the true construction of s. 10 of the Requisitioned Houses and Housing (Amendment) Act, 1955, and having regard to the acceptance by an owner of premises on Mar. 23, 1956, of an invitation under s. 4 of the Act to accord to a licensee the status of statutory tenant and to the payment by the corporation to him of compensation under s. 4 (2) (c), the corporation were entitled to receive contribution from the Ministry of Housing and Local Government, who were defendants to the summons, at the rate of one hundred per cent. under s. 10 (1) (a). The facts appear in the judgment at p. 511, letters A-F, post.

J. W. Mills for the plaintiffs, the local authority.

- E *Denys B. Buckley* for the defendants, the Ministry of Housing and Local Government.

- F **DANCKWERTS, J.:** This is an application for the construction of the provisions of the Requisitioned Houses and Housing (Amendment) Act, 1955, under which, in certain events, compensation will be payable to the owner of a house which has been requisitioned. Compensation has to be paid by the local authority, who become entitled to certain payments from the Minister of Housing and Local Government.

The Act of 1955, which came into force on May 6 of that year, was intended to bring to an end the requisitioning of houses, and return, subject to certain conditions, those houses to the owner. Section 1 (1) provides:

- G "On the commencement of this Act, any power of the Minister to retain possession of requisitioned houses shall be terminated, and the right to possession of every such house shall vest in the appropriate local authority."

The effect of that provision is to take the houses which have been requisitioned away from the Minister, who had the right to requisition them—and to transfer the requisitioned houses, or the right to them, to the local authority. Section 1 (2) provides the date on which requisitioning is intended to come to an end:

- H "Subject to the provisions of this Part of this Act, the local authority in whom the right to possession of a requisitioned house is vested under this section may retain possession of the house until Mar. 31, 1960, and no longer."

- I There is, thus, a definite date on which the requisitioning is to come to an end. Section 4, which is one of the material sections that I have to consider for the purposes of this application, is a provision intended to provide for the conversion of the position of a licensee, holding a house purely by virtue of the requisitioning, to that of a statutory tenant. Section 4 (1) is as follows:

"Any local authority may, subject to such directions, if any, as may be given by the Minister, and shall, if so required by the Minister, serve on the

* The terms of s. 10 (1) are set out at p. 510, letter H, post.

owners of such requisitioned dwellings as may be decided by the authority or specified by the Minister, as the case may be (being dwellings of which possession is retained under this Act) a notice inviting those owners to accord to the licensees of the dwellings the status of statutory tenants in consideration of payments to be made by the local authority in accordance with this section by way of compensation for loss of the right to vacant possession on the release of the dwellings."

That provides for the offer. Subsection (2) provides for the effect of acceptance by the owner. It reads:

"If within the period specified in that behalf in any such notice of invitation the owner gives to the local authority notice of acceptance in such form as may be so specified, then—"

The word "then" plainly means "thereupon". Certain consequences are to follow. These are set out in the following (1) three paragraphs of sub-s. (2):

"(a) the right of the local authority to retain possession of the dwelling under this Act shall be terminated at the expiration of a period of one week beginning with the day on which the next instalment of rent is payable by the licensee under the licence by virtue of which he occupies the dwelling;

"(b) as from the expiration of that period, the Rent Acts shall apply to the dwelling as if the licensee had retained possession by virtue of those Acts after the expiration of a tenancy upon the terms that the landlord undertook to pay the rates and to provide such services (if any) as were provided for the licensee as such (whether by the local authority or by the owner in pursuance of arrangements with the local authority) and otherwise upon the like terms and conditions (other than terms as to rent) as the said licence; and

"(c) the local authority shall pay to the owner compensation at such rate as may be specified in the notice of invitation, being a rate determined by the Minister with the consent of the Treasury (such compensation to be calculated by reference to the aggregate of the rental compensation payable in respect of the dwelling for the year ending with the date on which the notice of invitation was given, to the nature of the interest of the owner in the dwelling and, in such cases as may be so determined, to the character of the dwelling)."

Section 10 is really the section on which the present question arises. That provides for contributions to the expenses of the local authority by the Minister in certain events. Subsection (1) provides:

"The Minister shall pay to every local authority in respect of any deficit incurred by that authority (as assessed by the Minister) in connexion with all requisitioned houses of which they are for the time being in possession under this Act, and in respect of any payments falling to be made by that authority under s. 4 of this Act, a contribution at the following rate, that is to say— (a) one hundred per cent. in respect of any such deficit incurred and payments falling to be made in the period ending with Mar. 31, 1956; (b) seventy-five per cent. in respect of any such deficit incurred and payments falling to be made in the years ending with Mar. 31, 1957 to 1960 inclusive."

It is on that provision that the question which I have to determine turns. It is claimed, in the present case, that the payment falls within para. (a) and not within para. (b), so that the contribution by the Minister is one hundred per cent. and not merely seventy-five per cent. The material words which have to be applied are "payments falling to be made in the period ending with Mar. 31, 1956".

I now turn to the facts of the case. The house concerned is 49, Rixsen Road,

(1) Paragraph (b) of s. 4 (2) is printed as amended by the Rent Act, 1957, s. 22 (2) (a), s. 26 and Sch. 8.

A Manor Park, E.12. On Jan. 28, 1956, a notice was sent to the owner by the local authority inviting him to accept the licensee as a statutory tenant according to the provisions of the Act. The first paragraph of the notice is:

B "In accordance with s. 4 of the Requisitioned Houses and Housing (Amendment) Act, 1955, the East Ham County Borough Council hereby invite you to accord to Clifford Henry Pursall, the licensee of the above-mentioned dwelling, the status of statutory tenant in consideration of the payment to you by them (in addition to any terminal compensation to which you may be entitled under s. 2 (1) (b) of the Compensation (Defence) Act, 1939) of a sum equal to five times the amount of the rental compensation payable to you in respect of the dwelling, being the rate of compensation which the Minister of Housing and Local Government, with the consent of C the Treasury, has determined as being the appropriate rate having regard to the nature of your interest in the dwelling."

That rate had been previously determined by the Minister, and therefore it was merely a case of the application of the rate already fixed by the Minister in the case of this particular house. I am informed that terminal compensation under D the Act of 1939 is in the nature of dilapidations.

Then para. 2 states what would happen if the invitation were accepted:

"If, within three months from the date of this notice, you accept the invitation in the form set out attached, the dwelling will be released at the expiration of one week from the next day on which rent is payable by the licensee to the council. The rent day is Monday of each week."

E The rent was payable weekly. That offer was accepted by the owner in the statutory form of acceptance. It was dated Mar. 23, 1956. The acceptance, therefore, plainly was before Mar. 31, 1956; but the date on which the occupation by the local authority came to an end was Apr. 2, 1956, and the compensation was eventually paid on May 2, 1956.

F It was contended on behalf of the local authority that the date when payment by way of compensation became payable was the date of the acceptance, namely, Mar. 23, 1956. It was contended on behalf of the Minister that the date was when the local authority went out of possession of the requisitioned house and the licensee under the requisitioning became a statutory tenant, so that he could not be turned out by the owner as his landlord, and the right to vacant possession thereupon determined.

G It is a question which is not at all easy to answer. There are certain things to be said in favour of the argument on behalf of the Minister. It has been pointed out that if before the date when the local authority gave up possession under the Act of 1955 the licensee either died or went out of his own accord the right to vacant possession would never be lost by the owner, as the statutory tenancy would not have come into operation in that case and that therefore, if the owner received H payment before that date, he would have been paid for something to which he had never in fact had to submit. I have, however, to see what the Act says and to construe the phrase "payments falling to be made" before a certain date.

I Section 4 (2) of the Act of 1955 defines what is to happen as the result of the acceptance of the local authority's invitation. It is to be noticed that para. (a) is a paragraph which defines the date when the local authority is to give up possession. A definite date is mentioned, that is to say a date which is necessarily later than the date of the acceptance, and will depend on the date when the payment of rent is payable by the licensee. The licensee does not become a tenant until he becomes a statutory tenant on the date which is fixed by this paragraph in the Act, and that is a definite date which is ascertainable with regard to the terms of his licence from the local authority. It might well take place at a considerable time after the date when the invitation was accepted. If the local authority had licensed the individual to occupy on terms which made his rent

payable only yearly (which, perhaps, would be unlikely), or at quarterly or at six-monthly intervals, obviously the right to occupy under the licence and the possession of the local authority might continue for a number of weeks after the date when the invitation by the local authority had been accepted by the owner. A

In the present case it was in fact only a little more than a week, because it was an occupation under which a rent was payable weekly by the licensee. The same date is named in s. 4 (2) (b) as the expiration of the period of the local authority's possession under the provisions of para. (a) after which the tenant becomes a statutory tenant. On the other hand when in regard to the provision providing for compensation under para. (c) no date is named at all: there is simply a provision that compensation at a certain rate is to be paid by the local authority. It has been contended by counsel for the plaintiffs that that shows that the ordinary rule should apply and that on the date when the offer is accepted the compensation becomes due and payable. B C

Counsel for the defendants argued that that was by no means conclusive because the very nature of compensation is a payment to be made for a loss which has been suffered by the person to be compensated; and in a case where there is a postponement of the acceptance as regards the determination of the occupation by the local authority the loss might never be suffered if the licensee went out before determination of the period; and he pointed to the concluding words of s. 4 (1) "by way of compensation for loss of the right to vacant possession on the release of the dwellings". But I think counsel for the plaintiffs was right when he said that counsel for the defendants was trying to give a twist to the sentence and a variation in the position of the words contained in that final provision in s. 4 (1). D E

It seems to me that, under that provision, the compensation is for the loss of the right to vacant possession on the release of the dwelling. By his acceptance of the invitation of the local authority the owner loses the right to vacant possession on release of the dwelling. He parts with the right when he accepts the invitation. If that is so everything that the owner is required to do has been done, and it seems to me that thereupon he is entitled to compensation for the right which he has given up. F

It is perfectly true that if the licensee goes out of occupation before the date of the determination of the local authority's right to possession, the owner would then never become subject to a statutory tenancy, and it might be said that he had been paid compensation for which he had given no consideration. It is not necessary for me to determine now whether that is so or not. The owner has in fact given up his right, though, if the normal process of conversion of the licence into a statutory tenancy does not occur, the right which the owner has given up may turn out to be less valuable than it would otherwise have been. G

In my view, therefore, the transaction so far as the owner was concerned was complete on Mar. 23, 1956, and the compensation became legally payable at that date. Whether it was paid or not immediately seems to me to be immaterial. H

Accordingly my decision must be in favour of the local authority.

Judgment for the plaintiffs.

Solicitors: *Sharpe, Pritchard & Co.* (for the plaintiffs); *Solicitor, Ministry of Housing and Local Government* (for the defendants).

[*Reported by E. COCKBURN MILLAR, Barrister-at-Law.*]

A HANCOCK v. PRISON COMMISSIONERS.

[VACATION COURT (Winn, J.), September 18, 1959.]

Prison—Discharge—Remission of part of sentence—Discretion of Prison Commissioners—Reduction of sentence on appeal—How far misconduct before the appeal was allowed should be taken into account—Prison Rules, 1949 (S.I. 1949 No. 1073), r. 37, as substituted by Prison Rules, 1952 (S.I. 1952 No. 1405), r. 3.

Criminal Law—Appeal—Sentence—Quashed on appeal—Substitution of a shorter term of imprisonment—Original sentence rendered null only for the future—Criminal Appeal Act, 1907 (7 Edw. 7 c. 23), s. 4 (3).

A prisoner sentenced to ten years' imprisonment for housebreaking in January, 1955, had his appeal against sentence allowed in October, 1957, by the Court of Criminal Appeal, which made an order quashing the original sentence and substituting one of seven years' imprisonment running from the commencement of the original term. The prisoner had not been of good conduct and industry up to the time when his appeal was allowed but thereafter was of good conduct and industry. In September, 1959, when two-thirds of his shorter sentence had expired and he became eligible at the Prison Commissioners' discretion for a remission of sentence for good behaviour under r. 37 of the Prison Rules, 1949, he brought an action against the Prison Commissioners, claiming a declaration that he was eligible for release from prison on Sept. 10, 1959, and that he had not forfeited or lost any remission of the sentence which he was serving.

Held: (i) whether or not the prisoner should be granted a remission of part of his sentence was a matter entirely within the discretion of the Prison Commissioners, and

(ii) for the purpose of their decision, it was immaterial whether the prisoner was serving the ten-year sentence or the seven-year sentence when he committed his acts of misconduct, since the effect of the order of the Court of Criminal Appeal was to make the first sentence null and void only for the future and not ab initio; but

(iii) the prisoner had become eligible for consideration for discharge by reason of his good conduct since his appeal was allowed, which suggested that his previous conduct had been stimulated by resentment at his original sentence.

[As to remissions of sentence for good conduct and industry, see 30 HALSBURY'S LAWS (3rd Edn.) 590, para. 1125; and for cases on the subject, see DIGEST Supp.]

For a summary of the Prison Rules, 1949, S.I. 1949 No. 1073, as amended, see 18 HALSBURY'S STATUTORY INSTRUMENTS 11.]

Case referred to:

R. v. Maguire and Enos, (1956), 40 Cr. App. Rep. 92; 3rd Digest Supp.

Action.

The plaintiff was a prisoner serving a sentence of seven years' imprisonment at Dartmoor. In January, 1955, he had been sentenced to a term of ten years' imprisonment for which a sentence of seven years had been substituted by the Court of Criminal Appeal in 1957. He brought an action against the defendants, the Prison Commissioners, seeking a declaration that he was eligible for release from prison on Sept. 10, 1959, and that he had not lost or forfeited any remission of the sentence which he was serving.

N. N. McKinnon, Q.C., and G. J. Shindler for the plaintiff.

Sebag Shaw for the defendants.

WINN, J.: The plaintiff, Ronald Arthur Hancock, seeks as against the defendants, the Prison Commissioners, a declaration which he hopes will have the result indirectly of securing his immediate release, whereas, as things are at

present, it looks as though he may have to remain in prison until April, 1962, A
unless the Prison Commissioners take a more favourable view of his position
than they have done hitherto. The plaintiff was sentenced on Jan. 11, 1955, to
a term of ten years' imprisonment for housebreaking. He was then only twenty-
three, but his earlier record was not a good one and in fact he had just escaped
from prison where he was serving a six-year sentence. I take those last detailed B
facts from a note which I have seen from the file of the proceedings in the Court
of Criminal Appeal. He did not appeal against his sentence of ten years'
imprisonment until the autumn of 1957, when, rather remarkably (and I am told
on very good authority that this case represents the longest extension of time
for appeal that has ever been granted), he was granted an extension of time for
appealing, and his appeal came on before the Court of Criminal Appeal on Oct.
14, 1957. The court expressed the opinion that the ten-year sentence was too C
long and it made an order, the precise terms of which are important. They were
these:

"Upon the appeal of the above-named appellant against sentence, the
court doth determine the same and doth quash the sentence passed at the
trial, and doth pass a sentence of seven years' imprisonment and make an D
order under s. 22 of the Criminal Justice Act, 1948, and doth pass that
sentence in substitution for the sentence of ten years."

Counsel for the plaintiff has submitted to me cogently (and one recognises that
it is an argument which calls for careful consideration and has considerable
weight) that the word "quash" in that order means that the ten-year sentence
was thereby rendered null and void and wholly set aside as though it had never E
been. There would be persuasive force in that argument, and I would be disposed
to accept it, had I not found in the very wording of s. 4 (3) of the Criminal Appeal
Act, 1907, the provision that, wherever the Court of Criminal Appeal finds itself
of the opinion that a sentence passed has been too severe, it shall quash that
sentence and pass such sentence as the court thinks ought to have been passed in
substitution therefor. It seems to me that, when one finds those words in the F
section and considers the context in which they are used and the subject-matter
to which they must be applied, one is inevitably driven to the conclusion that the
word "quash" is not there used in the sense in which the SHORTER OXFORD
ENGLISH DICTIONARY tells me that it often is used, "to annul, make null or
void"; but instead that it is used in the less drastic meaning, that the former
sentence is by the order of the court rendered null and void at the moment when G
the Court of Criminal Appeal decides to substitute for it a different sentence, so as
to make that earlier sentence null and void and of no effect from that point of
time onwards, but not so as to render it null and void ab initio, i.e., as from the
date when it was passed. I feel that that must be the right way of construing the
section, because otherwise, at least as a matter of theory, the successful appellant
against the length of sentence would have been unlawfully imprisoned as from H
the date of his conviction and removal to gaol until the time when the Court of
Criminal Appeal so pronounced, and all measures of restraint exercised on him
(not merely by retaining him in gaol but in other ways) in that interim period
would be, at least in theory, tortious wrongs committed against him. That will
not be so if, as I think, the true intent of such an order and the true meaning of
the words in s. 4 (3) of the Criminal Appeal Act, 1907, which enables the order to
be made, is that the Court of Criminal Appeal quashes the original sentence for I
the future and substitutes the new sentence which the Court of Criminal Appeal
considers the proper sentence, albeit that that sentence itself takes its extent
from the original date of the first sentence; i.e., it is a term of so many years
calculated from the starting date of the sentence which has been quashed in the
sense in which I have indicated.

That being so, it appears to me that the plaintiff was imprisoned until the time
when the Court of Criminal Appeal found in his favour to the extent of reducing

A his sentence by virtue of the ten-years' sentence, and that, on his success in the Court of Criminal Appeal, he thereafter became a prisoner detained and detainable legally by virtue of the new seven-year sentence, being a sentence of imprisonment the duration of which was to be calculated by adding seven years to the starting date of the ten-year sentence, presumably Jan. 11, 1955.

B The problem posed to me today is one well worthy of the consideration of the court, which I still think it was right to have considered, even in vacation, because the plaintiff would naturally labour under a continuing sense of grievance if he could not get his complaint considered for weeks or months after the date when, according to his view of the matter, he would have been released, which was Sept. 10, 1959. Looking at the problem in the way which I have indicated, it
C no longer seems to me to be one of great complexity or difficulty, because, as is shown by *R. v. Maguire and Enos* (1), a sentence of imprisonment is a sentence for the period stated by the court in sentencing the convicted person. It is fallacious to regard the sentence as one which is to last only for two-thirds of that period. The man or woman is sentenced to a period of ten years, seven years, six years, or whatever it may be, and it is only through the indulgence of an administrative provision that in practice prisoners who behave themselves (and
D for whose encouragement to behave themselves this provision has been made) normally will find themselves discharged by the governor from prison some two-thirds of the way through the period of time named in the sentence. If there is in fact a discharge by the governor based on the remission which has been de facto granted to a prisoner, then the sentence expires by the express force of s. 25 (1) of the Prison Act, 1952, and thereon the prisoner is in the position of
E having completely served a sentence of a period longer than the time during which he has been actually in gaol.

Rule 3 of the Prison Rules, 1952 (S.I. 1952 No. 1405), amending r. 37 of the Prison Rules, 1949, provides that "arrangements are to be made"; and the court is, I think, entitled to say it knows, though there is no evidence of the fact, that arrangements have been made by which a prisoner who is serving a sentence
F of imprisonment may become eligible, by good conduct and industry, for discharge when a portion of his sentence has yet to run, not exceeding one-third of the whole sentence.

The expiration of time has brought the plaintiff to a date at which not more than one-third of the seven-year sentence passed by the Court of Criminal Appeal, if calculated from Jan. 11, 1955, remains yet to run. It is, I take it, a
G mere arithmetical calculation which produces Sept. 10, 1959, the date mentioned to me as that on which not more than one-third of the seven-year sentence had yet to run. That being so, the plaintiff has become eligible for discharge (i.e., has become eligible for the Prison Commissioners to consider whether they would approve of his being discharged), but only if he has been of good conduct and industry. The common-ground facts here are that the plaintiff has been of good
H conduct and industry for a very considerable time, viz., since October, 1957, but has not been of good conduct and industry throughout the whole period while he has been in prison.

It remains with the Prison Commissioners to decide what they will do with the plaintiff, because, in my opinion, and I so declare, he is by good conduct and industry since October, 1957, eligible for consideration by the commissioners
I as a person who would be discharged because of that good conduct and industry, having now reached a date when not more than one-third of his sentence has yet to run. The court has no power to direct the commissioners to consider the question, and whether they do so or do not do so is within their uncontrolled administrative discretion. If they do consider his case with a view to deciding whether he should be discharged, they will inevitably have in mind that he has not throughout the whole period of his detention in gaol been of good conduct or

industrious and therefore did not, prior to October, 1957, acquire by good A
conduct and industry any eligibility for discharge.

As so often happens when problems are analysed and closely considered, the
problem is seen not to exist at all and, because it does not exist, it is impossible
for the court or any other adviser to solve it in a logical and practical way. The
practical aspects of the matter are very important. On the one hand, it is B
manifest that the control of prisons and prisoners by the Prison Commissioners
and the visiting justices should not be interfered with by the courts, unless in any
particular case there has been some departure from law and good administration
amounting to an offence in law, and I would not think of interfering in any way
with the entirely unfettered power and discretion of the Prison Commissioners
in this matter. On the other hand, the Prison Commissioners have very C
courteously (and, if I may say so, I think very sensibly) consented to my express-
ing an opinion on this difference of view between the plaintiff and themselves.
It seems to me that the Prison Commissioners are right in saying that it is
immaterial in fact and in law whether the plaintiff was serving the ten-year
sentence or serving the seven-year sentence at the time when he attempted to
escape and was guilty of other acts of misconduct which resulted in the imposition
on him of sentences of losses of remission; except that I feel an uneasy doubt D
whether some visiting committees—not necessarily this one—dealing with a man
who has been sentenced to ten years and is still in the first stage, and having
regard to the fact that he will not be affected for several years to come, may not
be a little more ready to impose a severe loss of remission than they would be on
a man who had reached a stage where the remission is sooner going to be a matter
of practical consequence to him. What is more (if I may say this without tres- E
passing impertinently into the sphere which is solely that of the Prison Commis-
sioners) it seems to me probable that the plaintiff did feel considerable resentment
about the sentence passed on him in January, 1955, a resentment found to be
substantially justified by those best qualified to judge the propriety of sentences.
I think that if, as I hope they will, the Prison Commissioners do see fit to consider
the plaintiff's case, with a view to deciding whether to give him a discharge now F
or at some date earlier than 1962, they will have in mind that such resentment
was likely to stimulate such conduct as that of which the plaintiff was guilty in
prison, and that the best evidence supporting that view is the way in which he
has behaved himself once he got a sentence which he recognised not to be unjust.

In the light of those observations, and recognising that I have really done
nothing more than deliver a discourse which has little to do with the discharge of G
my proper functions as a judge, I would say that no order of any kind should be
made in this action. If either learned counsel were to ask me to make an order,
I would only make it in the form of a declaration that it is immaterial for the
purposes of the Prison Rules, 1949, r. 37, that the first sentence was quashed and
the second sentence substituted, but that nevertheless, by reason of good conduct
since October, 1957, the plaintiff has become eligible for consideration for dis- H
charge, but whether he is to be discharged remains entirely in the discretion of
the Prison Commissioners.

Judgment for the defendants.

Solicitors: *S. Sydney Silverman* (for the plaintiff); *Treasury Solicitor* (for the
defendants).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

A RUSHTON v. TURNER BROTHERS ASBESTOS CO., LTD.

[MANCHESTER ASSIZES (Ashworth, J.), July 22, 1959.]

Factory—Dangerous machinery—Contributory negligence—Workman deliberately inserting hand into moving machine in order to clean groove—Operative cause of accident—Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6 c. 67), s. 14 (1).

B Statutory Duty—Breach—Causation—Contributory negligence—Workman deliberately inserting hand into moving machine.

The plaintiff was employed by the defendants to operate a fibre crushing machine, which consisted of a rotating pan within which were two rotating stones connected by a central pin. From time to time, in the course of the work, the crushed fibre tended to stick in the grooves along which slid a trapdoor at the base of the machine. Through this trapdoor the crushed fibre was discharged into a chute periodically during the day. The machine could be cleaned from above by lifting the cover of the pan, and in that case the machine was stopped and the stones automatically stopped rotating; but the usual method of cleaning the grooves was from below the machine, by opening the trapdoor and putting one's hand in through the door, having first stopped the rotation of the stones. The defendants knew that this was the method which their workmen normally used. There was no guard or barrier at this part of the machine, but it was the practice among the defendants' workmen to stop the machine before attempting to clean the grooves. When the plaintiff first started to operate a crushing machine, he received adequate training in regard to using and cleaning the machine and was instructed never to attempt to clean the grooves when the machine was in motion. He also received from the defendants a card with safety instructions and warning him not to touch any part of the machine when it was in motion except those parts which formed part of his normal job and which he had been instructed to do by the foreman or a teacher operative. After the plaintiff had been employed on the machine for about six months, it was discovered one afternoon that a small piece of metal from the top edge of one of the grooves, separating the groove from the pan with the rotating stones, had broken away. It was decided that it would be safe to continue to use the machine for the remainder of that shift, and the plaintiff continued to operate the machine, knowing its condition. Later in the afternoon, when the groove required cleaning, he put his left hand into the machine without stopping it and his fingers were crushed. In an action against the defendants for damages for personal injuries,

G Held: although the defendants were in breach of their statutory duty under s. 14 (1) of the Factories Act, 1937, in that they had failed to fence a dangerous part of the machinery, they were not liable in damages to the plaintiff because the cause of the accident, in the sense of the operative act and effective cause, was the plaintiff's own negligence in deliberately inserting his hand into the moving groove.

H [Editorial Note. This decision should be considered with the dicta of PEARSON, J., in *Ginty v. Belmont Building Supplies, Ltd.*, [1959] 1 All E.R. at p. 424, letters A-D.

I As to the liability of an employer where an accident was caused by the workman's own fault, see 17 HALSBURY'S LAWS (3rd Edn.) 10, para. 11; and for cases on the subject, see 24 DIGEST (Repl.) 1057, 1058, 227-230.]

Cases referred to:

Admiralty Comrs. v. S.S. Volute, [1922] 1 A.C. 129; 91 L.J.P. 38; 126 L.T. 425; 41 Digest 780, 6417.

Johnson v. Tennant Bros., Ltd., ((Leeds Assizes, Parker, J.) July 9, 1954; *affd.*, C.A., Nov. 19, 1954), Unreported.

Williams v. Sykes & Harrison, Ltd., [1955] 3 All E.R. 225; [1955] 1 W.L.R. 1180; 24 Digest (Repl.) 1055, 218.

Action.

In this action the plaintiff, William Davies Rushton, claimed damages against his employers, Turner Brothers Asbestos Co., Ltd., the defendants, for personal injuries suffered by him as the result of an accident while he was operating a crushing machine in the course of his employment.

The facts are stated in the judgment.

C. T. B. Leigh for the plaintiff.

Fenton Atkinson, Q.C., and *J. Martin Collins* for the defendants.

ASHWORTH, J.: This is a claim by William Davies Rushton against Turner Brothers Asbestos Co., Ltd., arising out of an injury which he sustained on Sept. 9, 1957, when in employment by the defendants as a fibre packer. The nature of the injury was that the plaintiff suffered a crushing of the tips of the four fingers of his left hand; amputation took place of the first joint of three of the fingers and there was a sliced amputation of the index finger.

The plaintiff had been with the defendants for quite a considerable time before the accident and had been employed as a packer, but at his own request he was allowed to earn higher pay at another allotted task of operating a machine which is known as a crushing machine. I do not think it necessary to elaborate in any great detail the description of the machine. It is enough to say that one part of the machine is a floor or pan, within which there are two stones connected by a central pin; they rotate round the edge of the pan, and this also rotates as it moves round the circumference. In the pan is placed from time to time a bag of asbestos fibre, and the purpose of the stones is to crush the fibre as they rotate. The transition takes about eight minutes, and it was the plaintiff's task to fetch a bag or a sack, empty it into a chute into the machine, and then after eight minutes collect the crushed fibre from the outlet chute, and take it away. In order to permit the crushed fibre to leave the pan, there was what I would describe as a trapdoor or slide, and this was operated by a handle screwed into the trapdoor much like a starting handle on a car, the handle being turned until the trapdoor slid open. It was sliding in two grooves, on the right-hand side and left-hand side. The descriptions of these grooves are as follows: vertical: 13-16th of an inch; and, horizontal: 3/4-inch. The top of the groove was separated from the pan itself by a protective layer of metal of 13-16th of an inch thickness.

As the fibre was discharged out of the trapdoor into the chute, from time to time parts of it tended to collect in these two grooves on either side of the trapdoor. The evidence goes to show that, as the process went on, the material which collected in the grooves tended to harden or to become impacted, as it is called, on the sides of the grooves. If sufficient material had collected it was clearly difficult to close the trapdoor effectively, and, therefore, it was necessary from time to time during a day's shift to clean the grooves. It was the operator's task, and, bearing in mind that the stones were rotating round the pan and that in between the stones there were scrapers cleaning the surface of the pan, I should have thought that for a man to place his hand in the trapdoor while the machine was in motion was about as foolish a piece of negligence as anyone could conceive.

The defendants, as I find, were fully alive to the importance of safety precautions for their operatives, and among the documents produced in the case was a small card entitled "Safety in the Factory". At the bottom of the card there was a place for a signature, and the plaintiff acknowledged that he had received such a document. It says that he must not touch any part of the machine when it is in motion:

"except those parts which form part of your normal job and which you have been instructed to do by the foreman in charge or a duly appointed teacher operative."

A The plaintiff was put on this machine at his own request, and the defendants were able to call before me two witnesses, Mr. Southworth and Mr. Butler, who were responsible for his instruction. I have seldom met witnesses who gave more clearly an impress of reliability and truthfulness. If one were to select one rather than another I would say that Mr. Southworth gave evidence as well as any man could possibly give it, and he was entirely truthful. He is a safety man, and he said that he put Mr. Butler in charge of the plaintiff and told him to instruct him about the machine. He went on to add that after half a day Mr. Butler said that the plaintiff was sufficiently trained. He said:

C "I examined him for a good hour, and then unbeknownst to him I watched him for three days at different times in different parts of the factory and I considered he was a highly satisfactory worker on that particular job. I watched him there just because it was my job to be in that particular department. I saw that he was doing the work properly."

I accept that evidence fully, and I am quite satisfied that in the course of the instructions it was made abundantly plain to the plaintiff that on no account should he attempt to clean the grooves when the machine was in motion. It was obviously necessary while he was being trained for him to operate the machine and in the course of the day to clean the grooves, and it was for that reason that I asked Mr. Southworth if he had seen him do it. He said "Yes," he had.

"Q.—How did he clean it? A.—He cleaned it with the machine stopped, and he used for the purpose a knife which was provided by the defendants."

E The reason why a knife was provided to the plaintiff was because, as the machine was operated, the impacted material tended to stick in the grooves and some form of sharp instrument would be needed to flick it out of the corners of the grooves. The bare finger would not be suitable or efficient for that purpose.

F So we reached the situation that, at least six (and probably eight) months before this accident, the plaintiff had been allowed to operate the machine, fully instructed as to the proper nature of doing so and with clear instructions that on no account had he to clean the grooves when the machine was in motion. The method of cleaning the machine could be one of two. It was possible to lift the cover of the pan and approach the grooves from above. If that course were taken, the machine was stopped and the stones would be stopped automatically. The other method of approach to the grooves was from underneath. It was possible to open the trapdoor and then insert the hand into the opening, and I was told by more than one witness that that was the normal method of cleaning the grooves adopted by those operating the machines. But the witnesses for the defendants who gave those answers were careful to add that, in all circumstances, the machine was stopped before any attempt was made to clean the grooves. None of them had ever seen a man indulge in the appallingly dangerous manoeuvre of attempting to clean the grooves while the machine was in motion, and, indeed, Mr. Southworth's view of it was that, if he saw a man doing so, he would tell him off in round terms and, if he saw him do it a second time, it would be the finish. I believe that, too.

I I am quite satisfied on all the evidence that the idea of cleaning the grooves when the machine was in motion was something which the defendants, from the common-sense angle, had barely any reason to contemplate as being likely to occur; but one must remember that it is not only the sensible workman who is within the scope of the protection given by the Factories Act, 1937. I take the view that, because the defendants knew that the normal method of cleaning the grooves was from below by opening the trapdoor and inserting the knife, they should have contemplated as a matter of law that one day a man would be foolish enough to do it without stopping the machine, and it is against that sort of risk, as I find, that the Factories Act, 1937, was passed. I should have been very willing, if the decided cases allowed, to hold the defendants free of any breach of the Factories Act, 1937, at all. It seems to me that this case only just falls

over the line in the realm of a risk through lack of fencing which the ordinary employer ought to contemplate and guard against, but I do so find that this particular part was dangerous, and it was not fenced at all (1). Fencing clearly could have been applied to the opening because, since the accident, a form of wire guard or barrier has been installed. That is, I need hardly say, not conclusive, but counsel for the plaintiff quite properly relies on it as indicating that the provision of the guard was a relatively simple matter. A B

The strength of the defendants' case is the folly of the plaintiff. [His LORDSHIP referred to the plaintiff's testimony, finding him not to be an impressive witness, and continued:] What happened on Sept. 9 was this. At some time during that day when the plaintiff was working the machine, some part of the top edge of the groove broke away, and at about 4 p.m. the plaintiff produced the piece of metal that had broken away and took it to Mr. Butler, asking him "Where has this come from?" Not long afterwards there was, so to speak, a little conference round the machine, by a Mr. Forbes, Mr. Southworth, the plaintiff, Mr. Butler and two other employees of the defendants. The plaintiff said that he took no part in that little gathering, and that he was busy sweeping up. I do not believe him. It is quite incredible that a man whose machine was stopped for a broken piece of metal, which has been handed in to the proper authority would content himself with sweeping up while there was a conference going on near the machine to discuss the breakdown. No doubt he was not consulted as to the proper course to take, but I am quite convinced that he knew what had happened. As a result of this little conference it was decided that the repair should be carried out on the Wednesday but that the machine was safe to run for the rest of that shift. Mr. Butler told me, and I believe him, that, as it were in response to the plaintiff's original question: "Where did this come from?", he showed him where the piece of broken metal came from, namely, the top edge of the groove. Therefore, the plaintiff was fully aware when he started working again at about 5.15 p.m. that evening that the top edge of that groove was in a condition where part of it had disappeared. The result of that disappearance was that the barrier, 13-16th of an inch in depth, was incomplete to the extent of the metal that had gone. In so far as he put his hand along the groove and came to that missing part, there was nothing to prevent his hand or finger coming into contact with the stones if it was lifted past the level in the groove. C D E F

This is, indeed, what happened. When, apparently, the time came to clean the groove, the plaintiff managed to do it without injury, putting his finger near the right-hand groove; and then he did the same with the left and was crushed. He told me that he had done it many times before—I understood him to say that he had done it some hundreds of times. Once again, I do not believe him. This was one of two machines in the room, which was compact, about eight men working in it, and, with a man like Mr. Southworth about, I am quite convinced that it would have been utterly impossible for the plaintiff to resort to this highly dangerous method without coming under Mr. Southworth's notice and censure. He might well have done it once or twice when people were missing, but I do not think that he could have lulled himself into the belief that that was the proper way of doing it. I need hardly say that, when he put his finger in, he had failed to stop the machine. There would have been no accident if he had stopped it. The lever by which he could have stopped it was within one pace distance to it; indeed, I doubt whether it was even necessary to step that one pace. By reaching out his right hand he could have operated that lever with ease, but he chose not to do so. In those circumstances he says that the defendants are liable to pay him compensation for an accident which, I consider, was entirely his own fault. G H I

(1) Under s. 14 (1) of the Factories Act, 1937: "Every dangerous part of any machinery . . . shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed . . . as it would be if securely fenced . . ."

A Counsel for the plaintiff submitted that the accident in this case does not differ in kind from many other accidents reported in the books in which defendant-employers have been found guilty of a breach of the Factories Acts, and where the plaintiff has succeeded in spite of considerable contributory negligence on his own part. It seems to me that in each case it is a question of degree. It is a question of degree, looking at the whole of the circumstances fairly and broadly
B to see whether the breach of the Factories Act, 1937, is of itself an operative cause of the accident or is more truly in a sense the circumstances in which the accident happened.

In *Williams v. Sykes & Harrison, Ltd.* (2) SINGLETON, L.J., quoted a passage from a speech by VISCOUNT BIRKENHEAD, L.C., in *Admiralty Comrs. v. S.S. Volute* (3). The principle laid down in the speech of LORD BIRKENHEAD was appropriate in his day in Admiralty cases and is quite appropriate in common law today. It was adopted by SINGLETON, L.J., in *Williams v. Sykes & Harrison, Ltd.* (2), and I would respectfully endeavour to apply it here, "broadly and upon common-sense principles."

It seems to me in this case that, first, the plaintiff was not injured by reason of some accidental omission on his part to take due care, nor was it a case of momentary inadvertence and failing to remember the safety rules. This was a case in which he must have known that the machine was in motion: he must have known that the limited protection given by the top of the groove had been greatly reduced by the breakage, and he must have known, and I so find, that he was placing his hand in a position of great danger when he deliberately inserted it into the moving groove. I know that the word came from me, but it was accepted by the plaintiff and I repeat it: it was a crazy thing to do. He admits that he would not do it again. What reason he had for doing it then, unless it be that his intelligence is less than I estimate, I do not know. I find that he did it quite deliberately, and that the cause of this accident, in the sense of the operative act and effective cause, is wholly to be attributed to him.

I fully appreciate that the occasions on which a court is able to permit defendants to escape in a case of this sort must be rare. Generally, when they have been in breach of the Factories Act, 1937, they must be expected to bear some portion of the responsibility and to pay some proportion of compensation; but this will not be the first case on record in which a court has come to the conclusion that the defendants can escape altogether because their breach of the statutory provisions was not, in a true sense of the word, an effective "cause" of the accident. PARKER, J., gave a decision to the same effect in *Johnson v. Tennant Bros., Ltd.* (4); it is not reported, but it was upheld in the Court of Appeal (5), and there have been other cases in which the degree of responsibility by the plaintiff has been placed as high as ninety per cent.

I take the view that in this case, looked at fairly, the plaintiff is the sole author of his own misfortune. For this reason there must be judgment for the defendants.

H *Judgment for the defendants.*

Solicitors: *J. Bright, Clegg & Son*, Rochdale (for the plaintiff); *James Chapman & Co.*, Manchester (for the defendants).

[Reported by M. DENISE CHORLTON, Barrister-at-Law.]

I (2) [1955] 3 All E.R. 225 at p. 231. The quotation reads as follows: "... the question of contributory negligence must be dealt with somewhat broadly and upon common-sense principles as a jury would probably deal with it. And while no doubt, where a clear line can be drawn, the subsequent negligence is the only one to look to, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the party secondly negligent . . . might, on the other hand, invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution."

(3) [1922] 1 A.C. 129.

(4) July 9, 1954.

(5) Nov. 19, 1954.

NOTE.

R. v. THOMAS.

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Ashworth and Hinchcliffe, JJ.),
October 2, 5, 1959.]

*Criminal Law—Appeal—Evidence—Evidence of matters occurring after trial—
Procedure—Criminal Appeal Act, 1907 (7 Edw. 7 c. 23), s. 9, s. 19.*

[As to the admission of further evidence on a criminal appeal, see 10 HALSBURY'S LAWS (3rd Edn.) 532, para. 978.]

Case referred to:

R. v. Robinson, [1917] 2 K.B. 108; 86 L.J.K.B. 773; 117 L.T. 160; 81 J.P. 152;
12 Cr. App. Rep. 226; 14 Digest (Repl.) 627, 6338.

Appeal.

The appellant, Anthony Hogarth Thomas, was convicted on Jan. 24, 1959, on three counts of an indictment for child stealing, abduction of and indecent assault on a girl aged thirteen. He appealed against conviction on two main grounds, viz., (i) he applied for leave to call additional evidence which, if accepted, would establish that the evidence given by the girl at the trial was false and had been admitted by her to be false, and (ii) that the jury had been wrongly invited to consider as possible corroboration matters which could not properly be so regarded. The convictions were quashed on the second ground but in the course of delivering the judgment of the court ASHWORTH, J., made the following observations, for which alone the case is reported.

N. R. Blaker for the appellant.

R. Stock for the Crown.

Oct. 5. ASHWORTH, J., after reviewing the facts and stating the two main grounds of appeal set out above, continued: We deal first with the question of additional evidence. It became clear at an early stage of the hearing before us that part of this evidence related to matters which were said to have occurred after the appellant's conviction and sentence; such evidence could not, therefore, have been laid before the jury at the appellant's trial. On the other hand, the other part of the proposed evidence related to matters which were said to have occurred before the appellant's trial. So far as the latter part of the proposed evidence is concerned, no procedural difficulty arose; s. 9 of the Criminal Appeal Act, 1907, expressly provides for the reception of such evidence. In regard, however, to matters which have occurred since an appellant's conviction the Act of 1907 contains no express provision. Notwithstanding the decision in *R. v. Robinson* (1) we are inclined to think that when a convicted person desires to rely on such evidence his proper course is to lodge a petition with the Home Secretary so that, if thought fit, action may be taken in accordance with s. 19 of the Act of 1907. In the present case we decided to hear the evidence *de bene esse* and to postpone any ruling as to the court's power or discretion to receive it. Having heard the evidence, we are of opinion that it was not of sufficient weight or reliability to be acceptable and that, in so far as it could have been laid before the jury at the appellant's trial, it would not have affected their conclusion. Accordingly it is unnecessary to express any further opinion as to the circumstances in which this court either can or should receive evidence of events occurring after a conviction.

(1) [1917] 2 K.B. 108; 12 Cr. App. Rep. 226.

A [HIS LORDSHIP then turned to the question of corroboration, concluding that the jury were invited to regard two matters as capable of constituting corroboration which could not properly be so regarded and that a careful study of the evidence aroused in the mind of the court serious misgivings as to the appellant's guilt.]

Appeal allowed.

B Solicitors: *Sharpe, Pritchard & Co.*, agents for *C. P. Brutton*, Dorchester (for the appellant); *Registrar, Court of Criminal Appeal.*
[*Reported by N. P. METCALFE, ESQ., Barrister-at-Law.*]

C

Re COHEN'S WILL TRUSTS.
Re COHEN'S SETTLEMENT TRUSTS.

D [CHANCERY DIVISION (Danckwerts, J.), April 16, 1959.]

Trust and Trustee—Variation of trusts by the court—Whether court will approve variation with possible risk to beneficiary—Variation of Trusts Act, 1958 (6 & 7 Eliz. 2 c. 53), s. 1.

E A proposed arrangement for the variation of trusts affecting interests of a testator's infant grandchildren in trust funds was one which in the ordinary course of events would be for their benefit, but it would not be advantageous to them in the unlikely event of one of the testator's daughters, the mother of the infants, dying in the lifetime of the testator's widow, who was then nearly eighty years of age. On application under s. 1 of the Variation of Trusts Act, 1958, for approval of the proposed arrangement,

F **Held:** the proposed arrangement would be approved on behalf of the infants, the risk being one which an adult would be prepared to take and which the court was accordingly prepared to take on behalf of infants.

[For the Variation of Trusts Act, 1958, see 38 HALSBURY'S STATUTES (2nd Edn.) 1130.]

Adjourned Summons.

G This was a summons adjourned under s. 1 of the Variation of Trusts Act, 1958, taken out by one of the trustees of the will and of a settlement (both dated Nov. 28, 1935) of the late Mr. Harold Leopold Cohen, for approval on behalf of infants and any persons born or unborn who might become interested therein of an arrangement for the variation of the trusts of the will and of the settlement. Mr. Cohen (hereafter called the testator) died on July 27, 1936, survived by his widow and four children, namely, a son, Leslie Cohen, and three daughters, H Mrs. Villar, Mrs. Levy and Mrs. Leland. The son was married and had one child, who would attain twenty-one years of age in October, 1959. Mrs. Villar had no children and there was evidence that she could not have children. Mrs. Levy had two children, both of whom were infants. Mrs. Leland survived the testator but died in 1948 and was survived by three daughters, one of whom was I still an infant. Her two daughters who were of age had respectively made settlements, each of a half of her share in 1955 and 1958.

By his will the testator gave his residuary estate to his trustees on trusts for sale and conversion, and, after providing for the payment of his funeral and testamentary expenses and for legacies and annuities, on trust to pay the income of the trust estate to his wife for life during her widowhood; but one-third of the income was to be held on protective trusts for life in the event of her remarriage, with a power to resort to capital should the income from the joint funds from the settlement and trust estate fall below £24,000 per annum while

she remained a widow. Subject to the interest of the widow the testator A
bequeathed his residuary estate

"in trust for all or any of my children or child who shall be living at my
death and if more than one in such shares and proportions that the shares
of the sons shall be equal and the shares of the daughters shall be equal
but that the share of each son shall bear to the share of each daughter the
same proportion as three bears to one." B

He then settled the shares of his children on protective trusts for his children
for life and after the death of any child on such trusts for such issue of that
child as the child might by deed or will appoint and in default of appointment on
the usual trusts for the children of such child equally. If the trusts of the
share of any child failed, it was to accrue to the shares of the other children in
the same proportions as the original shares. The will also gave any child of the C
testator power to appoint up to a moiety of the income of his or her share for
the benefit of any spouse who might survive him or her for life on protective
trusts. The trusts of the settlement, so far as relevant, were the same as those
of the will, except that under the settlement the testator's widow was only
entitled to have her income made up out of income to £24,000 per annum. D

The approval of the court was sought for a variation of the trusts, so that out
of the will fund the widow would be paid a capital sum and her annuity would
be reduced and charged on the settlement in exoneration of the will funds.
Subject to those provisions and to the provision for the payment of small sums
to future spouses of the testator's surviving children, the surviving children's
shares of the settlement fund were to be held for them (viz., for the first generation
exclusively) and the will fund was to be held exclusively for the grandchildren E
(the second generation) and their issue.

This variation would be of benefit to the children concerned but in the unlikely
event of one of the testator's children predeceasing the testator's widow (who
was nearly eighty) the interests of his or her children might be adversely
affected by the incidence of estate duty. F

John Pennycuik, Q.C., and *J. P. F. E. Warner* for Lord Woolton, one of the
trustees of the settlement.

J. Cunliffe for the widow.

B. L. Bathurst, Q.C., and *E. W. Griffith* for the son's daughter.

G. F. Dearbergh for the son.

R. Cozens-Hardy Horne and *J. A. Wolfe* for the testator's surviving daughters. G

Geoffrey Cross, Q.C., and *D. H. McMullen* for the infant children of Mrs. Levy.

R. B. S. Instone for the children of Mrs. Leland and the trustees of the settle-
ments made by the two eldest of them.

DANCKWERTS, J.: If the court is asked to sanction this sort of scheme,
those who seek the court's sanction must be prepared to take some sort of risk,
and if it is a risk that an adult would be prepared to take, the court is prepared H
to take it on behalf of an infant. I am prepared to approve the arrangement on
behalf of the infants and of all persons unascertained or unborn who are or may
become interested under the trusts of the will or settlement.

Order accordingly.

Solicitors: *Alsop, Stevens & Co.* (for all parties).

[*Reported by E. COCKBURN MILLAR, Barrister-at-Law.*]

A

Re MWENYA.

[COURT OF APPEAL (Lord Evershed, M.R., Romer and Sellers, JJ.), July 24, 27, 28, 29, October 13, 26, 1959.]

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Slade and Winn, JJ.), June 17, 18, 19, July 3, 1959.]

B

Habeas Corpus—Jurisdiction—Foreign territory—Arrest and detention in protectorate.

The jurisdiction of the High Court to grant a writ of habeas corpus extends to the issue of the writ to protectorates (or other such territories) which, having regard to the dominion in fact exercised by the Crown, are under the subjection of the Crown and in which the issue of a writ will be proper and efficient (see p. 537, letter A, post).

C

Dicta of LORD MANSFIELD, C.J., in *R. v. Coule* ((1759), 2 Burr. at pp. 855, 856) and of VAUGHAN WILLIAMS and FARWELL, L.JJ., in *R. v. Earl of Crewe, Ex p. Sekgome* ([1910] 2 K.B. at pp. 605, 608, 618) applied.

Ex p. Anderson ((1861), 3 E. & E. 487) considered.

D

Appeal allowed.

[As to places to which habeas corpus may be granted, see 11 HALSBURY'S LAWS (3rd Edn.) 29-31, paras. 50, 51; and for cases on the subject, see 16 DIGEST 249, 250, 477-500.]

E

As to the meaning of Her Majesty's dominions, see 5 HALSBURY'S LAWS (3rd Edn.) 433, para. 987. It is to be observed that by art. 13 (1) of the Federation of Rhodesia and Nyasaland (Constitution) Order in Council, 1953 (S.I. 1953 No. 1199), the words "part of Her Majesty's dominions" in any Act passed before the date of that order include, for certain purposes, the federation as a whole.

For the Habeas Corpus Act, 1862, s. 1, see 6 HALSBURY'S STATUTES (2nd Edn.) 100.]

F

Habeas Corpus—To whom writ will issue—Constructive custodian—Detention in protectorate—Whether writ will issue to Secretary of State.

The applicant was a native of Northern Rhodesia, which was a protectorate. Under the Emergency Powers Regulations, 1956, reg. 18, the governor of Northern Rhodesia made a restriction order which required the applicant to remain within the Mporokoso District, an area of about 1,500 square miles. The applicant applied for a writ of habeas corpus directed, among others, to Her Majesty's Secretary of State for the Colonies, on the ground that the regulations and order were invalid. Under the constitution and other legislation in regard to Northern Rhodesia the Secretary of State had certain powers extending beyond advice, but none which enabled him to be regarded as having custody of the applicant.

G

H

Held (by the DIVISIONAL COURT): although a writ of habeas corpus would issue not only to the person who had actual custody of the body but also to another person who had constructive custody (viz., power and control over the body) and would issue in special circumstances against a Secretary of State, yet the writ would not be issued in this case to the Secretary of State, since, on the facts, he had no sort of custody of the applicant, notwithstanding that he might be in a position to advise the Sovereign that the applicant should be brought before the court.

I

Dictum of KENNEDY, L.J., in *R. v. Earl of Crewe, Ex p. Sekgome* ([1910] 2 K.B. at p. 629) followed; dicta of VAUGHAN WILLIAMS and FARWELL, L.JJ. (ibid., at pp. 592, 618) not followed; *Re Ning Yi-Ching* ((1939), 56 T.L.R. 3) approved.

R. v. Secretary of State for Home Affairs, Ex p. O'Brien ([1923] 2 K.B. 361; [1926] A.C. 603) explained and distinguished.

[As to the availability of the writ of habeas corpus against the executive, see A
11 HALSBURY'S LAWS (3rd Edn.) 25, para. 42.]

Cases referred to:

Anderson, Ex p., (1861), 3 E. & E. 487; 30 L.J.Q.B. 129; 3 L.T. 622; 25 J.P. 116; 121 E.R. 525; 16 Digest 249, 492.

Barnardo v. Ford, Gossage's Case, [1892] A.C. 326; 61 L.J.Q.B. 728; 67 L.T. 1; 56 J.P. 629; 16 Digest 248, 469. B

Calvin's Case, (1608), 7 Co. Rep. 1a; Jenk. 306; 2 State Tr. 559; 77 E.R. 377; 11 Digest (Repl.) 560, 2.

Ning Yi-Ching, Re, (1939), 56 T.L.R. 3; Digest Supp.

Nyali, Ltd. v. A.-G., [1955] 1 All E.R. 646; [1956] 1 Q.B. 1; [1955] 2 W.L.R. 649; *affd.* H.L., [1956] 2 All E.R. 689; [1957] A.C. 253; [1956] 3 W.L.R. 341; 3rd Digest Supp. C

R. v. Cowle, (1759), 2 Burr. 834; 2 Keny. 519; 97 E.R. 587; 16 Digest 249, 489.

R. v. Crewe (Earl), Ex p. Sekgome, [1910] 2 K.B. 576; 79 L.J.K.B. 874; 102 L.T. 760; 16 Digest 249, 493.

R. v. Secretary of State for Home Affairs, Ex p. O'Brien, [1923] 2 K.B. 361; 129 L.T. 419; *affd.* H.L. sub nom. *Secretary of State for Home Affairs v. O'Brien*, [1923] A.C. 603; 92 L.J.K.B. 830; 129 L.T. 577; 87 J.P. 174; Digest Supp. D

Sobhuza II v. Miller, [1926] A.C. 518; 95 L.J.P.C. 137; 135 L.T. 215; Digest Supp.

Southern Rhodesia, Re, [1919] A.C. 211; 88 L.J.P.C. 1; 119 L.T. 689; 8 Digest (Repl.) 685, 8.

Staples v. R., (P.C., Jan. 27, 1899), Unreported. E

Appeal.

This was an appeal from a decision of the Divisional Court (LORD PARKER, C.J., SLADE and WINN, JJ.) upholding a preliminary objection to an application made by Andrew Mwenya and directed to the Secretary of State for the Colonies, the Governor of Northern Rhodesia and the District Commissioner for the Mporokoso District of Northern Rhodesia, for a writ of habeas corpus in respect of the alleged detention of the applicant in the Mporokoso District of the Protectorate of Northern Rhodesia. F

The following statement of fact is taken from the judgment of LORD PARKER, C.J., on the hearing of the application before the Divisional Court. Mr. Mwenya was a native of Northern Rhodesia, having been born within that territory. At all material times Northern Rhodesia was a protectorate and it continued as such at the present time despite the Rhodesia and Nyasaland Federation Act, 1953. In an affidavit by Her Majesty's Secretary of State for the Colonies, sworn on June 12, 1959, it was stated that G

"The Northern Rhodesia Protectorate is a foreign country within which Her Majesty has power and jurisdiction by treaty, grant, usage, sufferance and other lawful means within the meaning of the Foreign Jurisdiction Act, 1890. The territory of the said protectorate is foreign territory under Her Majesty's protection. It has never been acquired by settlement or ceded to or conquered or annexed by Her Majesty or any of Her royal predecessors, nor has Her Majesty or any of Her royal predecessors recognised the same as, nor is it, part of Her dominions, but She has power and jurisdiction within the same." H I

Mr. Mwenya alleged that he was wrongfully detained in the Mporokoso District of Northern Rhodesia pursuant to restriction orders dated June 15 and Oct. 5, 1957, made by the Governor of Northern Rhodesia. The restriction orders provided that Mr. Mwenya should remain within the area of Chief Mporokoso in the Mporokoso District, which comprised an area of about 1,500 square miles. The Governor's powers to make such restriction orders flowed from reg. 18 of the Emergency Powers Regulations, 1956, which provided that the Governor,

- A if satisfied that for the purpose of maintaining public order it was necessary so to do, might make a restriction order against any person. Those regulations were made pursuant to the Emergency Powers Order in Council, 1939, as amended by the Emergency Powers Orders in Council of 1952 and 1956, made by virtue of the powers conferred by the Foreign Jurisdiction Act, 1890. The ground of Mr. Mwenya's application was that the orders were not validly made. His case for wrongful detention was based on the contention that those orders in council were statutory rules to which the Rules Publication Act, 1893 (repealed in 1946) applied. Section 1 (1) of that Act provided:

- C "At least forty days before making any statutory rules to which this section applies, notice of the proposal to make the rules, and of the place where copies of the draft rules may be obtained, shall be published in the London Gazette."

That provision admittedly was not complied with, and in the circumstances Mr. Mwenya contended that the Orders in Council were invalid, and further that the restriction orders, which depended ultimately on the validity of those Orders in Council, were likewise invalid.

- D The respondents, on the other hand, contended that those Orders in Council were not statutory rules to which the Act of 1893 applied. They contended further that in any event the restriction on Mr. Mwenya's liberty of movement did not constitute such a detention or confinement as would give him any right to relief by way of habeas corpus.

- E At the opening of the proceedings a preliminary objection was taken on behalf of the respondent that in any event the court had no jurisdiction to issue the writ to custodians in a protectorate in respect of a detention in that protectorate, since the territory comprised in a protectorate was foreign territory. For the purpose of the preliminary point the Divisional Court was asked to assume and assumed—(a) that Mr. Mwenya was a British subject; (b) that the said Orders in Council were invalid and that so, too, were other Orders in Council in regard to Northern Rhodesia, including that setting up a High Court having the power to issue the writ of habeas corpus; and (c) that Mr. Mwenya's confinement was of such a nature as to enable him, if he had been confined in this country, to apply for the writ. After hearing argument on the preliminary point the Divisional Court, at the invitation of all parties gave a ruling on the objection. The court ruled against Mr. Mwenya on the preliminary point and dismissed his application against the Governor of Northern Rhodesia and the District Commissioner. The court delivered a reserved judgment on July 3, 1959. The preliminary point was not decisive, however, against the Secretary of State for the Colonies and the judgment of the Divisional Court on the question as against the Secretary of State is reported at p. 542, letter F, post.

Mr. Mwenya appealed to the Court of Appeal.

- H *J. G. Foster, Q.C., Neil Lawson, Q.C., and B. H. Anns* for the appellant, Mr. Mwenya.

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.) and J. R. Cumming-Bruce for the Secretary of State.

B. J. M. MacKenna, Q.C., and J. G. Le Quesne for the Governor and the District Commissioner.

- I *Cur. adv. vult.*
Oct. 13. The following judgments were read.

LORD EVERSLED, M.R., having referred to the nature of the application to the Divisional Court and the grounds thereof, and having stated the preliminary objection and set out the assumptions on which the Divisional Court proceeded in relation to that objection, continued: The argument before us was confined to the preliminary point previously mentioned. I do not, therefore, in this judgment go into the further question whether the Secretary of State has

such a control over the alleged detention of Mr. Mwenya as would in any case justify an order being made against him. A

In the course of the argument on the first three days I expressed uneasiness at dealing with a matter of this kind on the basis of a number of hypotheses as set forth in the passage of the judgment of the Divisional Court to which I have referred (1). I must not be taken to be criticising the Divisional Court or the parties who invited the Divisional Court to deal separately with the "preliminary objection"; but as things have turned out, I confess that my uneasiness has remained. This is a case affecting the liberty of one who alleges that he is a British subject illegally detained. The "preliminary point" turns out to be one involving a constitutional question of very considerable difficulty on which (like the Divisional Court) we have found it necessary to reserve judgment, so that it was impossible for us to express our view before the long vacation. No doubt if we shared the view of the Divisional Court, it would be the end of the matter (subject to an appeal to the House of Lords). But if we take a different view, it is by no means the end of the case, since there then remain many vital questions to be determined, including particularly (A) Do the orders of which Mr. Mwenya complains constitute such a "detention" as would entitle him in any event to apply for a writ of habeas corpus? In other words is there in any relevant sense anyone who can be called a "jailer" of Mr. Mwenya or who is otherwise controlling or detaining his body? (B) Are there courts established in Northern Rhodesia competent to make orders of habeas corpus and, if so, is the effect of the Rhodesia and Nyasaland Federation Act, 1953, and the Order in Council (2) made thereunder, and particularly s. 13 (2) of that order, to exclude any right or power of the Queen's Bench Court here to make the order asked? On all these questions an answer favourable to Mr. Mwenya has been assumed for the purposes of arguing the preliminary point. Yet they are questions essential to the application, and the Divisional Court has expressed no view on them, as it has also expressed no finding on the nature and extent of the power, jurisdiction or sovereignty (whichever be the right word) exercised by the Crown in regard to Northern Rhodesia as a so-called "protectorate". Nor have we had our attention directed to any evidence on any of these matters. As I shall later observe there is in the evidence before us no detail whatever as to the nature of the Northern Rhodesia Protectorate in the sense that it does not appear at all what were the treaties or other arrangements made or with whom, nor does it appear what is in fact the extent of the power or jurisdiction internally exercised in Northern Rhodesia by or on behalf of the Crown, or the Crown and Parliament. C D E F G

The Attorney-General repudiated the suggestion that he was inviting the court to deal with the application on a basis of hypotheses. His point was and is the simple one, that is to say, that the Court of Queen's Bench in England has, in any case, no power or jurisdiction to direct a writ or order of habeas corpus to a protectorate, and he submitted that such submission was a proper and legitimate one to take by way of preliminary objection. H

I repeat that I am not to be taken as criticising anyone, but repeat also that I am uneasy about the consequence; and in case the matter goes to the House of Lords, I have felt it right to give expression to my uneasiness. It may be that no one can complain of any injustice founded on delay. But the fact is that the question raised by the preliminary point is one of considerable difficulty and complexity. Further, the difficulty is much enhanced by the circumstance I

(1) HIS LORDSHIP had referred to the assumptions stated at p. 527, letter F, ante.

(2) Federation of Rhodesia and Nyasaland (Constitution) Order in Council, 1953 (S.I. 1953 No. 1199). By art. 13 (2) (d) the term "colony" includes the Federation of Rhodesia and Nyasaland as a whole in the Habeas Corpus Act, 1862.

- A that (as appears from cases) the word "protectorate" is not one of recognised or precise meaning. It follows that since we have not gone into, or been invited to go into (and have, of course, no decision on), the constitutional relationship between Northern Rhodesia and the Crown, or on the extent of the exercise by the Crown—or of the Crown and Parliament—of "power", "jurisdiction", "dominion" or "sovereignty" (whichever be the appropriate word) in Northern
- B Rhodesia, we are left to decide what, in some degree at least, must be a general and academic question, namely: Has the court here any jurisdiction to make an order of habeas corpus directed to any territory other than territories strictly described as colonies or foreign dominions (as that phrase is understood, for example in the Habeas Corpus Act, 1862)? And the Attorney-General in the
- C course of his argument seemed to me to concede that he wished to avail himself of the present case to get a decision on this important but general question. Having said so much, for reasons which I hope will be self-evident, and which may (I also hope) explain and excuse any delay that may occur before the present case is finally determined, I turn to the question as formulated by the Attorney-General.
- D The history of the prerogative writ of habeas corpus is traced in SIR WILLIAM HOLDSWORTH'S HISTORY OF THE ENGLISH LAW, Vol. 9, pp. 108-125. Whatever its origin, it appears to have served procedural uses in the Court of King's Bench from the time of King Edward I, but was eventually extended and developed so that it came "to be the most efficient protection ever invented for the liberty of the subject". During the time of SIR EDWARD COKE and the ensuing
- E struggle between Parliament and the common law on the one hand and the Sovereign on the other, its use was proclaimed to be in conformity with the principle of Magna Carta and its purpose to prevent or redress the use of arbitrary power. No doubt its scope was ordinarily exercised within the realm; but it seems clear that at this time it was not regarded as limited to England. So
- F much, indeed, was not doubted in the argument, and is shown by the judgment of the Divisional Court and the extensive citations made in that judgment. I do not repeat in full those citations; it is clearly stated in the quotations (3) from BACON'S ABRIDGEMENT and the COMMENTARIES OF SIR WILLIAM BLACKSTONE (and in almost identical language) that the writ (of habeas corpus) runs into all parts of the King's dominions:
- G "for the King is at all times entitled to have an account, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted"

(BLACKSTONE). The Divisional Court proceeded to refer also to the passages from

- (3) These quotations were (a) BLACKSTONE'S COMMENTARIES, Vol. 3, p. 131: "This is a high prerogative writ, and therefore by the common law issuing out of the court of King's Bench, not only in term-time, but also during the vacation, by a fiat from the chief justice or any other of the judges, and running into all parts of the King's dominions: for the King is at all times entitled to have an account, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted."
- H

- (b) BACON'S ABRIDGEMENT, Vol. 3, p. 424: "It hath been already observed, that the writ of habeas corpus is a prerogative writ, and that therefore by the common law it lies to any part of the King's dominions; for the King ought to have an account why any of his subjects are imprisoned, and therefore no answer will satisfy the writ, but to return the cause with paratum habeo corpus, etc. Hence it was holden, that this writ lay to Calais at the time it was subject to the King of England. It hath been holden, that this writ lies to the Marches of Wales, as it does to all other courts which derive their authority from the King, as all the courts exercising jurisdiction within his dominions do, and that being a prerogative writ it does not come within the rule *brevia domini regis non currunt*, etc., for that must be understood of writs between party and party."
- I

"Also, it hath been adjudged, that this writ lies to the Cinque Ports, to Berwick, although objected to have been part of Scotland, and to the County Palatine."

LORD MANSFIELD, C.J., in *R. v. Cowle* (4), on which the appellant much relied, A including particularly the sentence:

"There is no doubt as to the power of this court; where the place is under the subjection of the Crown of England . . ."

To these citations I add also the cited passage from SIR EDWARD COKE's report in *Calvin's Case* (5), also much relied on by the appellant: B

"But the other kind of writs that are mandatory, and not remedial, are not tied to any place, but do follow subjection and ligeance, in what country or nation soever the subject is . . ."

These passages from BACON, BLACKSTONE, LORD MANSFIELD and SIR EDWARD COKE were the basis of the decision of COCKBURN, C.J., in *Ex p. Anderson* (6) that the writ of habeas corpus might be issued to "all parts of the dominions of the Crown of England"; though it was particularly the judgment of LORD C MANSFIELD, C.J., in a passage immediately following that already quoted, which laid it down that it was otherwise in the case of "foreign dominions which belong to a prince who succeeds to the throne of England"—e.g., the electorate of Hanover.

The judgment in *Ex p. Anderson* (6) is, to my mind, historically at any rate, D of considerable importance, and it was cited by both VAUGHAN WILLIAMS, L.J., and KENNEDY, L.J., in this court in *R. v. Earl of Crewe, Ex p. Sekgome* (7), to which I shall presently refer. In the circumstances I think it right to repeat in this judgment the passage from the judgment of COCKBURN, C.J. (being substantially the whole of it), cited in the Divisional Court, which is as follows (8):

"Nevertheless, it is to be observed that, in establishing a local judicature E in Canada, our legislature has not gone so far as expressly to abrogate the right of the superior courts at Westminster to issue the writ of habeas corpus to that province; which writ, in the absence of any prohibitive enactment, goes to all parts of the Queen's dominions. LORD COKE, LORD F MANSFIELD, BLACKSTONE and BACON'S ABRIDGEMENT all agree that writs of habeas corpus have been and may be issued into all parts of the dominions of the Crown of England, wherever a subject of the Crown is illegally imprisoned or kept in custody. In addition to these dicta of eminent authorities, we have actual precedents of the issue of the writ, in very modern times, into the Islands of Man, Jersey and St. Helena. Inasmuch, therefore, as the power of this court thus to issue the writ has been not

(4) (1759), 2 Burr. 834, see at pp. 853, 854: "But, if Berwick was to be deemed a G dominion of the Crown, and no part of the realm of England; it may be under the control and superintendence of the King in this court.

"The constitution given to Berwick by the Crown of England, approved by Parliament, shows it necessarily is so; much stronger than in the case of counties palatine or Wales. The people of Berwick have not jura regalia, or a complete jurisdiction within themselves, like a county palatine: they have no sovereign courts of the King within themselves, like Wales. They are made a free borough, to hold in burgage, by rent. H Such a creature of law must necessarily be collected, as part of a kingdom, and subordinate . . ."

Ibid., at pp. 855, 856: "Writs, not ministerially directed (sometimes called prerogative writs, because they are supposed to issue on the part of the King), such as writs of mandamus, prohibition, habeas corpus, certiorari, are restrained by no clause in the constitution given to Berwick: upon a proper case, they may issue to every dominion of the Crown of England. There is no doubt as to the power of this court: where the place is under the subjection of the Crown of England; the only question is, as to the propriety. To foreign dominions, which belong to a prince who succeeds to the throne of England, this court has no power to send any writ of any kind. We cannot send a habeas corpus to Scotland, or to the electorate: but to Ireland, the Isle of Man, the plantations, and, as since the loss of the Duchy of Normandy, they have been considered as annexed to the Crown, in some respects, to Guernsey and Jersey, we may; and formerly, it lay to Calais; which was a conquest, and yielded to the Crown of England by the treaty of Bretigny." I

(5) (1608), 7 Co. Rep. at p. 20a.

(6) (1861), 3 E. & E. 487.

(7) [1910] 2 K.B. 576.

(8) (1861), 3 E. & E. at p. 494.

A merely asserted as matter of doctrine, but carried into effect in practice; and as the writ has issued even into dominions of the Crown in which there is an independent local judicature; we think that nothing short of legislative enactment would justify us in refusing to exercise the jurisdiction, when called upon to do so for the protection of the personal liberty of the subject."

B It is no doubt true that none of those very learned men, not BACON nor BLACKSTONE nor SIR EDWARD COKE nor LORD MANSFIELD, was addressing his mind to the problem which is now raised before us. It is also true, as was pointed out in the judgment of the Divisional Court, that the decision in *Ex p. Anderson* (9) may be said to have been subjected later to some measure of qualification. Yet it must, in my judgment, be taken as clear that at least from the date of *Ex p. Anderson* the writ of habeas corpus was (apart from any statutory restriction) C treated as running in any part of the colonies or dominions of the Crown properly and strictly so called. It is so stated in SIR WILLIAM HOLDSWORTH'S HISTORY OF THE ENGLISH LAW, Vol. 9, at p. 124:

D "It was a well-established principle that, though the writ could not issue into the foreign dominion of a prince who succeeded to the throne of England, and therefore not to Scotland or Hanover, it could issue into any other part of the King's dominions. It was held, therefore, in 1861 in *Ex p. Anderson* (9) that it could issue into Canada . . ."

Moreover, the terms of the Habeas Corpus Act, 1862, appear to be a statutory acknowledgment of that principle.

E So far, I do not think that I am expressing any view different from that entertained by the Divisional Court; for that court, if it indicated some doubt as to the validity and basis of COCKBURN, C.J.'s decision, acknowledged, as I understand it, that (apart from the effect of the Act of 1862) the writ would issue to any part of the Queen's dominions properly so called. The question remains, is its scope limited at most to those territories? And it was the view of the Divisional Court that the terms of the Act of 1862 carried at least an implication (by reason F of the Act's limitation to the Queen's dominions properly so called) that the scope of the writ was so conscribed and would not extend to a "protectorate".

G There is no authority binding on this court which covers the question. In the case of *R. v. Earl of Crewe, Ex p. Sekgome* (10), the issue of a writ of habeas corpus to the Protectorate of Bechuanaland was sought but, as the Divisional Court observed, the broad proposition in this case of the Attorney-General and his co-respondents does not appear to have been raised; on the contrary, the last part of the report of counsel's argument for the Secretary of State seems to me rather to concede the opposite view. He is reported as contending (11):

H "Thirdly, although the Bechuanaland Protectorate is, it is contended, a foreign country within the meaning of the Foreign Jurisdiction Act, 1890, that does not necessarily prevent the application of the Habeas Corpus Act, 1862. Prima facie the writ of habeas corpus runs in the Crown's dominions. For the purpose of habeas corpus dominion cannot be judged by the same test as it is in the Foreign Jurisdiction Act, 1890. Any territory in which the Crown's writ of habeas corpus runs is part of the Crown's dominions for that purpose, and if there were no court in the particular place competent to issue the writ the old jurisdiction of the King's Bench to do so possibly I still exists."

However that may be, there is no doubt that KENNEDY, L.J., was of opinion that the writ would not run in the Bechuanaland protectorate as not being part of His Majesty's dominions; and KENNEDY, L.J.'s view was adopted by CASSELS, J., in *Re Ning Yi-Ching* (12). It is none the less clear that the other two members of this court took a different view on this matter from KENNEDY, L.J. I do not

(9) (1861), 3 E. & E. 487.

(11) [1910] 2 K.B. at p. 587.

(10) [1910] 2 K.B. 576.

(12) (1939), 56 T.L.R. 3.

repeat in this judgment the citations made by the Divisional Court from the judgments. I add, however, a further passage from that of VAUGHAN WILLIAMS, L.J. (13):

"In *Ex p. Anderson* (14) no doubt seems to have been entertained as to the power of the court at Westminster to issue a writ of habeas to go to any place under the subjection of the Crown of England whenever it is suggested to the court that a subject of the Crown is illegally imprisoned. The only doubt seems to have been as to the propriety of the issuing of such a writ to Canada, a colony where separate jurisdiction has been established. The statute of 1862 seems to have been passed merely for the purpose of abrogating the jurisdiction of the courts at Westminster in favour of colonial independence by declaring that no writ of habeas shall issue out of England into a colony or foreign dominion where the Crown has a court of justice having authority to grant and issue such writ and to ensure throughout such colony or dominion due execution thereof. I cannot, therefore, agree that the rule for a habeas should be discharged on this ground."

I add also the following further passage from KENNEDY, L.J.'s judgment. I apologise for the length of the citation (15).

"But I see no reason to assign to the phrase [viz., "His Majesty's dominions"] less than its ordinary force when it occurs in the Habeas Corpus Act, 1862, in the preamble of the Foreign Jurisdiction Act, 1890, and in the judgment of the Court of Queen's Bench dealing with the question of the issue of the writ from the common law standpoint in the case of *Ex p. Anderson* (14), which was decided shortly before the Habeas Corpus Act, 1862, and which was, I believe, the cause of the passing of that statute. If this view is correct, the protectorate of a foreign country in which His Majesty has and exercises power and jurisdiction as a protecting and not as a ruling Sovereign, and which he has never annexed to the possessions of the British Crown, certainly cannot properly be treated as part of His Majesty's dominions. The one and only fact, upon the evidence in the present case, which has presented to my mind any difficulty in so regarding the whole of this Bechuanaland Protectorate has been this. It appears in the evidence, and is not disputed, that in regard to a portion of that protectorate, as established in March, 1885, and dealt with by the Order in Council of May 9, 1891, and in the subsequent proclamations made under that order, the chiefs of the local tribes in 1904 (see the Order in Council of May 16, 1904) 'abandoned all rights and jurisdiction in and over' such portion, and the last-mentioned order defined the lands of which such portion consisted to be 'Crown lands' and vested them in the High Commissioner, and that Gaberones, where Sekgome is confined, lies within this area. Further, by proclamations dated respectively Feb. 7, 1905, June 7, 1905, and June 30, 1905, the High Commissioner, acting under the powers conferred upon him by the Order in Council of May 16, 1904, has in fact made grants of certain tracts of these 'Crown lands' whilst retaining the district of and about Gaberones as 'the Gaberones Crown Reserve'. Now I must frankly say that I find it difficult to discern a clear line of practical distinction between such dealing with the lands in and over which the local chiefs have abandoned all rights and jurisdiction and an annexation of those lands by the Crown. But, as LORD HALSBURY, L.C., observed in the course of the argument of counsel in *Staples v. R.* (16), 'I never heard that you can force a Sovereign to take territory'; and not only does the Order in Council of May 16, 1904, itself (cl. 4) state 'This order may be cited as "The Bechuanaland Protectorate (Lands) Order in Council, 1904"', but the

(13) [1910] 2 K.B. at p. 592.

(14) (1861), 3 E. & E. 487.

(15) [1910] 2 K.B. at pp. 622, 623, 624.

(16) Unreported; Privy Council, Jan. 27, 1899.

- A subsequent proclamations relating to these 'Crown lands', to which I have referred, designate them in their preambles as certain lands 'situate within the Bechuanaland Protectorate' which have been vested in the High Commissioner by the above-mentioned Order in Council. The clear inference from such language is that these Crown lands (which, as I have said, include Gaberones) have not been annexed to His Majesty's dominions, but are treated by the Sovereign as still integral portions of the protectorate."

I have added this last citation because it seems to me to indicate that there was present to the mind of KENNEDY, L.J., the point which I think should be decisive of any case of this kind—namely, that the question should not be determined by reference merely to the fact that the country in question bears the label "Protectorate", but must, or at least may, depend on the extent to which the Crown (or the Crown and Parliament) has in fact assumed and exercises jurisdiction on and over the affairs (and particularly the internal affairs) of the country to the exclusion of any other, or other effective, jurisdiction.

- C I, therefore, agree so far with the Divisional Court that, in the existing state of the authorities the matter must be resolved by reference to principle. But it is, I regret, at this point that I have felt compelled respectfully to a different conclusion from that stated by LORD PARKER, C.J. The matter of principle is there stated in the judgment:

- E "The writ of habeas corpus is a prerogative writ, namely, as this court conceives it, a manifestation of the sovereignty of the Crown and an instrument by which that sovereignty is exercised. It follows that there can be no power to issue this writ which is not derived from, or which is more extensive than, such sovereignty. The Crown is not sovereign over the common law but retains only such part of that unqualified plenitude of absolute power which constitutes sovereignty as the common law accords to the Crown. At the same time the prerogative is part of the common law of this country and exists by force and virtue of the law. Therefore the writ of habeas corpus may lawfully be issued only in cases where the common law or some statute permits or requires the sovereign to issue it. The sovereign herself cannot issue the writ otherwise than through this court, which derives any jurisdiction it has from her, and in which in contemplation of law she is always present.

- G "The concept of sovereignty of any ruler or state is in its aspect of power essentially related to the area throughout which the sovereign power is lawfully exercisable, that is, is exercisable without restraint or hindrance by any competing sovereignty. It is self-evident, in the opinion of the court, that throughout the territorial dominions of the Crown—that is all territory belonging to the Crown, as distinct from territory belonging to any person who is for the time being King or Queen (which if abroad would remain for this purpose 'foreign')—the Crown possesses full sovereignty provided that, or to the extent that, the common law has not imposed limitations upon that sovereignty. Thus by the coronation oath the British sovereign undertakes to 'govern the people of the United Kingdom of Great Britain and Northern Ireland and the dominions thereto belonging, according to the statutes in Parliament agreed on and the laws and customs of the realm'.

- I "Looked at in this way, the undoubted duty of the sovereign to protect her subjects, and the undoubted right of the subject to protection, are limited to protection in the sovereign's dominions."

No arguments were in fact addressed to us on this statement of principle by the Divisional Court. As I understand it, however (and I hope I do not misinterpret it) the statement (and particularly its second paragraph) seems to proceed to some extent at least on the basis of the theory of the indivisibility of sovereignty, particularly associated with the name of AUSTIN. But if this

theory was accepted in England a hundred years ago (and influenced, as I shall show, the prevalent English view of those days as regards protectorates) it is not, as I believe, accepted now. Equally it is, I think, clear that if a hundred years ago the notion of a protectorate was exemplified by the case of the Ionian Islands, as regards which the power and jurisdiction of this country were limited to matters of external relations, in modern times the nature of protectorates may vary enormously, and may extend to cases where the protecting power assumes in regard to the protected country a jurisdiction over its internal affairs (as well as external relations) which is exclusive of other jurisdictions and is for practical purposes indistinguishable from the power or jurisdiction exercised over colonies or conquered countries. In the recent case in this court of *Nyali, Ltd. v. A.-G.* (17) MORRIS, L.J., cited the judgment of the Privy Council in *Sobhuza II v. Miller*, delivered by VISCOUNT HALDANE (18):

"The question which at once presents itself is, what is the meaning of a protectorate? In the general case of a British protectorate, although the protected country is not a British dominion, its foreign relations are under the exclusive control of the Crown, so that its government cannot hold direct communication with any other foreign power, nor a foreign power with its government. This is the substance of the definition given by SIR HENRY JENKYNs at p. 165 of his book on BRITISH RULE AND JURISDICTION BEYOND THE SEAS. Their Lordships think that it is accurate, and that it carries with it certain consequences. The protected state becomes only semi-sovereign, for the protector may have to interfere, at least to a limited extent, with its administration in order to fulfil the obligations which international law imposes on him to protect within it the subjects of foreign powers. A restricted form of extra-territorial sovereignty may have its exercise called for, really involving division of sovereignty in the hands of protector and protected. But beyond this, it may happen that the protecting power thinks itself called on to interfere to an extent which may render it difficult to draw the line between a protectorate and a possession . . . The Foreign Jurisdiction Act thus appears to make the jurisdiction, acquired by the Crown in a protected country, indistinguishable in legal effect from what might be acquired by conquest. It is a statute that appears to be concerned with definitions and secondary consequences rather than with new principles."

Having referred to *R. v. Earl of Crewe, Ex p. Sekgome* (19) and *Re Southern Rhodesia* (20), LORD HALDANE said (21):

"Both of these cases imply that what is done may be unchallengeable on the footing that the Order in Council, or the proclamation made under it, is an act of state. This method of peacefully extending British dominion may well be as little generally understood as it is, where it can operate, in law unquestionable."

It is at this point that I venture to revert to the state of the evidence and the assumptions that we have to make in the present case. The Secretary of State for the Colonies in his affidavit—following closely the similar affidavit of Lord Crewe in *Sekgome's* case (19)—says:

"The Northern Rhodesia Protectorate is a foreign country within which Her Majesty has power and jurisdiction by treaty, grant, usage, sufferance and other lawful means within the meaning of the Foreign Jurisdiction Act, 1890. The territory of the said protectorate is foreign territory under Her Majesty's protection. It has never been acquired by settlement or ceded to or conquered or annexed by Her Majesty or any of Her royal

(17) [1955] 1 All E.R. at p. 657; [1956] 1 Q.B. at p. 23.

(18) [1926] A.C. at p. 522.

(20) [1919] A.C. 211.

(19) [1910] 2 K.B. 576.

(21) [1926] A.C. at p. 525.

A predecessors, nor has Her Majesty or any of Her royal predecessors recognised the same as, nor is it, part of Her dominions, but She has power and jurisdiction within the same."

B But one may ask, what in the end of all is the extent of the power and jurisdiction? With whom were the "treaties" (if any) made and what was their nature? What other power, jurisdiction or "sovereignty" exists in the country and in whom is it vested? One thing seems plain enough, namely, that the terms of the Rhodesia and Nyasaland Federation Act, 1953, contain no hint of any power or jurisdiction vested elsewhere than in the Crown or in the Crown and Parliament, and no hint of any distinction in jurisdiction between Northern Rhodesia and the other components of the Federation. Finally, the applicant, Mr. Mwenya, a native of the country, is, or is for present purposes
C conceded to be, a British citizen. If, then, the nature and extent of the "power", "dominion", "jurisdiction" or "sovereignty" (whichever word you choose to use) as regards the internal affairs and governance of Northern Rhodesia is "indistinguishable in legal effect" from what might be acquired by conquest, then, I ask myself, on what principle is it to be said that the writ of habeas corpus, this "most efficient protection ever invented for the liberty of
D the subject", will not run. On the assumption that I am making, on what principle can the Court of Queen's Bench be debarred from making an order in favour of a British citizen unlawfully or arbitrarily detained? For my part—and always on the assumption that I am making—I can see no good answer to the question. Put otherwise, the answer must, as I think, be (and as KENNEDY, L.J., thought) because the country concerned is a "foreign dominion" from
E which the jurisdiction, so far as relevant, of the Crown or the Crown and Parliament, is excluded or has never been assumed or exercised.

I have found support for the view that I have formed, and particularly for the infinite variety which the relevant characteristics of protectorates may assume, in the chapter entitled "Protectorates, Spheres of Influence and Barbarous Countries" (Part III, ch. 3) in MR. W. E. HALL's book (1894) on
F THE FOREIGN POWERS AND JURISDICTION OF THE BRITISH CROWN. After stating at the beginning of his chapter that the meaning of the term "protectorate" is indefinite and variable, having only the common characteristic that the protected community has parted with freedom of action in foreign affairs, Mr. HALL proceeds to show that as regards the extent of jurisdiction exercised within a protected country the view and practice of Great Britain were, for some
G time at least, far more limited than those of Germany and France. He says at p. 206:

H "It is more probable that the Austinian theory of the indivisibility of sovereignty furnished the influence under which they [English statesmen and lawyers] long persisted in regarding protected states or communities as independent, and which induced them, arguing logically from their premises, to repudiate all possession of power within the territory, whether by way of privilege or obligation, except over British subjects."

Thus, the learned author states (at p. 207) his belief that all states represented at the Berlin Conference of 1884-85, except Great Britain, maintained that a protectorate included the right of administering justice over the subjects of
I other civilised states. Mr. HALL then shows how the British view changed, citing by way of example the Pacific Protectorates. He wrote (at p. 215):

"In this case authority over foreign subjects is appropriated independently of consent on the part of other European states. It rests upon the implied assertion that exercise of jurisdiction on all persons within a protected territory is so necessary, or at least so natural, a consequence of the protectorate, where native administration and judicial organisation is inadequate, that foreign powers may be expected to acquiesce in its enforcement in the same manner as they acquiesce in the effects of complete sovereignty.

[Subsequently, at p. 225] If the foregoing statement of the position held by Great Britain within a protected territory is accurate, it may be expected that the English courts will consider that, in assuming a protectorate, the Crown takes to itself powers which, so far as they go, are identical with those that it would have in a conquered country. It can prescribe laws until Parliament chooses to legislate; and it can subject to its administration all persons upon the protected soil. This is done in those protectorates where general jurisdiction is claimed. The Crown, in the exercise of its prerogative rights, legislates by applying English law, so far as it is suitable to a rough state of society; and it applies the law indifferently to all persons whom it finds within the territory over which, by agreement or assumption, it has obtained a limited territorial jurisdiction."

Finally, he deals with the question, are natives of the protected country to be treated as foreigners or as subjects of the protecting state:

"If however the views expressed (see p. 227) in the foregoing sections are well founded, it becomes logically necessary that the amount of protection shall be afforded to the members of a protected community, when within the territory of a foreign state, which is implied in the political connexion between Great Britain and their country, and which is correlative to the security offered by Great Britain to persons who enter its protectorates under the wing of a foreign power. In other words, they share the right of subjects to enjoy the advantages of such good order as, in different degrees, is maintained within the civilised possessions of a European state and in its protected territories . . ."

It is in reference to this last question that the fact or assumed fact may be relevant that Mr. Mwenya is a British subject.

For these reasons I am, for my part, and with all respect to the contrary view of the Divisional Court, unable to accept the contention that because Northern Rhodesia is a "protectorate", therefore, and as a matter of course and of principle, it follows that the Court of Queen's Bench has no power or jurisdiction to make an order of habeas corpus in the case of a British subject in that country who is unlawfully or arbitrarily detained there. I need not say that I do not intend by any means to assert a contrary general proposition—namely, that the writ of habeas corpus will run in any protectorate—still less that it will run in any foreign country. But, as it seems to me, if on a proper investigation of the facts it appears that the internal governance of Northern Rhodesia is in legal effect indistinguishable from that of a British colony or a country acquired by conquest, then in conformity with the nature of the writ as expounded by the learned authors to whom I have referred, BACON, BLACKSTONE, COKE, MANSFIELD, I see for my part no reason for denying jurisdiction to the court.

It is true that the result will be (if I am right) that the question in any given case will or may involve inquiry as to the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown. But to this I suggest there is a twofold answer, namely—(a) as a matter of history and logic, the availability of the "most efficient protection ever invented for the liberty of the subject" should not depend on a mere label or on matters of convenience; and (b) it is inconsistent with the general principles of our law to try to decide broad general questions without regard to the facts of particular cases. If the fact is that the power and jurisdiction of the Crown vis-à-vis Northern Rhodesia is (as the Act of 1953 seems ex facie clearly to suggest) in no whit different from that exercised in a "colony" or "dominion", then in my view there is nothing, historically or logically, which bars the making of an order of habeas corpus directed thereto—and, indeed, that the balance of opinion in the authorities is plainly the other way. What may be the result in other cases is a matter which will depend on the facts of those cases when they come before the court.

- A In conclusion then, I do not attempt anything in the way of definition which would or might provide the answer to other cases, beyond saying that the jurisdiction ought not to be limited to territories, outside England, which are strictly labelled "colonies or foreign dominions", but will extend to territories which, having regard to the extent of the dominion in fact exercised, can be said to be "under the subjection of the Crown" and in which the issue of a writ will be regarded (in LORD MANSFIELD'S words (22)) as "proper and efficient". In other words, I would hold that we ought not in this case to lay it down, in disregard (as it seems to me) of what has been said by the highest authorities, that the jurisdiction is limited to colonies and foreign dominions strictly so called; and, disagreeing accordingly with the Divisional Court, should refer the matter back to them, in the light of what is said above, to determine
- C the other issues raised in the present case.

- ROMER, L.J.: The essential contention of the Crown on the preliminary issue which was argued before us may be expressed syllogistically as follows: The writ of habeas corpus will in no circumstances issue into any British protectorate; Northern Rhodesia is a British protectorate; therefore the writ will not issue into Northern Rhodesia. There is no difficulty with regard to the second premise of this syllogism, for it is sufficiently established by the affidavit of the Secretary of State for the Colonies. The difficulty, in my judgment, lies in the first premise. In the argument which counsel for the Crown addressed to us with a view to establishing it, they were content, it appeared, that almost every material assumption should be made against them. But they contended
- E (inter alia) that it is irrelevant—and, indeed, not permissible—to inquire into the nature and extent of the control which the Crown and Parliament have imposed on a protectorate; and that it is equally irrelevant to inquire whether courts have been established there with jurisdiction to issue writs of habeas corpus themselves. The reason why it is suggested that none of such matters as these is of relevance on the present issue is that a British protectorate, no matter what features it possesses, remains foreign territory and there is no jurisdiction to investigate by habeas corpus machinery the validity of the detention of any person, even a British subject, within such territory.
- F

- I entertain a suspicion, amounting almost to a certainty, that this broad and basic proposition of the Crown will be found, when the facts have been explored, not to arise for decision at all in the present case. It is accordingly a matter
- G of some regret, in my opinion, that this court has been asked to pronounce on it in the present appeal; and I share the feeling of uneasiness to which LORD EVERSHED, M.R., has referred in his judgment. Inasmuch, however, as the Divisional Court have accepted the Crown's proposition, and we are asked to decide whether they were right in doing so, we are bound as it seems to me to express our views on the matter.

- H I am not prepared to accede to the submission of the Crown in the general and unqualified way in which it has been presented. No authority was cited to us which compels us to accept it; and in the absence of such authority I can see no satisfactory principle on which the Crown's proposition should be supported. The degree of sovereignty assumed and exercised by the Crown, at the instance of Parliament, when a protectorate is established varies in every individual case.
- I It may be confined to the control of the protectorate's foreign relations, in which case all matters of an internal and domestic character are left wholly in the hands of the native sovereignty or power. On the other hand (as VISCOUNT HALDANE said in delivering the judgment of the Privy Council in *Sobhuza II v. Miller* (23))

"... it may happen that the protecting power thinks itself called on to interfere to an extent which may render it difficult to draw the line between a protectorate and a possession."

A similar view is expressed in *JENKYN'S BRITISH RULE AND JURISDICTION BEYOND THE SEAS* at p. 192. It is quite clear from the language of the Habeas Corpus Act, 1862, that Parliament recognised the jurisdiction of the High Court in England to issue writs of habeas corpus into the colonies or foreign dominions of the Crown unless courts of justice had been lawfully established there having authority to grant and issue such writs themselves. If so it would seem to be an illogical anomaly that the writ could not issue into protectorates of the kind envisaged by LORD HALDANE in which no courts had been established capable themselves of issuing such writs. As is stated in the passages from BLACKSTONE'S COMMENTARIES and BACON'S ABRIDGEMENT cited (24) in the judgment of the Divisional Court, the object, for relevant purposes, of the writ of habeas corpus is that the Sovereign should be informed why any of her subjects are imprisoned and be satisfied as to the validity of their detention. The machinery provided by the writ for obtaining this information would obviously be ineffective in relation to any territory in which the Crown had to no extent displaced the sovereign power; and because of this, and also because of the comity of nations, the writ would not issue into, for example, the United States of America for the purpose of inquiring into the detention of a British subject who is imprisoned there. But in territory in which the Crown, on the advice of Parliament, has assumed such a degree of power and control that the protected state is to all intents and purposes a British possession and in which the writ, if issued, would certainly be effective in its results, it is difficult to see why the Sovereign should be deprived of her right to be informed through her High Court as to the validity of the detention of her subjects in that territory. The contrary view would result in a subject having no redress at all if he were detained, however unlawfully, in a protectorate which was in substance a colony, but which had no effective courts of its own. I think that counsel for the Crown were disposed to agree that hardship such as this might arise if the full width of their submission were to be accepted; but they said that it was a matter for Parliament to deal with if they thought it proper to do so and that however closely a protectorate may have become assimilated to a colony it nevertheless remains foreign territory and habeas corpus cannot therefore issue into it. For myself I do not believe that the right of the Sovereign to inquire into the liberty of her subjects depends on the narrow distinction between territory which is part of Her Majesty's dominions in substance and territory which has become part of her dominions in fact by a formal Act of Annexation. The question whether the writ can issue does not, in my judgment, depend on such a distinction as that but on the propriety and effectiveness of issuing it. The propriety and effectiveness of issuing it into Northern Rhodesia may have to be decided hereafter; but for the purpose of considering the validity of the Crown's submission it must be assumed that in the case of some protectorates the issue of the writ would be both proper and effective.

As I have already indicated, there is no authority, so far as I am aware, compelling this court to hold that the writ of habeas corpus will not issue into any British protectorate. The decisions and judicial utterances relevant to the question have been exhaustively reviewed and considered in the judgment of the Divisional Court and by LORD EVERSHERD, M.R., and I do not propose to consider them again. In *R. v. Cowle* (25) LORD MANSFIELD used language which, if taken at its face value, is inconsistent with the Crown's contention. VAUGHAN WILLIAMS, L.J., in *R. v. Earl of Crewe, Ex p. Sekgome* (26) clearly took the view that the writ could in a proper case issue into a protectorate and I agree with that view notwithstanding the contrary opinion entertained by KENNEDY, L.J., on the question.

I accordingly agree with LORD EVERSHERD, M.R., in rejecting the broad proposition which the Crown advanced before us. I agree also with him in thinking

(24) See p. 529, note (3), ante. (25) (1759), 2 Burr. 834. (26) [1910] 2 K.B. 576.

A that the matter will have to be referred back to the Divisional Court for inquiry into the further matters which arise on the view we have taken and to which he has referred in his judgment. Junior counsel for the Crown urged on us that the courts could not inquire into the degree of sovereignty which has been achieved in Northern Rhodesia or in any other British protectorate. He cited no authority, however, in support of that proposition and I can find no foundation for it in principle. Moreover, the proposition is difficult to reconcile with LORD HALDANE's observations in *Sobhuza II v. Miller* (27) and with DENNING, L.J.'s judgment in *Nyali, Ltd. v. A.-G.* (28) in which the lord justice said that in regard to a protectorate one must look to the acts of the Crown to see what jurisdiction it has exercised. I am therefore unable to accept junior counsel for the Crown's submission on this point. I agree that the appeal should be allowed.

C **SELLERS, L.J.:** There may be, and without prejudging them there would appear to be on the face of the matters raised, good reasons why the writ of habeas corpus sought in this application would not be granted if the matters involved were heard and determined. But those issues do not call for our consideration. They can, it is said by the Crown, all be treated as answerable in favour of the applicant. The present and, it is submitted, the conclusive answer to the application is that the English courts have no jurisdiction to issue a writ of habeas corpus ad subjiciendum in respect of a British subject detained wrongfully and illegally, in a British protected territory. The British subject in such a territory, whether resident or temporarily on business or on holiday, cannot, it is said, look to this country's courts to restore him to freedom of which he has been deprived without justification, notwithstanding that if a court of this country were to inquire into the circumstances, to declare the detention unjustified and to order his release, the order could be carried out by reason of the power and force of the internal governmental control which this country might exercise over the territory in question. If the judgment of the Divisional Court from which this appeal comes is right then the power of the historic writ of habeas corpus is a more limited and qualified safeguard to the liberty of the subject than would appear to be necessary. The subject in Southern Rhodesia within Her Majesty's dominion may claim this "most famous" of English writs, but not the subject in Northern Rhodesia even though the rights of the Crown in the two territories may be "indistinguishable in legal effect" to use LORD HALDANE's words already quoted by LORD EVERSHED, M.R. (29).

E There would be much force in an argument which set up and established the impossibility of enforcing an ensuing order of a court of this country, as in the case of a detention in a foreign country which was sovereign and independent and over which our country had no jurisdiction or control or in which our powers and activities were so limited and restricted that there would be conflict and confusion if not open hostility with the internal government of the territory in question if the order were sought to be enforced. But that is not the argument, and there is no submission that an order of a court in this country to release one of Her Majesty's subjects wrongly detained in Northern Rhodesia could not be enforced.

H The affidavit of Her Majesty's Secretary of State for the Colonies sworn on June 12, 1959, states that the Northern Rhodesia Protectorate is a foreign country within which Her Majesty has power and jurisdiction. If, as for the present purposes of this case must be assumed, the power and jurisdiction of this country to enforce an order of an English court in Northern Rhodesia is as great and as extensive or even merely as effective as it would be in any part of territories which had in fact been acquired by settlement or ceded to or conquered or annexed by Her Majesty or any of Her royal predecessors and which is

(27) [1926] A.C. 518.

(28) [1955] 1 All E.R. 646, see at p. 652; [1956] 1 Q.B. 1, see at p. 15.

(29) See p. 534, letter F, ante.

accepted or recognised as part of Her Majesty's dominions, why, one would inquire, should this great bulwark of freedom stop short at a territorial boundary? A

It can well be recognised, as development of internal government and independence within Her Majesty's territories and dominions take place or have taken place, within the vast confines of the British Commonwealth of Nations, that the enforcement of a writ of habeas corpus issued from our courts might prove more difficult and be more resented within Her Majesty's territories than in a protectorate and no doubt the Habeas Corpus Act, 1862, was a wise and timely provision. There may come times in a country's history when it may appear highly inconvenient or politically hazardous that the law should pursue its course, but in a court of law such considerations are irrelevant and cannot serve to deprive a subject of a right which an English court could give and enforce. B

Ex p. Anderson (30) is perhaps the most striking of the cases where the writ of habeas has issued from an English court in respect of a detention outside the territorial boundaries of England, but within Her Majesty's dominions, in that case—Canada. The case was only argued on one side and at least two of the judges later tended to minimise its effect, but it brought about the Habeas Corpus Act, 1862, which provided that no writ should issue out of England into any colony or foreign dominion of the Crown having a court competent to grant and issue the said writ and to enforce it. In addition to the authority of *Ex p. Anderson* (30) this statute would impliedly indicate that the writ would lie within Her Majesty's colonies and foreign dominions if no such court existed and I do not understand the Crown to have submitted otherwise. The submission of counsel for the Crown was that there was a strict territorial boundary which was conclusive as to the scope of the writ. C D E

If this restriction had throughout history always been the confines of England and the normal territorial boundaries of the court the argument would have been compelling. But once the writ has gone beyond our shores, as it has, and outside the normal jurisdiction of the court why should the writ be limited by territorial boundaries? The writ is concerned with personal freedom and the emphasis in principle, it would seem, is not on where the wrongful detention is occurring but, assuming the court is satisfied that the detention is without justification whether it can, having regard to the proper interests, rights and powers of those governing the place of detention, make an order which can be enforced and so release an applicant who has asked for justice before it. If that, as I would hold, is the principle to be applied—an elementary principle of justice as I see it having its roots, in LORD BIRKENHEAD's words (31), "deep into the genius of our common law"—then there would be no question of this court extending its own jurisdiction, as the Attorney-General alleged and as he contended, rightly, we had no power to do, but only an application of one of the greatest powers of our law to the changing circumstances of a developing society. F G

It has been accepted at the Bar that the point has not been authoritatively decided, but I do not regard the main trend of opinion to be against the view I have expressed. Many passages in judgments in several cases have been referred to and relied on, one way or the other, to advance or refute the argument. They do not reveal unanimity of opinion and there is perhaps uncertainty of meaning and intention in some of the expressions used. The judges in the earliest cases had not in mind the issue which arises here, but I think it would be difficult to read into any of them (until as late as KENNEDY, L.J., in *Ex p. Sekgome* (32)) a refutation of the powers of the English court to issue the writ to safeguard a subject's freedom in a territory over which this country had wide powers of jurisdiction and control, wide enough to enforce as a matter of ordinary administration any order the court might make. H I

The judgment of LORD PARKER, C.J., in this case cites BLACKSTONE (33). The

(30) (1861), 3 E. & E. 487.

(31) *Secretary of State for Home Affairs v. O'Brien*, [1923] A.C. at p. 609.

(32) [1910] 2 K.B. 576.

(33) The citation is at p. 529, note (3), ante.

A reason for his view that the writ would run "into all parts of the King's dominions" is that "for the King is at all times entitled to have an account, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted". BACON'S ABRIDGEMENT is to the same effect. With great respect to the view of the Divisional Court I would have felt that the substance if not the precise words of LORD MANSFIELD, C.J.'s judgment in *R. v. Cowle* (34) tended to support the argument for the applicant here on the issue of jurisdiction. LORD MANSFIELD gave the writ the greatest breadth of application which in the then circumstances could well be conceived (35).

"There is no doubt as to the power of this court; where the place is under the subjection of the Crown of England; the only question is, as to the propriety."

C "Subjection" is fully appropriate to the powers exercised or exercisable by this country irrespective of territorial sovereignty or dominion and it embraces in outlook the power of the Crown in the place concerned. Both LORD MANSFIELD and COCKBURN, C.J., later in *Ex p. Anderson* (36) drew attention to the fact that in the constitution given to Berwick and Canada respectively there was no clause restraining or expressly abrogating the right of the superior courts (then at Westminster) to issue the writ of habeas corpus to those territories. On the other hand, the establishment in a protectorate of courts with a comparable jurisdiction might well be said impliedly to abrogate the right of the courts here to issue a writ of habeas corpus and so, with the same effect as the Habeas Corpus Act, 1862, might be sufficient to defeat an application to these courts. In this court in 1910 VAUGHAN WILLIAMS, L.J., and FARWELL, L.J., in *R. v. Earl of Crewe, Ex p. Sekgome* (37), expressed opinions on the precise question of a writ of habeas corpus issuing from this country into protected territory, but I accept that these views of these learned judges do not form the basis of their decision in that case.

I would join VAUGHAN WILLIAMS, L.J., in this (38):

F "... I ask myself why, if the writ of habeas can be issued to the King's territorial dominions, the writ should not be ordered to go to any country or place under the subjection of the Crown of England whenever it is suggested to the court in England that a subject of the Crown is illegally imprisoned."

I would concurringly join the learned lord justice in the answer that he gave. It does not seem to me, also, that the mere fact of absence of annexation and theoretical possession should deprive the Crown and those who are under the law from the benefits and power of the writ of habeas.

G The writ of habeas corpus ad subjiciendum is to be treasured and preserved and should be available and so used that it may ever continue to deserve undiminished the high praise which so often and from so many sources it has received. I waited in vain in the course of the argument on behalf of the Crown to hear an endeavour to support the widest application of the writ and an expression of regret or reluctance that it was felt to be incumbent to point out to the court such obstacles as may be thought to be in the way of its unfettered use.

H It may well be that it would be against propriety for the writ to issue in this particular case. There appear to be courts in Northern Rhodesia set up by Her Majesty in Parliament which could give any redress the applicant deserves and do it more conveniently and expeditiously than here, but I am not prepared to say, as we are solely asked to say on this appeal, that the English courts have no jurisdiction in any circumstances to entertain an application for a writ of habeas corpus ad subjiciendum in respect of an unlawful detention of a British subject in a British protectorate, however extensive our jurisdiction there or however powerful our control. It is desirable, as the Crown submitted, that

(34) (1759), 2 Burr. 834.

(35) (1759), 2 Burr. at pp. 855, 856.

(36) (1861), 3 E. & E. 487.

(37) [1910] 2 K.B. 576, see at pp. 605, 608, 618.

(38) [1910] 2 K.B. at p. 605.

proceedings for a writ of habeas corpus should be swift and a subject's rights in the matter should be clear, but I see no inherent difficulty or undue delay in an English court inquiring into the extent of the jurisdiction, power and control exercised by this country in any protectorate and in any event, in agreement with my Lords, I would not hold in the absence of compelling authority, that our courts ought to be precluded from considering if it became necessary, the extent of the Crown's jurisdiction. A

I would allow the appeal on this preliminary question and would let the case be heard on its merits. B

Appeal allowed.

[For the ultimate orders, see p. 544, letters F and G, post.]

June 17, 18, 19. Motion for writ of habeas corpus. C

This was an application directed to the Governor of Northern Rhodesia, the District Commissioner for the Mporokoso District of Northern Rhodesia, and the Secretary of State for the Colonies, for a writ of habeas corpus in respect of the detention of Mr. Mwenya in the Mporokoso District of the Protectorate of Northern Rhodesia. The facts have been stated at p. 526, letters F to I, ante. The decision of the Divisional Court on the motion is not reported on the preliminary point which resulted in the dismissal of the motion as against the Governor of Northern Rhodesia and the District Commissioner, from which the appeal previously reported was brought. The case then proceeded against the Secretary of State for the Colonies, when for convenience the first point argued was whether the Secretary of State had in the circumstances a sufficient degree of control to constitute him a custodian of the body (Mr. Mwenya) to whom the writ could issue. The judgment of the Divisional Court is reported only on this question. The motion as against the Secretary of State was dismissed at the conclusion of the argument before the Divisional Court. D

Neil Lawson, Q.C., and B. H. Anns for the applicant. E

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.) and J. R. Cumming-Bruce for the Secretary of State. F

Cur. adv. vult.

July 3. **LORD PARKER, C.J.**, read the following judgment of the court in which, after having given reasons for the court's ruling dismissing the application against the Governor of Northern Rhodesia and the District Commissioner on the preliminary objection, HIS LORDSHIP continued: For convenience the first point argued was whether the Secretary of State had in the circumstances a sufficient degree of control to constitute him a custodian of the body to whom the writ could issue. Mr. Mwenya again relied on *R. v. Earl of Crewe, Ex p. Sekgome* (39). In that case the Divisional Court held that the Secretary of State was not the custodian of the body. VAUGHAN WILLIAMS, L.J., while not deciding the matter, expressed some doubt whether this view of the Divisional Court was correct. Thus he said (40): G

"As to the second preliminary objection on which the discharge of the rule for a habeas was based by the Divisional Court, namely, that Lord Crewe, to whom the rule nisi is addressed, has not the custody of the body of Sekgome, I am by no means satisfied, having regard to the statute 16 Car. 1, c. 10, ss. 6 and 8, that a writ of habeas must necessarily be addressed to the governor of the gaol or gaoler or other the official in command of the gaol, and in that sense having the actual custody of the imprisoned person claiming to be entitled to the protection of the writ of habeas corpus. I am disposed rather to say that the writ may be addressed to any person who has such control over the imprisonment that he could order the release of the prisoner." H

A Again, FARWELL, L.J., said (41):

"I must not, however, be taken to assent to the view . . . that the Secretary of State would not be the proper person to make a return to a writ of habeas corpus if there had been no proclamation of Dec. 5, 1906. . . . I should be slow to conclude that the Secretary of State could not be called on to make a return to the writ."

B KENNEDY, L.J., however, expressed a contrary view, where he said (42):

"I am of opinion that the Secretary of State for the Colonies is not a person to whom such a writ can properly be directed. It appears to me that, in the case of the executive or administrative superior of the actual custodian of the person in detention who applies for a writ of habeas corpus, it may be right and proper that the writ, if issued, should be directed to him either with or without the inclusion of the actual custodian, if that executive or administrative superior is a person whose authority the custodian must rely upon in order to justify the detention, and to whom obedience must be rendered by the custodian, if he orders a release. I am inclined to think that the High Commissioner, who is the chief executive and administrative official of the territory, is a person to whom in this present case the writ might properly have been directed. But I know of no authority, and certainly I can find no guidance of principle, to justify the appellant's contention that a writ of habeas corpus in this case can properly be directed to His Majesty's Secretary of State for the Colonies, on the ground that, if it approves itself to his conscience and judgment, it is his duty to advise His Majesty himself to give, or to authorise a Secretary of State to give, instructions to the High Commissioner to withdraw the proclamation of Dec. 5, 1906, and to order Sek-gome's release from detention under that proclamation."

E In *Re Ning Yi-Ching* (43) CASSELS, J., again preferred the view of KENNEDY, L.J. He is reported in these words:

F "It had further been contended that the writ could not issue to Lord Halifax because he was not in control of the prisoners but was only acting in an advisory capacity. In his view that contention was well-founded, although it did not follow that he thought that in a proper case the writ would not issue against a Secretary of State."

G Reliance was further placed by the applicant on *Barnardo v. Ford*, *Gossage's Case* (44), and *R. v. Secretary of State for Home Affairs, Ex p. O'Brien* (45). Both those cases are authority for the proposition that the writ will issue not only to the actual gaoler but to a person who has power or control over the body. Further, in *O'Brien's* case (45) the writ was issued to the Secretary of State for Home Affairs, who had in fact handed the physical custody of the body over to the Government of the Irish Free State. It is clear, however, from the facts of that case, that the Secretary of State had not only been responsible for the original detention but that there were strong grounds for thinking that in handing over the body to the Government of the Irish Free State he had not lost all control over it. In those circumstances the court decided to issue the writ in order that the full facts could be investigated and argument heard on the return.

H The position here is quite different. The Restriction Orders under which the applicant is detained were not made by the Secretary of State. His approval or consent were not required and there is no evidence that he took any part in the detention. No doubt the writ will issue not only to a person who has the actual custody but also to a person who has the constructive custody in the sense of having power and control over the body. Here, however, we can find no custody by the Secretary of State in any form.

(41) [1910] 2 K.B. at p. 618.

(42) [1910] 2 K.B. at p. 629.

(43) (1939), 56 T.L.R. 3 at p. 6.

(44) [1892] A.C. 326.

(45) [1923] 2 K.B. 361, and sub nom. H.L. *Secretary of State for Home Affairs v. O'Brien*, [1923] A.C. 603.

We were referred to a number of provisions in the constitution of, and in other legislation in regard to, Northern Rhodesia under which the Secretary of State is specifically given certain powers, and powers which extend beyond advice; but we find it impossible to say that as a result of those powers he can be said to have the custody of the body in any sense. Apart from the powers given by such legislation the only powers of the Secretary of State arise by reason of his constitutional position under which he advises Her Majesty. The fact, however, that he can advise and attempt to persuade Her Majesty to cause the body to be brought up does not mean that he has such a control as will enable the writ to issue. Nor is it in our view relevant that if the writ were issued the Secretary of State might well feel it proper to influence the production of the body. Accordingly while agreeing that there may be special circumstances in which a Secretary of State is amenable to the writ, we can find nothing in the facts of this case which would justify us in calling on him to produce the body. That being so, we intimated our decision to that effect and this made it unnecessary to proceed further with the case.

Finally we should mention another point that was raised, namely that even if the Secretary of State could be regarded as the custodian of the body the writ would not issue to a custodian in this country where the original and present detention was, as in the present case, in a foreign territory. There may be some substance in the submission that the phrase "issue the writ into . . ." properly means, as seems to have been assumed in *Ex p. Sekgome* (46), "issue the writ in respect of a detention in . . .". Having regard to the views expressed previously, it is unnecessary to come to a decision on this point. We only mention it in order to state that nothing that we have said should be read as expressing the view that if, for instance, the Governor or the District Commissioner paid a visit to this country he would be amenable to the writ in respect of the detention complained of, merely by reason of his physical presence here.

Application refused.

[Oct. 26. The case, having been adjourned for consideration whether application should be made for leave to appeal, was again brought before the Court of Appeal on this date, when counsel for the Governor of Northern Rhodesia and the District Commissioner informed the court that all restriction orders relating to Mr. Mwenya had been revoked. Counsel consenting on behalf of his clients to an order for costs of proceedings against them in the Divisional Court and in the Court of Appeal, and the Attorney-General on behalf of the Secretary of State for the Colonies not resisting an order for costs, so far as the Secretary of State was concerned, in the Court of Appeal and in the Divisional Court, including there the issue whether the Secretary of State was a custodian, the Court of Appeal made appropriate orders as to costs and made an order staying all further proceedings save in so far as might be necessary for the purpose of enforcing the orders as to costs.]

Solicitors: *Potel Tattersall & Lake* (for the applicant); *Treasury Solicitor* (for the Secretary of State for the Colonies); *Charles Russell & Co.* (for the Governor of Northern Rhodesia and the District Commissioner for the Mporokoso District).

[*Reported in the Court of Appeal by F. GUTTMAN, Esq., Barrister-at-Law, and in the Divisional Court by HENRY SUMMERFIELD, Esq., Barrister-at-Law.*]

A

SUTTON v. SEARS.

[QUEEN'S BENCH DIVISION (McNair, J.), October 9, 1959.]

B

Legal Aid—Costs—Taxation—Review of taxation—Jurisdiction of court to order review—Application stated to be by plaintiff's solicitor—Legal Aid and Advice Act, 1949 (12 & 13 Geo. 6 c. 51), Sch. 3, para. 4 (1) —Legal Aid (General) Regulations, 1950 (S.I. 1950 No. 1359), reg. 18 (3) (b), as substituted by S.I. 1954 No. 166, reg. 27.

C

The plaintiff was granted a civil aid certificate for the purpose of bringing an action in the Queen's Bench Division of the High Court of Justice. The certificate stated that the plaintiff's contribution was nil and, as amended, named N. as the plaintiff's solicitor. At the trial of the plaintiff's action, judgment was entered for the defendant and the judge directed, as was required by reg. 18 (3) (b)* of the Legal Aid (General) Regulations, 1950, that the plaintiff's costs be taxed as between solicitor and client in accordance with Sch. 3 to the Legal Aid and Advice Act, 1949. Schedule 3, para. 4 (1) to the Act provides that costs are to be taxed according to the ordinary rules applicable on a taxation between solicitor and client where the costs are to be paid out of a common fund, which is a method of taxation applicable also to cases outside the Act. In due course N. delivered his bill of costs to be taxed. In his taxation the taxing master made substantial reductions in the fees allowable to counsel and solicitors; objections to this taxation were lodged but were disallowed by the taxing master who then issued his allocatur. Neither the Act of 1949 nor the regulations made thereunder expressly provided for the review of a taxation made under that Act. On a summons taken out by N., under R.S.C., Ord. 65, r. 27 (41)†, for an order for a review of the taxation, the summons stating that it was "an application by the plaintiff's solicitor"‡,

D

E

F

Held: the judge in chambers had jurisdiction to review the taxation since

G

(i) Sch. 3, para. 4 (1) of the Legal Aid and Advice Act, 1949, and reg. 18 (3) of the Legal Aid (General) Regulations, 1950, envisaged that the solicitor acting for the assisted person should carry in his bill for taxation and should continue to act until the taxation was completed (see p. 551, letter H, post); and

H

(ii) an order for taxation made under reg. 18 (3) of the Regulations of 1950 conferred jurisdiction on the judge in chambers to entertain the review as part of the normal machinery of taxation (see p. 549, letter D, post); alternatively, the right of a solicitor to call for a review of the taxation of solicitor and client costs (viz., the right conferred by R.S.C., Ord. 65, r. 27 (41)) was preserved by the Act of 1949 since that Act, in particular s. 1 (7) (a), expressly preserved the relationship of solicitor and client (see p. 549, letter I, post).

I

Hammond v. Hammond ([1957] 3 All E.R. 16) not followed. Dictum of DEVLIN, J., in *Rolph v. Marston Valley Brick Co., Ltd.* ([1956] 2 All E.R. at p. 56) considered but not applied.

Per CURIAM: there is much to be said for the view that, unless there is statutory provision to the contrary, the court has inherent jurisdiction to secure that the solicitor as an officer of the court is remunerated properly and no more for the work he does as a solicitor (see p. 550, letter A, post).

[For the Legal Aid and Advice Act, 1949, Sch. 3, para. 4 (1), see 18 HALSBURY'S STATUTES (2nd Edn.) 566.]

* As substituted by S.I. 1954 No. 166, reg. 27.

† By R.S.C., Ord. 65, r. 27 (41) "Any party . . . dissatisfied with the certificate or allocatur of the taxing officer . . . may . . . apply to a judge at chambers for an order to review the taxation . . ."

‡ See, as regards the words quoted, p. 551, letter I, post.

For the Legal Aid (General) Regulations, 1950, reg. 18 (3) (b), as substituted by S.I. 1954 No. 166, see Supplement to 5 HALSBURY'S STATUTORY INSTRUMENTS 218.]

Cases referred to:

- Daimler Co., Ltd. v. Continental Tyre & Rubber Co. (Great Britain), Ltd.*, [1916] 2 A.C. 307; 85 L.J.K.B. 1333; 114 L.T. 1049; 9 Digest (Repl.) 573, 3780. B
- Eaves v. Eaves & Powell*, [1955] 3 All E.R. 849; [1956] P. 154; [1955] 3 W.L.R. 984; 3rd Digest Supp.
- Francis v. Francis & Dickerson*, [1955] 3 All E.R. 836; [1956] P. 87; [1955] 3 W.L.R. 973; 3rd Digest Supp.
- Gibbs v. Gibbs*, [1952] 1 All E.R. 942; [1952] P. 332; 3rd Digest Supp. C
- Giles v. Randall*, [1915] 1 K.B. 290; 84 L.J.K.B. 786; 112 L.T. 271; Digest (Practice) 936, 4756.
- Hammond v. Hammond*, [1957] 3 All E.R. 16; [1957] P. 349; [1957] 3 W.L.R. 395; 3rd Digest Supp.
- Isaacs v. Isaacs*, [1955] 2 All E.R. 811; [1955] P. 333; [1955] 3 W.L.R. 253; 3rd Digest Supp. D
- Lyon v. Lyon*, [1952] 2 All E.R. 831; [1953] P. 1; 3rd Digest Supp.
- Park, Re, Cole v. Park*, (1888), 41 Ch.D. 326; 58 L.J.Ch. 128; 59 L.T. 925; *affd.*, (1889), 41 Ch.D. 336; 42 Digest 159, 1596.
- Reed v. Gray*, [1952] 1 All E.R. 241; [1952] Ch. 337; 3rd Digest Supp.
- Rolph v. Marston Valley Brick Co., Ltd.*, [1956] 2 All E.R. 50; [1956] 2 Q.B. 18; [1956] 2 W.L.R. 929; 3rd Digest Supp. E
- Self v. Self*, [1954] 2 All E.R. 550; [1954] P. 480; [1954] 3 W.L.R. 119; 3rd Digest Supp.
- Storer & Co. v. Johnson*, (1890), 15 App. Cas. 203; 60 L.J.Ch. 31; 62 L.T. 710; 42 Digest 160, 1609.
- Theocharides v. Joannou*, [1955] 1 All E.R. 615; [1955] 1 W.L.R. 296; 3rd Digest Supp. F
- Young v. Young & Kohler*, [1955] 1 All E.R. 796; [1955] 1 W.L.R. 395; 3rd Digest Supp.

Summons to review taxation.

On Sept. 16, 1953, a civil aid certificate was issued in favour of Arthur Richard Sutton certifying that he was entitled to legal aid "as plaintiff to take proceedings in the High Court of Justice, Queen's Bench Division, against William Arthur Sears for damages for fraudulent misrepresentation and to enforce any order for costs". The certificate further provided that the plaintiff's solicitor was Edward Thompson, Esq., of Edward Thompson & Co., 8, South Side, Clapham Common, and that the National Assistance Board and the local legal aid committee had assessed the plaintiff's contribution as nil. Subsequently, on Mar. 5, 1955, the certificate was amended by the substitution of Merton Naydler, Esq. as the assisted person's (the plaintiff's) solicitor. A writ having been issued by the plaintiff against the defendant, Sears, claiming rescission of a conveyance and damages for fraudulent misrepresentation, which writ was later amended to claim damages for breach of contract and certain other relief, and a statement of claim, defence and reply having then been filed by the parties, the action was tried by HAVERS, J., over a period of sixteen days, between Apr. 4, 1957 and June 4, 1957. At the trial HAVERS, J., directed that judgment should be entered for the defendant with costs not exceeding certain limits set out in the judgment, and further directed the plaintiff's costs to be taxed as between solicitor and client in accordance with the provisions of the Legal Aid and Advice Act, 1949. Mr. Naydler's (the plaintiff's solicitor) bill of costs having been taxed and objections which were lodged by Mr. Naydler to certain items in the taxation having been disallowed by the taxing master, the question G
H
I

A arose whether McNAIR, J., sitting as judge in chambers, had jurisdiction to review the taxation on a summons taken out by the solicitor.

J. H. Hames for the applicant.

Colin Duncan for the Law Society.

Cur. adv. vult.

B Oct. 9. McNAIR, J., read the following judgment: At the request of the parties, I have adjourned this chambers summons into open court for judgment on a preliminary question of jurisdiction.

In this judgment I propose to confine myself to the question whether, when a direction has been given on the trial of an action in which one or more of the parties is a legally assisted person that the legally assisted person's costs be taxed as between solicitor and client in accordance with the provisions of Sch. 3 to the Legal Aid and Advice Act, 1949, and taxation has taken place, I, sitting as judge in chambers have jurisdiction to review such taxation.

DEVLIN, J., in *Rolph v. Marston Valley Brick Co., Ltd.* (1) expressed obiter his doubts whether on the facts of the case before him he had such jurisdiction though he in fact embarked on such a review and upheld the taxing master's allocatur.

D In *Hammond v. Hammond* (2), KARMINSKI, J., forming the view that DEVLIN, J.'s reasoning in support of his doubts was unanswerable, held on the facts of the case before him that he had no jurisdiction to entertain a review. It appears that up to the decision of DEVLIN, J., in *Rolph's* case (1) the normal practice in such cases was for the judge to entertain the review.

[His LORDSHIP then set out the facts and having referred to the direction given by the trial judge, that the plaintiff's costs be taxed as between solicitor and client in accordance with the Legal Aid and Advice Act, 1949, continued:] In due course Mr. Naydler (the plaintiff's solicitor) delivered his bill of costs as between solicitor and client which was taxed by Master CULLIS. In the course of this taxation, substantial reductions were made in the fees allowable to counsel and to the solicitors. Objections were lodged to this taxation stated to be "Objections taken by the plaintiff to the taxation". These objections were considered by the taxing master and disallowed. On July 31, 1958, Master CULLIS issued his allocatur stating (so far as is material for present purposes) that he had taxed the costs of the plaintiff as between solicitor and client in accordance with Sch. 3 to the Legal Aid and Advice Act, 1949, as follows: Profit costs, £439 19s. 4d., counsel's fees, £1,377 19s., other disbursements, £103 0s. 2d., total £1,920 18s. 6d. Included in the items allowed were the usual items for attending taxing defendant's costs, drawing bills of costs and copy, attending taxing. On Aug. 13, 1958, a summons was taken out by Mr. Naydler calling on all parties concerned to attend on the judge in chambers

H "on the hearing of an application on the part of the plaintiff's solicitor for an order that the taxation of the costs herein by Master CULLIS be reviewed and that the objections made by the plaintiff's solicitor to the disallowance of the several items specified in the said objections be allowed and the said items allowed."

I As I understand the position, the summons was, in accordance with the usual practice, not served on the plaintiff or indeed on anyone else. The summons came before me as judge in chambers on Mar. 5, 1959, and, after counsel for the applicant, Mr. Naydler, had drawn my attention to the two decisions to which I have referred and intimated that he desired to submit that I had in fact jurisdiction to entertain the review, I adjourned the summons generally for service on the Law Society, as it seemed to me that the Law Society as the administrators of the legal aid fund were probably primarily interested and that in any event I should derive benefit from hearing their views.

(1) [1956] 2 All E.R. 50; [1956] 2 Q.B. 18.

(2) [1957] 3 All E.R. 16; [1957] P. 349.

On Oct. 2, 1959, the summons was restored to my list, when counsel for the applicant again appeared in support of the summons and Mr. Colin Duncan, of counsel, appeared on behalf of the Law Society. Both counsel submitted to me that I had jurisdiction to undertake the review, and I am indebted to them both for their exhaustive and instructive arguments. I should state at the outset that counsel for the applicant expressly disclaimed any intention to ask for the costs of the present proceedings, and nothing in this judgment is intended to deal with the point, which was in fact decided by DEVLIN, J., in *Rolph's* case (3) that, on the facts of the case before him, he had no jurisdiction to deal with the costs of the review. A B

The broad submissions advanced on behalf of the applicant may be summarised as follows. (A) That the review of taxation is an integral part of taxation and the mandatory requirement contained in reg. 18 (3) (b) of the Legal Aid (General) Regulations, 1950, as substituted (4), that, where the court gives judgment or makes a final order in proceedings to which a legally assisted person is a party, the judgment or order shall include a direction that the costs of any assisted person shall be taxed in accordance with the provisions of Sch. 3 to the Act of 1949, necessarily involves that the proper authorities, namely, the taxing master, and, on review, the judge, should have jurisdiction to ensure that the taxation is in order and completed. (B) That the solicitor's right to carry in objections to disallowances from his bill and, if the objections are overruled, to call for a review by the judge, is a right arising out of the relationship of solicitor and client which is expressly preserved by s. 1 (7) (a) of the Act, there being no express provision to the contrary provided by the Act. (C) That in any event, there being no express provision to the contrary contained in the Act or regulations, the court by virtue of its inherent jurisdiction over its officers, including solicitors, has jurisdiction to entertain a review. C D E

Neither the Legal Aid and Advice Act, 1949, itself nor the regulations made thereunder make any express reference to the review of taxation. The right to claim a review of taxation is conferred by R.S.C., Ord. 65, r. 27, and the regulations thereunder. Rule 27 provides as follows: F

"The following special allowances and general regulations shall apply to all proceedings and all taxations in the Supreme Court of Judicature."

An order for taxation in accordance with Sch. 3 to the Act of 1949 is without doubt an order for taxation in the Supreme Court of Judicature. The particular form of taxation provided for by para. 4 of that schedule, namely, a taxation as between solicitor and client where the costs are to be paid out of a common fund in which the client and others are interested is a particular method of taxation applicable to cases outside the Act. See per BUCKLEY, J., in *Giles v. Randall* (5). By para. 4 of Sch. 3 this form of taxation is applied to taxation of the costs of legally assisted persons under the Act. By reg. (39), which is one of the regulations referred to in R.S.C., Ord. 65, r. 27, provision is made by which the solicitor may before the allocatur or certificate is signed carry in objections to the taxing master's certificate. By reg. (40) the taxing master is required, on such objections being made, to reconsider and review the taxation and may tax the costs of such objections and add them to or deduct them from any sum payable by or to any party to the taxation. Up to this stage there cannot, as it seems to me, be any doubt at all that the whole of this procedure is applicable to a legal aid taxation, though no express provision seems to be made in the legal aid regulations or in the Act for enabling the legally assisted person, who may, as in *Rolph v. Marston Valley Brick Co., Ltd.* (3), be financially interested, G H I

(3) [1956] 2 All E.R. 50; [1956] 2 Q.B. 18.

(4) S.I. 1950 No. 1359, reg. 18 (3), substituted by the Legal Aid (General) (Amendment No. 1) Regulations, 1954 (S.I. 1954 No. 166), reg. 27.

(5) [1915] 1 K.B. at p. 295.

A to obtain legal assistance to help him to resist the application or for enabling the interests of the legal aid fund, out of which the costs, when taxed, are to be paid, to be protected. Finally, by reg. (41) of R.S.C., Ord. 65, r. 27, it is provided that:

B “Any party who may be dissatisfied with the certificate or allocatur of the taxing master . . . may . . . apply to a judge at chambers for an order to review the taxation . . . and the judge may thereupon make such order as the judge may think just.”

C Prima facie, accordingly, it would seem that there is no reason why reg. (41) should not apply to the taxation of the costs in a legally aided case to the same extent as without question reg. (39) and reg. (40) apply. The reasons that justify a review by a judge in appropriate cases, in a case in which the party is not a legally assisted person, seem equally applicable to a case where the costs arise in the case of a legally assisted person. In each case a review by the judge is desirable in order to secure that the taxation is properly carried out and is part of the machinery by which that object is achieved.

D Accordingly, unless there is authority to the contrary which I ought to follow, I am prepared to accept counsels' first main submission and to hold that the order for taxation made at the trial of the action, as required by reg. 18 of the Legal Aid (General) Regulations, 1950, that the plaintiff's costs be taxed as between solicitor and client in accordance with the provision of the Legal Aid and Advice Act, 1949, conferred jurisdiction on me to entertain the review as part of the normal machinery of taxation.

E Subject to the same reservation I would, though with less feeling of certainty, reach the same conclusion by a somewhat different process of reasoning, namely, that summarised in counsel's second main submission. By s. 1 (5) of the Act it is provided that:

F “Legal aid shall consist of representation, on the terms provided for by this Part of this Act, by a solicitor and so far as necessary by counsel . . .”

G The assisted person has the right, subject to certain limitations, to select his solicitor and counsel from the panels of solicitors and counsel willing to act (see s. 6 (2)). When appointed the solicitor is in truth the assisted person's solicitor though he is paid not by the client but out of the legal aid fund (see s. 6 (5)). But as the result of s. 6 (6) and para. 2 of Sch. 3 to the Act, the sums allowed to the solicitor in connexion with the proceedings in the Supreme Court are stated to be the full amount allowed on taxation of the costs on account of disbursements and eighty-five per cent. of the amount so allowed on profit costs. As I have mentioned earlier no provision is made either in the Act or in the regulations made thereunder in relation to the solicitor's right to carry in objections to the taxing master before the allocatur is made or to the procedure for review. It seems to me to be a necessary incident of these statutory provisions that the solicitor should have a right to attend the taxation of his own costs and to carry in objections to the taxing master and that this right arises out of the relationship between him and his client. If this be correct, it would also seem to me that his right to call for a review under R.S.C., Ord. 65, r. 27 (41), is also a right arising out of this relationship. Finally, by s. 1 (7) of the Act it is provided that:

I “Save as expressly provided by this Part of this Act or by regulations made thereunder,—(a) the fact that the services of counsel or a solicitor are given by way of legal aid shall not affect the relationship between or rights of counsel, solicitor and client or any privilege arising out of such relationship.”

Accordingly, subject to the reservation mentioned above, I should be prepared to hold that the right of a solicitor to call for a review of a taxation of solicitor and client costs is expressly preserved by the Act.

Having reached these conclusions on the two main arguments addressed to me, I do not feel it necessary to express any concluded opinion on the question of inherent jurisdiction. There is, however, in my judgment, much to be said for the view that, unless there is statutory provision to the contrary, the court has inherent jurisdiction to secure that the solicitor as an officer of the court is remunerated properly and no more for the work he does as a solicitor: see *Storer & Co. v. Johnson* (6) and *Re Park, Cole v. Park* (7).

Before considering *Rolph v. Marston Valley Brick Co., Ltd.* (8) and *Hammond v. Hammond* (9), it is convenient that I should list two groups of cases to which I was referred by counsel as being cases where a review of taxation of costs in legal aid cases was in fact entertained by judges of first instance. The first group consists of cases where review was undertaken but no point was raised as to the power for review. These cases are *Reed v. Gray* (10), *Gibbs v. Gibbs* (11), *Isaacs v. Isaacs* (12), *Young v. Young & Kohler* (13), and *Francis v. Francis & Dickerson* (14). The second group consists of cases in which a review was undertaken though some doubt or hesitation was expressed. These cases are *Self v. Self* (15), *Theocharides v. Joannou* (16), and *Eaves v. Eaves & Powell* (17). Finally, in *Lyon v. Lyon* (18) the Court of Appeal entertained an appeal from a review of such a taxation without comment.

I now turn to *Rolph v. Marston Valley Brick Co., Ltd.* (8) and *Hammond v. Hammond* (9). In *Rolph's* case (8) a legally assisted infant obtained a compromise judgment for £1,500 with costs. JONES, J., approving the settlement, directed that, of the £1,500, £1,475 should be paid into court, where it became subject to a first charge under s. 3 (4) of the Legal Aid and Advice Act, 1949, to the net liability of the legal aid fund on the infant's account arising from the difference between the party and party costs and the solicitor and client costs on taxation. Taxation duly took place, and the plaintiff's solicitor carried in objections to certain disallowances made on the solicitor and client taxation, which objections were disallowed. The solicitor took out a summons to review the taxation. I was informed at the hearing before me that the summons was stated in terms to be an application on behalf of the plaintiff—not as in the present case an application on behalf of the plaintiff's solicitor. DEVLIN, J., proceeded to carry out the review, but overruled the objections. Application was then made to him for a direction that the costs of the summons to review should be taxed under Sch. 3 to the Act. This application was rejected on grounds which are not strictly material to the problem before me. But in the course of his judgment DEVLIN, J. (19) after stating that the first of three possible grounds for dismissing the application was that

“it ought not to have been entertained at all on the ground that the solicitor is acting without the authority of the client in whose name he purports to act”,

continued as follows:

“I do not propose to refuse the application on the first ground because the point was not investigated in the argument before me and I have not therefore got any specific information about the nature of the solicitor's

(6) (1890), 15 App. Cas. 203.

(7) (1888), 41 Ch.D. 326.

(8) [1956] 2 All E.R. 50; [1956] 2 Q.B. 18.

(9) [1957] 3 All E.R. 16; [1957] P. 349.

(10) [1952] 1 All E.R. 241; [1952] Ch. 337.

(11) [1952] 1 All E.R. 942; [1952] P. 332.

(12) [1955] 2 All E.R. 811; [1955] P. 333.

(13) [1955] 1 All E.R. 796.

(14) [1955] 3 All E.R. 836; [1956] P. 87.

(15) [1954] 2 All E.R. 550 at p. 552; [1954] P. 480 at p. 485.

(16) [1955] 1 All E.R. 615 at p. 617.

(17) [1955] 3 All E.R. 849 at p. 853; [1956] P. 154 at p. 159.

(18) [1952] 2 All E.R. 831; [1953] P. 1.

(19) [1956] 2 All E.R. at p. 56; [1956] 2 Q.B. at p. 27.

- A retainer. As I intend to refuse the application on the other grounds I have not felt it necessary that the expense should be incurred of inviting a further argument from counsel on the first point. But I think that probably I ought to have dismissed the summons at the outset without going into the merits of it at all. It is brought by the solicitor in the name of the assisted person; but the solicitor cannot possibly have authority from the assisted person to bring this summons. He could not be heard to say that she was his client, for, if she was, he would be acting in breach of duty towards her by seeking to obtain money from her estate partly for his own benefit. When the court becomes aware that a solicitor is acting without authority, I think the court should act of its own motion and refuse to grant relief: see *Daimler Co., Ltd. v. Continental Tyre & Rubber Co. (Great Britain), Ltd.* (20) per LORD PARKER OF WADDINGTON. That was a different type of case to this, but I think that the principle is of general application and certainly should be applied in a case where the relief would affect an infant plaintiff who is unrepresented."
- B
- C

- In that case, as distinct from the present case, the infant client was personally interested. But the reasoning that would lead to the rejection of the application to review on the basis of lack of authority would, as it seems to me, also lead to the rejection of the solicitor's original application to the taxing master, since any item allowed by the taxing master over and above the allowance in the party and party taxation would also be to the prejudice of the infant client. Accordingly, the court's direction for the taxation under Sch. 3 to the Act would not be implemented without the employment of a second solicitor. For my part I am not satisfied that this line of reasoning, which raised doubts in DEVLIN, J.'s mind as to his jurisdiction to entertain the review, should persuade me to depart from the conclusions I have stated earlier.
- D
- E

- In *Hammond v. Hammond* (21) KARMINSKI, J., had before him an application to review a taxation of a legally aided petitioner's costs under Sch. 3 to the Act. The application, as in *Rolph v. Marston Valley Brick Co., Ltd.* (22), was brought in the name of the assisted person. It was conceded that the petitioner could neither suffer nor benefit from any variation of the order made on taxation. Nevertheless KARMINSKI, J. (23), after referring to part of the passage in DEVLIN, J.'s judgment which I have set out, stated that he had come to the conclusion that DEVLIN, J.'s reasoning was unanswerable and that he ought to follow it. He concluded, accordingly, that he had no power to deal with the application. I, for my part, however, though I hope I always show proper respect to the views of my brethren, do not, for the reasons I have already stated, feel that the reasoning is unanswerable. It seems to me that when the Act or the regulations thereunder require that the court should direct that the costs of the legally assisted person should be taxed as between solicitor and client on the basis indicated, the legislative authority necessarily envisaged that the legally assisted person's solicitor should carry in his bill for taxation and should continue to act until the taxation is completed including any necessary review. The taxation of a solicitor's bill as between solicitor and client is in truth more akin to the exercise of an administrative function than a judicial function. The taxing master, and, though with less practical experience in matters of costs, the judge, are as I think charged with the task as a matter of administration of seeing that the solicitor is remunerated properly and no more. For my part I should not be deterred from undertaking a review by reason of the fact that the application was expressed to be, as it was in the cases of *Rolph* (22) and *Hammond* (21) (but not in the present case), an application on behalf of the client, when in fact it is clear that the application is made on behalf of the solicitor. If the taxing
- F
- G
- H
- I

(20) [1916] 2 A.C. 307 at p. 337.

(21) [1957] 3 All E.R. 16; [1957] P. 349.

(22) [1956] 2 All E.R. 50; [1956] 2 Q.B. 18.

(23) [1957] 3 All E.R. at pp. 18, 19; [1957] P. at p. 355.

master or the judge thinks fit in a particular case, I see no reason why a direction for service on any other party interested should not be made. It may well be that it is desirable that the regulations should be amended to provide for such service, and for the manner in which a legally assisted person should be represented on such taxation, though, in cases involving infants, the jurisdiction, I am informed, is commonly exercised on an ex parte application by the solicitor without the infant being separately represented, the theory, I suppose, being that the taxing master is particularly well qualified to protect the interests of the infant. However that may be, I do not feel that the absence of such provision in the regulations debars me from exercising jurisdiction.

I accordingly conclude that I have jurisdiction to entertain the present application.

Application granted.

Solicitors: *Merton Naydler* (for the applicant); *The Secretary of the Law Society.*
[Reported by WENDY SHOCKETT, Barrister-at-Law.]

RIORDAN v. THE WAR OFFICE.

[QUEEN'S BENCH DIVISION (Diplock, J.), October 14, 15, 1959.]

Crown—Crown servant—Dismissal—Dismissal at pleasure by Crown—Whether regulations made by Army Council under letters patent excluded Crown's right to dismiss employee at pleasure—Whether employee determined own employment under regulations—War Department (Outstations) Civilian Staff Regulations, 1950, reg. 437, reg. 438.

By the War Department (Outstations) Civilian Staff Regulations, 1950, which were made by the Army Council under prerogative powers delegated to them by the Sovereign, by letters patent, it was provided (by reg. 16) that civilian employees at establishments covered by the regulations must be informed that their terms of service were subject to the regulations and must be required to sign a statement that they understood this fact. By reg. 437 (a) (v) it was further provided that two weeks' notice in writing must be given to unestablished industrial employees whose services were no longer required and by reg. 438 (a) (iii), such employees who themselves wished to terminate their employment were required to give one week's notice in writing. In April, 1956, the plaintiff was serving as an unestablished civilian industrial employee at an establishment to which the Regulations of 1950 applied. On the afternoon of Friday, Apr. 13, 1956, some trouble arose between the plaintiff and another employee which resulted in the plaintiff handing to his superior officer, B., at 4 p.m. that afternoon, a printed notice of termination of his (the plaintiff's) employment. The printed notice expressly referred to reg. 438 (a) (iii); the plaintiff had filled in most of the blank spaces on the notice, but had not stated the date on which his resignation was to take effect and had not signed or dated the notice. At 4.30 p.m. B. handed the notice to an assistant in the office of the head of the establishment (who was then away) and the notice was stamped with the date and time of its receipt in the office. At 4.55 p.m. the plaintiff attempted to withdraw the notice but was told by B. that it was then too late to do so. When the head of the establishment, Major T., returned to the office on Monday, Apr. 16, 1956, he was handed the plaintiff's notice and was told of the attempt to withdraw it, but on Apr. 16, he wrote the plaintiff a letter, which the plaintiff received the same day, informing him that his notice of resignation had been accepted and that his last day of duty would be Friday, Apr. 20, 1956. This meant that the plaintiff was given only four days' notice of his discharge, viz., from Apr. 16 to Apr. 20, instead of the two weeks' notice which was required by reg.

- A 437 of the Regulations of 1950. On Apr. 20, 1956, the plaintiff's service was in fact terminated, and in an action by him claiming damages for wrongful dismissal,

Held: (i) the plaintiff had no cause of action arising out of the termination of his employment by Major T. because, though reg. 437 by providing for a specified period of notice purported to exclude the Crown's right to terminate the employee's service without notice, the regulations were void in so far as they purported to take away the Crown's right of summary dismissal, as they were not made under statutory authority.

- B *Dunn v. R.* ([1896] 1 Q.B. 116) and dictum of LORD GODDARD, C.J., in *Inland Revenue Comrs. v. Hambrook* ([1956] 1 All E.R. at p. 811) applied.

- C (ii) alternatively, the plaintiff himself had terminated his employment under reg. 438, by one week's notice expiring on Apr. 20, 1956, since for the purpose of that regulation the plaintiff's notice was given at the latest at 4.30 p.m. on Apr. 13 (when it was handed to the assistant in Major T.'s office), and once given it could not be withdrawn save with the mutual consent of the plaintiff and the Crown, through its appropriate officer, viz., the head of the establishment, Major T.

- D [As to the general nature of the relationship between the Crown and persons in the civil employment of the Crown, see 25 HALSBURY'S LAWS (3rd Edn.) 449, para. 873; 7 HALSBURY'S LAWS (3rd Edn.) 252-254, para. 548; as to the duration of office of persons in Crown employment, see 25 HALSBURY'S LAWS (3rd Edn.) 483, para. 927.]

- E Cases referred to:

- De Dohse v. R.*, (1886), 66 L.J.Q.B. 422, n; 3 T.L.R. 114; 16 Digest 242, 372.
Dunn v. R., [1896] 1 Q.B. 116; 65 L.J.Q.B. 279; 73 L.T. 695; 60 J.P. 117; 11 Digest (Repl.) 571, 85.
Gould v. Stuart, [1896] A.C. 575; 65 L.J.P.C. 82; 75 L.T. 110; 11 Digest (Repl.) 570, 80.
F *Inland Revenue Comrs. v. Hambrook*, [1956] 1 All E.R. 807; [1956] 2 Q.B. 641; [1956] 2 W.L.R. 919; *affd.* C.A., [1956] 3 All E.R. 338; [1956] 2 Q.B. 658; [1956] 3 W.L.R. 643; 3rd Digest Supp.
Reilly v. R., [1933] All E.R. Rep. 179; [1934] A.C. 176; 103 L.J.P.C. 41; 150 L.T. 384; 11 Digest (Repl.) 571, 86.
Rodwell v. Thomas, [1944] 1 All E.R. 700; [1944] K.B. 596; 114 L.J.K.B. 6; 171 L.T. 278; 11 Digest (Repl.) 571, 87.
G *Shenton v. Smith*, [1895] A.C. 229; 64 L.J.P.C. 119; 72 L.T. 130; 11 Digest (Repl.) 570, 79.
Terrell v. Secretary of State for the Colonies, [1953] 2 All E.R. 490; [1953] 2 Q.B. 482; [1953] 3 W.L.R. 331; 11 Digest (Repl.) 793, 509.

Action.

- H In this action the plaintiff, Leo James Riordan, claimed damages for wrongful dismissal from the defendants, the War Office. From August, 1947, until Apr. 20, 1956, the plaintiff was an unestablished* civil servant, serving the War Office. At the material time, the plaintiff was working as a civilian employee at a War Department depot at Bordon, Hants. His immediate superior at the depot was a Mr. Lothian who, in turn, was subordinate to a Mr. Ball, the stores superintendent; the commanding officer and head of the establishment at Bordon was a Major Turton. In the afternoon of Friday, Apr. 13, 1956, some trouble arose between the plaintiff and Lothian; as a result, at 4 p.m. that afternoon, the plaintiff handed Ball a typewritten notice of termination of employment which the plaintiff had filled in so that it read as follows:

"To Major C. E. N. Turton, R.A.O.C. Notice of termination of employment (Civilian Staff Regs., 1950, para. 438 (a) (iii)). O.C., N.T. Stores, sub-

* I.e., an unpensionable employee: see the War Department (Outstations) Civilian Staff Regulations, 1950, reg. 6 (g).

depot, Bordon, Hants. Sir, Mr. L. J. Riordan, clock no. 4604; dept. Tank Tracks. I wish to resign with effect from [the plaintiff had not filled in the blank that followed] Reason. See copy of typewritten letter to Mr. Stansfield, Director of Civil Employment, War Office and J.I.C.* at War Office. My present address and nearest post office is "

and the plaintiff had then stated his address but not the nearest post office; there followed on the form spaces for signature and the date neither of which the plaintiff had filled in; at the bottom of the form the plaintiff had written, "copy of letter to Joint Industrial Council War Office". At the time when the plaintiff handed the notice to Ball he intended to resign, and told Ball that he was fed up. No misconduct was alleged against the plaintiff. At about 4.30 p.m. on the same Friday afternoon, Ball handed the plaintiff's notice to a Mr. Toms, an assistant in Major Turton's office, Major Turton being away; Mr. Toms stamped the date and time of receipt on the notice. At 4.55 p.m. on the same afternoon the plaintiff, whose temper had then cooled, telephoned Ball and asked him to withdraw the notice; Ball replied that it was too late to do so since it had been handed to Mr. Toms. Major Turton returned to the office on Monday, Apr. 16, 1956, when the plaintiff's notice of resignation was handed to him. Notwithstanding that the plaintiff had attempted to withdraw the notice, Major Turton, who was not displeased at the chance to dispense with the plaintiff's services, decided to accept it and on Apr. 16 he wrote to the plaintiff as follows:

"Subject—Termination of employment. Dear Mr. Riordan reference your notice of termination of employment under Civilian Staff Regulations, 1950, para. 438 (a) (iii) undated. This is to inform you that your resignation has been accepted, and your last day of duty will be Friday, Apr. 20, 1956. Please arrange with civ. admin this headquarters to hand in the under-mentioned documents."

Friday, Apr. 20, was seven days from the date when the notice of resignation was received in Major Turton's office. Major Turton's letter was handed to the plaintiff on Apr. 16 and he then wrote to the major asserting that he had offered to withdraw his notice, but on Apr. 20, 1956, the plaintiff's service was in fact terminated.

By the War Department (Outstations) Civilian Staff Regulations, 1950, which were made by the Army Council under powers delegated to them by the Sovereign, by letters patent, it was provided, so far as is relevant, as follows. By reg. 1, the regulations were applied, with certain irrelevant exceptions, to civilian employees of the outstation establishments of the War Department (of which the plaintiff was one), and such employees were subject to any additions and amendments made to the regulations by the War Office. Regulation 2 provided for employees to have access to copies of the regulations. Regulation 9 (a) provided that heads of establishments were responsible for engaging staff, and by reg. 16 it was provided that:

"(a) An employee will be informed on engagement that the terms of his service are subject to these regulations and to any additions or amendments that may be made thereto by War Office authority, including those made during service. All candidates engaged will be required to sign the following statement:—'I understand that I shall be serving under the conditions of Civilian Staff Regulations, which are generally applicable to all grades of civilian employees in War Department outstation establishments'. (b) In particular, all new entrants will be clearly told on engagement what their position is with regard to hours of attendance, overtime and sick pay, and their attention will be specially drawn [to certain paragraphs in the regulations concerning conduct and discipline] . . . Any applicant engaged as

* Joint Industrial Council.

- A a purely casual employee (see para. 437 (c)) will be informed that his employment is liable to be terminated without notice."

Regulation 435 (b) (iii) provided that the head of the establishment was to deal with discharge of employees in the position of the plaintiff, and reg. 436 provided that the prior authority of the War Office was required for the dismissal of employees, "dismissal" being defined by para. (d) of reg. 436 as "termination of employment . . . as a disciplinary measure in consequence of the employee's misconduct". By reg. 437 (a) it was provided that:

- C "When an unestablished employee is to be discharged, his services being no longer required, notice will be formally given to him in writing as follows . . . (v) Industrial employees [viz., the plaintiff's grade] except those casually employed, a fortnight . . . (c) No notice on discharge is required for a casual employee* . . . provided that it has been made clear to him on engagement that such are the terms of his employment. In no case will a casual employee receive longer notice than one week."

Finally by reg. 438 it was provided that:

- D "(a) An unestablished employee wishing to terminate his employment will be required to give notice in writing as follows . . . (iii) All other employees except those casually employed [which covered the plaintiff], one week . . . (c) In default of the due notice required by (a) . . . above, such sum as the G.O.C.-in-C. may determine, not exceeding the amount of pay which would have been issued to the employee for the period of notice, may be recovered from him or deducted from any sums due to him, by way of liquidated damages for the loss and inconvenience to which the War Department may have been subjected by reason of such default of notice."

- E The defendants denied that the plaintiff was wrongfully dismissed and contended that the Regulations of 1950 did not restrict the Crown's right to terminate the plaintiff's services at pleasure, i.e., without notice, at any time; alternatively, they contended that the plaintiff gave notice of termination of his own employment, which was binding on him, under reg. 438 of the regulations.

- F The plaintiff appeared in person.
J. R. Cumming-Bruce for the defendants.

- G DIPLOCK, J., having referred to the facts, continued: The plaintiff was in the service of the Crown. That service terminated on Apr. 20, 1956, and it was so terminated either by the operation of the plaintiff's own notice of termination handed to Mr. Ball (1) in writing at about 4 p.m. on Apr. 13, 1956, and also given orally at the same time, or by his actual dismissal by Major Turton (2) on Apr. 20, 1956. If the former is the true view the plaintiff clearly has no cause of action for wrongful dismissal since he was not dismissed, but even if the latter is the true view it is well-established law that the Sovereign, through her officers (in this case Major Turton (2)), can of course terminate at pleasure the employment of any person in the public service except in special cases where it is otherwise provided by law: per LORD GODDARD, C.J., in *Inland Revenue Comrs. v. Hambrook* (3) where the early authorities are examined. Therefore, unless the plaintiff can show that his is a special case where it is otherwise provided by law he can have no cause of action, even if his employment was determined summarily by Major Turton on behalf of the Crown without the plaintiff's consent.

- I The plaintiff, who appeared in person, did not draw my attention to any provision, statutory or otherwise, on which he relied as making the conditions of

* An employee engaged on a day to day basis: see reg. 6 (g) (v) and footnote thereto.

(1) The plaintiff's superior officer.

(2) The head of the establishment at Bordon where the plaintiff was employed.

(3) [1956] 1 All E.R. at p. 811; [1956] 2 Q.B. at p. 649.

his service an exception to the general rule, or, in LORD GODDARD's words (4), as otherwise provided by law. Counsel for the defendants, in accordance with the traditions of the Bar when a litigant appears in person, has drawn my attention to what seems to be the only material on which the plaintiff can rely to show that the conditions of his service were as otherwise provided by law, namely, some regulations called the War Department (Outstations) Civilian Staff Regulations, 1950, made by the Army Council. These regulations are not made under any statutory power but by virtue of powers delegated to the Army Council by the Sovereign by letters patent, which confer on the council such power and authority as were formerly exercised under the prerogative by the Secretary of State, commander in chief, and other principal officers commanding under the Secretary of State, and also full power and authority from time to time to appoint such officers conducting the business of the civil departments of our military services entrusted to them as shall seem necessary to them and to revoke the appointment of any such officers as they shall see fit and appoint others in their place. There is no merit in the word "regulations"; they are no more than instructions by the Army Council on behalf of the Sovereign of the terms on which civilian employees are to be engaged.

[HIS LORDSHIP then referred to the relevant regulations of the Regulations of 1950, for which see pp. 554, 555, ante, and continued:]

Assuming in the plaintiff's favour first that reg. 437 of the Regulations of 1950 is part of a contract of employment between the Crown and the plaintiff and, secondly, that he did not himself terminate his own employment, the notice to which he would have been entitled from the Crown would have been fourteen days (5). That which he was given by Major Turton's letter of Apr. 16, unless he had himself terminated his employment, was four days' notice (6), and his measure of damages would not in any event exceed ten days' wages. The cash amount at stake in this action is therefore in any event trivial, but the principle is an important one.

Counsel for the defendants, while hinting tactfully but firmly that I should not embarrass the Crown by adding my own to the many obiter dicta on the fact whether there exists a contract of employment in the strict sense between the Crown and those in its employment, contends that the regulations, and in particular reg. 436 and reg. 437, in no way restrict the Crown's right to terminate the plaintiff's services at pleasure at any moment and without notice. He further contends in the alternative that the plaintiff himself in fact gave notice of termination of his own employment in accordance with reg. 438. In order to decide whether either of those contentions is right, I think that I have first to determine what the regulations purport to do. I think that it is plain from reg. 16, and the statement which every employee is required by that regulation to sign (7), that they purport to define the terms and conditions of the employee's employment and to require the employee's express assent to them. (I am not committing myself in using the words "employee" and "employment"; they are the words used in the regulations.) These regulations are quite different from the regulations which were referred to the Judicial Committee of the Privy Council in *Shenton v. Smith* (8), which were expressed to be for the information and guidance of colonial governors and other of Her Majesty's officers in the colonies. Counsel for the defendants' contention that these regulations are no more than instructions to senior officers as to the way in which this particular service of the Crown is to be administered seems to me to be quite inconsistent with reg. 16, to which I have already referred, which enumerates regulations regarding conduct and discipline, and refers to hours of work and pay, and with reg. 438 which purports not only to impose a duty on employees but also to provide for the recovery from an employee of liquidated damages for its breach. These

(4) [1956] 1 All E.R. at p. 811; [1956] 2 Q.B. at p. 649.

(5) The relevant terms of reg. 437 are set out at p. 555, letter B, ante.

(6) Major Turton's letter is set out at p. 554, letter E, ante.

(7) For reg. 16, see p. 554, letter I, ante.

(8) [1895] A.C. 229 at p. 235.

A regulations seem to me to purport to lay down mutually binding terms of employment between the Crown and the employee, to which the assent of the employee has to be obtained on his entering into the service of the Crown. Whether this involves what is strictly a contractual relationship between the Crown and persons who have assented to serve subject to the regulations (as the Judicial Committee of the Privy Council appears to have thought it might in *Reilly v. R.* (9)) or not, it seems to me that it is at least sufficiently analogous to a contractual relationship to make it proper for me to construe the regulations in the same way as I would the terms of a contract of employment. Applying these canons of construction, it seems clear that reg. 437, by providing for a specified period of notice of termination of his employment to be given to an employee by the Crown except in the specific case of casual employees, purports to exclude the Crown's right to terminate the employee's service at pleasure, that is to say, at any time and without any previous notice, but in so far as the regulations do purport to take away the Crown's right to dismiss the plaintiff summarily, whether by way of contract or otherwise, they are in my view void: per LORD HALSBURY, L.C. (obiter) in *De Dohse v. R.* (10); TUCKER, J., in *Rodwell v. Thomas* (11); and LORD GODDARD, C.J., in *Terrell v. Secretary of State for the Colonies* (12). These cases were based on contract, as was *Dunn v. R.* (13), which is a direct authority binding on me, and such a provision purporting to exclude the Crown's power to terminate services at pleasure, if purporting to be made by way of contract as distinct from statute, was ruled against as ultra vires and so void: *Gould v. Stuart* (14).

It does not seem to me to make any difference that in this case the provisions purport to oust the Crown's right to dispense with the plaintiff's services at pleasure. The regulations are made by the Army Council and, therefore, in law, as I have already held, are no more than instructions by the Army Council on behalf of the Sovereign as to the terms on which civilian employees are to be engaged. In so far as they purport to be binding on the plaintiff, it is in my view by virtue of his assent to be employed on their terms—see reg. 16, (15); and there is no express provision in the letters patent authorising the Army Council, by whom the regulations are made, to abandon the Crown's prerogative right to dispense with his services at pleasure, even if, contrary to the view expressed by FRY, L.J., which is reported in STUART ROBERTSON'S CIVIL PROCEEDINGS BY AND AGAINST THE CROWN (1908) at p. 357, the Queen herself could abandon such prerogative by letters patent. In my view the law is correctly stated by Mr. STUART ROBERTSON at p. 359 of that book, where he says:

“The Crown's absolute power of dismissal can only be restricted by statute, and anything, short of a statute, which purports to restrict it, is void as contrary to public policy.”

I hold therefore that the plaintiff can have no cause of action arising out of termination of his employment.

This makes it strictly unnecessary to consider counsel for the defendants' alternative submission that the plaintiff was not dismissed but himself terminated his employment. However, as the matter has been argued and as much of the evidence has been directed to this point, I express my finding on it. For the reasons that I have indicated, I think that the regulations relating to the termination of employment must be regarded if not as the terms of a contract of employment at least as analogous to the terms of such a contract and that the giving of a notice terminating the employment, whether by employee or employer, is the exercise of the right under the contract of employment to bring

(9) [1933] All E.R. Rep. 179 at p. 181; [1934] A.C. 176 at p. 180.

(10) (1886), 3 T.L.R. 114 at p. 115.

(11) [1944] 1 All E.R. 700 at p. 704; [1944] K.B. 596 at p. 602.

(12) [1953] 2 All E.R. 490 at p. 496; [1953] 2 Q.B. 482 at p. 497.

(13) [1896] 1 Q.B. 116.

(14) [1896] A.C. 575.

(15) For reg. 16, see p. 554, letter I, ante.

the contract to an end, either immediately or in the future. It is a unilateral act, requiring no acceptance by the other party, and, like a notice to quit a tenancy, once given it cannot in my view be withdrawn save by mutual consent. A

The plaintiff handed to Mr. Ball at 4 p.m. on Apr. 13, 1956, a written notice of termination of his employment addressed to Major Turton, the head of the establishment at which the plaintiff was employed. It gave no date of termination, but it referred expressly to reg. 438 (a) (iii), which specifies one week's notice. It was not signed. I think that this was a sufficient notice given by the plaintiff terminating his employment one week from the date on which it was given. Once given it could not be withdrawn save by the mutual consent of the plaintiff and the Crown, through its appropriate officer, namely, in this case the head of the establishment, Major Turton. If it was given when it was handed by the plaintiff to Mr. Ball at 4 p.m. on Apr. 13, or when it was handed by Mr. Ball to Mr. Toms at Major Turton's office at 4.30 p.m. on the same day, then the plaintiff's attempted withdrawal of it at 4.55 p.m. was non-effective. If it was only given when Major Turton received it on Apr. 16, then in my view the plaintiff was entitled to withdraw it up to that time. The regulation under which the notice purported to be given does not say to whom the notice was to be given, although the form provided by the War Office is addressed to the officer commanding. B C D

The question turns on whether Ball received it as agent for Major Turton, or whether he received it from the plaintiff to transmit it to Major Turton on the plaintiff's behalf; and, in the latter event, whether Ball acted beyond the scope of his authority in handing it to Toms, and whether Toms received it as agent for Major Turton. It seems to me that the notice must have been received by Ball as an agent for Major Turton, and the plaintiff in handing it to him intended to give it to him in that capacity. Ball was his superior officer and the natural person to whom such notice would be given by an employee in the plaintiff's position. If the plaintiff had kept to his intention to terminate his employment on the expiration of a week from the date of his notice to Ball, the delay in passing on the notice to Major Turton, or his officer, would not have interfered with its effect to terminate the plaintiff's employment on Apr. 20, nor would the plaintiff have been in breach of his contract of employment in ceasing to work after that day. It was, I think, within the scope of Ball's authority to hand the notice to Toms, and Toms received it at 4.30 p.m. as agent for Major Turton and not as agent for the plaintiff. In my opinion the plaintiff's notice was voluntarily given under the regulations at 4 p.m. on Apr. 13, 1956, when he handed it to Ball, or at the latest at 4.30 p.m. when the latter handed it to Toms. At 4.55 p.m., when the plaintiff purported orally to withdraw it, it was too late for him to do so, save with the consent of the appropriate officer and no such consent to its withdrawal was given. I hold therefore that the plaintiff himself terminated his employment on Apr. 20 by notice expiring on that date. For these reasons it follows that this action fails. E F G

Judgment for the defendants.

Solicitor: *Treasury Solicitor* (for the defendants).

[*Reported by WENDY SHOCKETT, Barrister-at-Law.*]

A

R. v. LONG.

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Ashworth and Edmund Davies, JJ.), October 19, 1959.]

B

Criminal Law—Sentence—Preventive detention—Notice of previous convictions—Three clear days' notice—Criminal Justice Act, 1948 (11 & 12 Geo. 6 c. 58), s. 23 (1).

Criminal Law—Practice—Probation order—Breach—Procedure—Admission of breach.

C

The period of the notice of intention to prove previous convictions, which is required by s. 23 (1)* of the Criminal Justice Act, 1948, to be given to the offender "at least three days before the trial" is a period of three clear days, viz., exclusive of the day on which the notice is given and of the day on which the trial begins. Accordingly a notice given on July 18 in relation to a trial that took place on July 21, was insufficient, as it allowed an interval less than three clear days.

D

R. v. Turner ([1910] 1 K.B. 346) applied.

Appeal allowed.

Observations on the need to follow the procedure for proof of a subsequent offence, when an offender is brought up for breach of probation, as stated in *R. v. Devine* ([1956] 1 All E.R. 548); see p. 561, letters F and G, post.

E

[As to the computation of time in which an act may be done, see 32 HALSBURY'S LAWS (2nd Edn.) 141, para. 206; and for cases on the subject, see 42 DIGEST 946-964, 187-392.]

For the Criminal Justice Act, 1948, s. 23, see 28 HALSBURY'S STATUTES (2nd Edn.) 374.

For the Prevention of Crime Act, 1908, see 5 HALSBURY'S STATUTES (2nd Edn.) 952.]

F

Cases referred to:

Chambers v. Smith, (1843), 12 M. & W. 2; 13 L.J.Ex. 25; 2 L.T.O.S. 101; 152 E.R. 1085; 42 Digest 956, 290.

R. v. Devine, [1956] 1 All E.R. 548; 120 J.P. 238; 40 Cr. App. Rep. 45; [1956] 1 W.L.R. 236; 3rd Digest Supp.

R. v. Turner, [1910] 1 K.B. 346; 79 L.J.K.B. 176; 102 L.T. 367; 74 J.P. 81; 3 Cr. App. Rep. 103; 42 Digest 958, 309.

G

Railway Sleepers Supply Co., Re, (1885), 29 Ch.D. 204; 54 L.J.Ch. 720; 52 L.T. 731; 42 Digest 949, 228.

Appeal.

H

This was an appeal by Dennis John Long against sentence. He was sentenced on July 21, 1959, by the recorder of Southampton borough sessions to eight years' preventive detention, being brought before the court on breach of a probation order. The main ground of appeal was that the statutory notice, pursuant to s. 23 (1) of the Criminal Justice Act, 1948, of intention to prove previous convictions was not served "at least three days" before his trial. The facts appear in the judgment.

I

Miss P. G. Coles for the appellant.

LORD PARKER, C.J., delivered the judgment of the court: This appellant pleaded guilty at Southampton borough sessions in January, 1958, to store-breaking, and he was placed on probation for three years. Apparently he had broken into a canteen but left without taking anything. Some months later, on May 27, 1959, he was given three years' imprisonment at Grimsby borough sessions for the larceny of a trailer and nine other offences, I think, were taken into

* The relevant terms of s. 23 (1) are printed at p. 560, letter C, post.

consideration. On July 21 he was brought before Southampton borough sessions on breach of his probation, and he was then sentenced by the recorder to eight years' preventive detention. A

The court feels that if the matter rested there this man, having regard to his previous record of something like twenty-one previous convictions, and to the fact that no doubt he had been warned on the last occasion by the recorder that he would go to preventive detention, fully deserved it, and they would not interfere, but it appears that the notice of previous convictions on which the sentence of preventive detention was based was served on him on July 18, and the trial which was to have taken place on July 20 was adjourned to come on on July 21, when clearly it was thought that the necessary three days had expired. Section 23 (1) of the Criminal Justice Act, 1948, provides: B

"For the purpose of determining whether an offender is liable to be sentenced to corrective training or preventive detention or to be ordered to be subject to the provisions of the last foregoing section [that is s. 22, which deals with supervision] no account shall be taken of any previous conviction or sentence unless notice has been given to the offender and to the proper officer of the court at least three days before the trial that it is intended to prove the conviction or sentence; [then these are the material words] and unless any such previous conviction or sentence is admitted by the offender the question shall be determined by the verdict of a jury." C

The learned recorder clearly took the view that if he adjourned the trial to July 21, three days would have elapsed since the service of the notice, and that accordingly this man would be eligible for preventive detention. D

The prisoner himself in his notice of appeal raises this point and, as far as we know, it has never come before the court before. The ordinary rule applicable in these cases is that the day of service is not included but the later date of the later event is included, and accordingly if the general rule applied here July 18 would not be included but the date of the trial, July 21, would be. Accordingly, the trial would have taken place three days after the service of the notice. On the other hand, there are clear exceptions to that general rule. It is, I think, well stated in 32 HALSBURY'S LAWS (2nd Edn.), p. 140, para. 205, where it is said: E

"When a period is fixed before the expiration of which an act may not be done, the person for whose benefit the delay is prescribed has the benefit of the entire period, and accordingly in computing it the day from which it runs as well as the day on which it expires must be excluded." F

In other words, in those circumstances the time of so many days is treated as so many clear days, and one of the cases to which counsel for the appellant has referred us is *R. v. Turner* (1). There the question arose whether a notice charging a man as being an habitual criminal had been given not less than seven days before the offender was to be tried pursuant to s. 10 of the Prevention of Crime Act, 1908. It is to be observed that it was there argued that the ordinary rule applied, and that if the ordinary rule applied, that is, excluding the first date and including the later one, the notice had been validly served. CHANNELL, J., in giving the judgment of the court said this (2): G

"Section 10 (4) (b) of the Prevention of Crime Act, 1908, provides that 'not less than seven days' notice must be given to the proper officer of the court and to the offender. The question whether the words 'not less than seven days' mean clear days is a troublesome one to answer, as there have been decisions upon similar words which are not exactly in accord. Those decisions depend upon particular statutes, and may therefore all be right and yet bring about apparently conflicting results. We have come to the conclusion that the decision most nearly in point is that in *Chambers v. Smith* (3) referred to by CHITTY, J., in *Re Railway Sleepers Supply Co.* (4), where he H

(1) [1910] 1 K.B. 346.

(3) (1843), 12 M. & W. 2.

(2) [1910] 1 K.B. at p. 359.

(4) (1885), 29 Ch.D. 204. I

- A reviewed the authorities. In *Chambers v. Smith* (5) the words were 'not being less than fifteen days', and the court in the first instance held that what I may call the ordinary rule applied, namely, that where a certain number of days are specified they are to be reckoned exclusive of one of the days and inclusive of the other unless clear days are expressed. But although that is the rule, the difficulty is to ascertain whether clear days are expressed
- B by the language of the particular statute. In *Chambers v. Smith* (5) the court, after having in the first instance thought that the words 'not less than fifteen days' were to be construed according to what I have called the ordinary rule, namely, inclusive of one of the days and exclusive of the other, on reconsideration came to the conclusion that they were to be construed as meaning fifteen clear days. The words upon which that decision
- C was based are the nearest to be found in the authorities to those which we have to construe in the present case, and we therefore come to the conclusion that the provision that 'not less than seven days' notice has to be given means 'seven clear days' notice, and we so answer the question."

In the judgment of the court the same interpretation should be put on the words in s. 23 of the Criminal Justice Act, 1948, and the reference to three days there should be read as a reference to three clear days. Accordingly, this man did not qualify for preventive detention in that notice of his previous convictions could not have been given. Accordingly, the sentence of preventive detention must be set aside.

The court has carefully considered this man's previous history and also the offence of which he was found guilty, namely, store-breaking but without taking anything, and will substitute a sentence of five years' imprisonment which will, of course, overlap the sentence of three years' imprisonment imposed at Grimsby borough sessions.

Before leaving this case, I should draw attention to the fact that the procedure laid down for the proof of a subsequent offence when a man is brought up for breach of probation was not observed. The matter was put by the clerk to the prisoner in the most general terms. He said: "Do you admit that at Southampton Borough Quarter Sessions on Jan. 27, 1958, a probation order for three years was made against you on your conviction for store-breaking with intent?"—so far, so good—then he goes on: "and that having committed a further offence you have been produced at these sessions for sentence". The court would like to draw attention again to the necessity for following the procedure which was

G laid down by this court in *R. v. Devine* (6) where the court emphasised that

"Where a person is brought before a court for breach of a probation order, [the breach alleged] should be put to him . . . in the clearest possible terms and he should be asked to say whether he admits it or not."

Appeal allowed. Sentence varied.

Solicitor: Registrar, Court of Criminal Appeal.

[Reported by N. P. METCALFE, Esq., Barrister-at-Law.]

Re ENDACOTT (deceased). CORPE v. ENDACOTT AND OTHERS.

[COURT OF APPEAL (Lord Evershed, M.R., Sellers and Harman, L.J.J.), October 8, 9, 12, 1959.]

Charity—Uncertainty—Memorial—Gift to parish council for purpose of providing some useful memorial to testator—Validity.

Trust and Trustee—Public non-charitable trust—Gift to parish council “for purpose of some useful memorial” to testator—Validity.

A testator gave by will his residuary estate “to North Tawton Devon Parish Council for the purpose of providing some useful memorial to myself.”

Held: the gift was not a good charitable gift and failed for uncertainty on the following grounds—

(i) the words “for the purpose of providing some useful memorial to myself” were not merely expository, but were intended to impose an obligation in the nature of a trust, so that the gift was not an out and out gift to the council.

(ii) though the purpose of the intended trust was to create a memorial to the testator himself, yet it was to be one that was useful and would serve a public purpose of some kind; but, as the purpose of utility so expressed was not synonymous with the gift's being simply for the benefit of the inhabitants of the parish, it was not within the line of authority by which gifts for such benefit had been held to be charitable.

(iii) the mere fact that the gift was to the parish council did not render it charitable, because the activities of the parish council were not limited to charitable purposes; and, even if they were so limited, it was not clear that the obligation intended to be imposed by the words of the will was confined within the scope of the assumedly charitable activities of the council.

Re Rumball ([1955] 3 All E.R. 71) distinguished.

(iv) the gift was of too wide and uncertain a nature to fall within the anomalous class of cases in which trusts, although not charitable, were upheld as being of a public character.

Re Hooper ([1931] All E.R. Rep. 129) and *Re Drummond* ([1914] 2 Ch. 90) distinguished.

Appeal dismissed.

[As to gifts for non-charitable public purposes, see 4 HALSBURY'S LAWS (3rd Edn.) 241, 242, para. 522; and for cases on the subject, see 8 DIGEST (Repl.) 353, 354, 409, 410, 313-341, 1004-1030.]

As to gifts for the benefit of inhabitants being charitable, see 4 HALSBURY'S LAWS (3rd Edn.) 227, para. 507.]

Cases referred to:

Astor's Settlement Trusts, Re, Astor v. Scholfield, [1952] 1 All E.R. 1067; [1952] Ch. 534; 3rd Digest Supp.

Catherall, Re, Lloyds Bank, Ltd. v. Griffiths, (June 3, 1959), Unreported.

Chichester Diocesan Fund & Board of Finance (Incorporated) v. Simpson, [1944] 2 All E.R. 60; [1944] A.C. 341; 113 L.J.Ch. 225; 171 L.T. 141; 8 Digest (Repl.) 395, 375.

Clarke, Re, Clarke v. Clarke, [1901] 2 Ch. 110; 70 L.J.Ch. 631; 84 L.T. 811; 8 Digest (Repl.) 356, 352.

Drummond, Re, Ashworth v. Drummond, [1914] 2 Ch. 90; 83 L.J.Ch. 817; 111 L.T. 156; 8 Digest (Repl.) 359, 371.

Flinn, Re, Public Trustee v. Griffin, [1948] 1 All E.R. 541; [1948] L.J.R. 923; sub nom. *Re Flinn, Public Trustee v. Flinn*, [1948] Ch. 241; 8 Digest (Repl.) 392, 377.

Garrard, Re, Gordon v. Craigie, [1907] 1 Ch. 382; 76 L.J.Ch. 240; 96 L.T. 357; 8 Digest (Repl.) 391, 347.

- A *Hooper, Re, Parker v. Ward*, [1931] All E.R. Rep. 129; [1932] 1 Ch. 38; 101 L.J.Ch. 61; 146 L.T. 208; 8 Digest (Repl.) 353, 328.
- Houston v. Burns*, [1918] A.C. 337; 87 L.J.P.C. 99; 118 L.T. 462; 8 Digest (Repl.) 396, 889.
- Income Tax Special Purposes Comrs. v. Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 3 Tax Cas. 53; 28 Digest (Repl.) 13, 45.
- B *Leahy v. A.-G. of New South Wales*, [1959] 2 All E.R. 300; [1959] 2 W.L.R. 722.
- Pettingall v. Pettingall*, (1842), 11 L.J.Ch. 176; 8 Digest (Repl.) 357, 361.
- Pirbright v. Salwey*, [1896] W.N. 86; 8 Digest (Repl.) 353, 327.
- Rumball, Re, Sherlock v. Allan*, [1955] 3 All E.R. 71; [1956] Ch. 105; [1955] 1 W.L.R. 1037; 3rd Digest Supp.
- C *Williams' Trustees v. Inland Revenue Comrs.*, [1947] 1 All E.R. 513; [1947] A.C. 447; [1948] L.J.R. 644; 176 L.T. 462; 2nd Digest Supp.

Appeal.

- This was an appeal by the third defendant, North Tawton Parish Council, from an order of DANCKWERTS, J., dated May 29, 1959, declaring that a testamentary gift to the parish council failed for uncertainty.

- By an originating summons dated Dec. 31, 1958, the plaintiff, the sole executor of the will of Albert George Endacott, deceased, asked for the determination of the question whether on the true construction of the will the gift therein contained to North Tawton Parish Council (a) was valid (b) failed for uncertainty or otherwise. DANCKWERTS, J., decided that the gift failed.

- E *J. L. Arnold, Q.C.*, and *C. A. Settle* for the third defendant, North Tawton Parish Council.

B. S. Tatham for the plaintiff, the trustee.

Michael Albery, Q.C., and *Oliver Lodge* for the first and second defendants, next of kin.

- F *Denys B. Buckley* for the fourth defendant, the Attorney-General.

LORD EVERSHERD, M.R.: By his will dated Jan. 2, 1952, the testator, Mr. Albert George Endacott, who died in June, 1958, first of all made an appointment of a firm of solicitors as executors and then gave to his son certain buildings and premises comprising a factory, subject to a mortgage, together with certain chattels. He concluded his will by the following residuary gift:

- G "Everything else I leave to North Tawton Devon Parish Council for the purpose of providing some useful memorial to myself, subject to the proviso that if my wife outlives me they must during the lifetime of my wife pay to my wife the interest which may accrue on the capital when properly invested by them."

- H The question before the court has been whether that residuary gift to North Tawton Parish Council can take effect. DANCKWERTS, J., answered that question negatively. He concluded his judgment, according to the short note of it:

- I "It is argued that the words 'for the purpose of providing some useful memorial to myself' are 'limiting words'. I think they are very wide words which may well include non-charitable purposes. The nature of the trustee would limit those wider purposes if the parish council's argument prevailed. I declare that the gift fails for uncertainty."

That short statement comprehends the various arguments that have been put forward, and the conclusion (let me say at once) is one with which I, for my part, entirely agree.

Counsel for the parish council has put his case on two broad distinct grounds. He has first said that the words "for the purpose of providing some useful memorial to myself" merely indicated the reason why the testator had made

this gift, but did not, and were not intended to, impose any obligation on the parish council, with the result that the gift should be treated as a gift out and out to the parish council. Alternatively, counsel has argued on the footing that the words (contrary to his first contention) impose a trust or obligation of some kind, though it is to be noted that it has not been suggested that such a trust would offend the rule against perpetuities. On this alternative basis, however, the argument has diverged thus: First, if the trust be not (on its true interpretation) a charitable trust, still it is said to be of a public nature and valid and effective, on the ground that it falls within a class of cases which have been referred to as "anomalous" and which were recited by ROXBURGH, J., conveniently in his recent decision in *Re Astor's Settlement Trusts, Astor v. Scholfield* (1). The contention is that this case, falling within that so-called anomalous class, must be treated as effective, being (as I have said) of a public character and being also such that, by appropriate machinery, it can be properly controlled by the court. It may perhaps be added that, since the gift was one of residue, then if the gift fails, an intestacy follows; and it is, of course, a fair comment to make that in a case of any kind where intestacy follows a particular result, the court will at any rate think carefully before arriving at such a conclusion.

Then, alternatively, it is said the trusts are in truth charitable, and the argument on this alternative again diverges. First of all it has been submitted that a parish council (and, of course, this particular parish council) is, according to its statutory constitution, limited, at any rate quoad any gifts of this kind which it receives, to charitable functions and activities. If that is right, then it is said that the gift to such a body stamps (and, if necessary, qualifies) the nature of the trusts which are declared and that they should accordingly be taken as being and intended to be within the scope of the (charitable) statutory activities or powers. Secondly (and this was a point particularly put to us by counsel for the Attorney-General) it is said that, whether the parish council be or be not a body confined in activity to charitable purposes, the true view of the meaning of these vital words "for the purpose of providing some useful memorial to myself" is that they are, as a matter of language, equivalent to a trust for the benefit of the local inhabitants of North Tawton Parish and therefore, according to authority, charitable.

Those, broadly, are the contentions; and I will deal at once and briefly with the first point, viz.: Was the language which I have quoted intended to impose an obligation, or was it merely expository? That matter I can deal with briefly because it is, after all, a matter of mere construction. It will, therefore, be convenient if I state at once what my view is of the meaning of these words, which once more I repeat, "for the purpose of providing some useful memorial to myself": and I say, like DANCKWERTS, J., that I do not think that these words were merely expository. In my judgment, they were intended to impose an obligation in the nature of a trust. Although I am anticipating what I shall say hereafter about the argument of counsel for the Attorney-General, I will at once state that, in my judgment, the object of these words, the trust, the obligation, which the testator intended them to impose was this: that the council were, with his money (and subject, of course, to the obligation about the widow) to create a memorial to himself. I think that his first idea was (and I am not saying that it was either foolish or ignoble) that there should thereafter be in North Tawton, Devon, a memorial to himself; but that the memorial was to have the quality that it was to be useful; and that I take to mean that it was intended that it should have the quality of utility rather than ornament. Though I do not think aesthetic or ornamental considerations were excluded, still (as I have said) I think his purpose was that the memorial, whatever form it took and whether material or not, should be useful; and, by

(1) [1952] 1 All E.R. 1067; [1952] Ch. 534.

A way again of anticipation of my answer to counsel for the Attorney-General, I cannot see that it was necessarily to be useful only to the inhabitants of North Tawton, Devonshire.

B I have stated my view of the construction and that view answers the first point. It follows that this was not a gift out and out to North Tawton Parish Council, but I think and hope that my view of the intention of those words also carries with it the answer to many of the other points that have arisen. I go further and say that in the end of all, as I think, this case should be decided on the grounds that (as I understand) DANCHEWITS, J., decided it, viz., that there was a specific obligation sought to be imposed, specific in this sense, that it was to be for the purpose of providing a memorial for this testator having the quality of utility, something obviously that could not be confined to charitable purposes, but no doubt having the quality also that it served a public purpose of some kind. I think that that view of the words does carry with it the result, with all respect to the learning which has been put before us, that to hold it valid would be for this court to go beyond (and appreciably beyond) the tenor of the decided cases on these difficult subjects.

D I come then to counsel for the parish council's alternative ground; and it is plain that once one is involved in the considerations which have been put before us, one is in much more troubled waters than in dealing with the first point which I have disposed of. Counsel has quite rightly drawn our attention to much learning in the form of case law that has grown up round these somewhat involved questions. All those who practise in this branch of the law know how infinite is the variety of the decided cases, how extreme sometimes are the refinements, and how apparent on occasions the contradictions which those cases demonstrate; and that is certainly not the least true about those cases dealing with the law of charity. But I wish to acknowledge my indebtedness to Mr. Arnold for putting these matters before us as a premise perhaps to my statement that I do not propose in this judgment, by my reference to cases or indeed otherwise, to add to the future burden of citation. I am able I think fairly to say that and without, I hope, shirking any judicial duty, because, in the end of all and on the view I take, the real question in this case depends on the meaning of the words which this testator has used according to their ordinary sense, a meaning which I have already tried to state.

G It is convenient and perhaps logical to take first the point that the parish council being, it is said, confined to charitable activities so far as is relevant, then this gift must take its character by reflection of that fact. I am unable to accept that argument. The cases, of which *Re Rumball, Sherlock v. Allan* (2) is the most recent, illustrate the proposition that gifts to persons holding a particular office, and particularly an ecclesiastical office, if they are not to be treated as gifts to the holder of that office in his personal capacity, are taken to be gifts to be applied for the purposes for which the office is held. The vicar or the cardinal archbishop (to take references from two cases (3)) receives the gift and disposes of it (as it is said) *virtute officii*, and the nature of the officium is such that the duties, the trusts, must be ecclesiastical, and, therefore, charitable. If that is accepted, then general words which follow may be regarded either as merely emphasising the fact that the gift is to the ecclesiastical officer *virtute officii*, or possibly not only to do that but also to limit to some extent the scope of his possible disposition, within the scope of his office, of those funds. No decided case, so far as we are aware, has applied that principle to such a body as a parish council. If it were shown perfectly clearly that every activity of a parish council, at any rate so far as gifts were concerned, must be of a charitable character, it might follow that a similar reasoning would apply; but I am not satisfied that it is true to say of a parish council that it is confined

(2) [1955] 3 All E.R. 71; [1956] Ch. 105.

(3) *Re Garrard*, [1907] 1 Ch. 382; *Re Flinn*, [1948] 1 All E.R. 541; [1948] Ch. 241.

in its activities to charitable activities or that it is so confined as regards any gifts it may receive. I do not forget the argument that you might give something to a vicar not personally, but having attached to it an obligation to apply it for purposes which were outside his ecclesiastical duties, but I cannot find in this case any true analogy to that kind of illustration. There is here a gift to this parish council for the purpose which I have stated, and the relevant question must be (the purpose being a very wide one and not on the face of it charitable) —Is the nature of a parish council's activities so clearly defined as being of a charitable character as to impose an essential limitation on the words which I have already tried to construe? A
B

We were referred to the Local Government Act, 1933, s. 268 (1). That deals with acceptance of gifts by local authorities and (so far as relevant) provides:

“Subject to the provisions of this section a local authority may accept, hold and administer any gift . . . for any local public purpose, or for the benefit of the inhabitants of the area . . .” C

I have no doubt (and I do not think counsel for the parish council really contended to the contrary) that the words “for any local public purpose” cannot be confined in that context to charitable purposes. It is only necessary to refer in passing to the language of VISCOUNT HALDANE in *Houston v. Burns* (4) to which counsel for the next of kin drew our attention. The words “local public purpose” are not, according to our law, regarded as being exclusively charitable; and, even against the background of the Local Government Act, 1894, it is plain that local public purposes in s. 268 of the Act of 1933 are not only charitable purposes. But I do not forget the point that this section deals with acceptance of gifts and would not necessarily colour the general activities of a parish council, though I venture for my part to think that if in the case of gifts it is made plain that a parish council can apply them to non-charitable as well as charitable purposes, it is a severe obstacle in the way of counsel for the parish council. D
E

We were further referred to a more recent Act, the Physical Training and Recreation Act, 1937, which extended the powers of local authorities, by s. 4 (1) in (among others) the following way: F

“A local authority may acquire, lay out, provide with suitable buildings . . . lands . . . for the purpose of gymnasiums, playing fields, holiday camps or camping sites, or for the purpose of centres for the use of clubs, societies or organisations having athletic, social or educational objects, and may manage those lands and buildings themselves . . .” G

It is, I would have thought, plain enough that the activities there contemplated go far beyond merely charitable activities; but counsel for the parish council has said that any indulgence of the powers of that section by parish councils was rendered retrospectively charitable by the Recreational Charities Act, 1958, s. 1 (1): H

“Subject to the provisions of this Act, it shall be and be deemed always to have been charitable to provide . . . facilities for recreation or other leisure-time occupation, if the facilities are provided in the interests of social welfare.” I

Subsection (2) imposes a qualification on that:

“The requirement of the foregoing subsection that the facilities are provided in the interests of social welfare shall not be treated as satisfied unless—(a) the facilities are provided with the object of improving the conditions of life for the persons for whom the facilities are primarily intended; and (b) either—(i) those persons have need of such facilities as aforesaid by reason of their youth, age, infirmity or disablement, poverty or social and economic circumstances; or (ii) the facilities are to be available to the members or female members of the public at large.”

- A I am not satisfied (and I put it quite briefly) that the effect of that section is to limit the powers of a parish council under s. 4 of the Act of 1937 to activities in the form of providing such things as holiday camps, clubs and so forth, which would be deemed or would be retrospectively made by the Act of 1958 charitable only. I, therefore, have not been persuaded, as DANCKWERTS, J., was not persuaded, that the colour or character of the gift here made is to be determined by considering that the donee, the parish council, is one whose official activities or whose constitutional functions were limited to charitable activities or functions.

- If that view is right, then I am absolved from further considering the kind of case illustrated by the decision which I have earlier mentioned of *Re Rumball* (5), and I am not, therefore, going to take time by considering those cases and answering the hypothetical question—assuming the premise that a parish council is to be treated for this purpose as having charitable functions only, whether you should confine the scope of the relevant language so as not to impose obligations outside the charity. I will, however, venture to add this, that if I am wrong in the view that I have taken as to the nature of the parish council's activities, I am not satisfied as a matter of construction that these words can amount to no more than a general direction, with or without limitation, that a parish council is not to take absolutely and beneficially but to apply the fund according to its statutory (and I will now assume charitable) duties. I have stated already my view of the meaning of the words used here, and I hope that in so doing I have justified the conclusion just stated; but, putting it in other words, if the principle illustrated by such cases as *Re Garrard*, *Gordon v. Craigie* (6), *Re Flinn*, *Public Trustee v. Griffin* (7) and *Re Rumball* (8) is applicable to such a case as this, i.e., to a non-ecclesiastical body or a body like a parish council (and I say no more on the matter whether it would be so applicable at all), the result is that this case, as I think, falls on a side of the line different from that on which fell those three decisions.

- I now turn to counsel for the parish council's alternative argument based on the view that there is here a trust and a trust of a public character, but not a charitable trust. He says that the trust is in line with the trusts which were rendered effective in those cases which I have called "anomalous" and many of which are referred to by ROXBURGH, J., in *Re Astor's Settlement Trusts* (9), beginning with *Pettingall v. Pettingall* (10). I include in that list cases such as the three to which we have had our attention particularly drawn today. The argument (re-stating it briefly) is, as I follow it, that assuming the non-charitable but public nature of this trust, still it is of a character which the court can efficiently, and will, enforce. It must be said that these cases which I have indicated are of a somewhat anomalous kind. They are classified in the recent book written by Mr. MORRIS and Professor BARTON LEACH, *THE RULE AGAINST PERPETUITIES*, at p. 298.

- H "We proceed to examine these 'anomalous' exceptions. It will be found that they fall into the following groups: (1) trusts for the erection or maintenance of monuments or graves; (2) trusts for the saying of masses, in jurisdictions where such trusts are not regarded as charitable; (3) trusts for the maintenance of particular animals; (4) trusts for the benefit of unincorporated associations (though this group is more doubtful); (5) miscellaneous cases."

I I am prepared to accept, for the purposes of the argument, that it does not matter that the trusts here are attached to residue and not to a legacy; i.e., it does not matter that the persons who would come to the court and either complain if the trusts were not being carried out or claim the money on the footing

(5) [1955] 3 All E.R. 71; [1956] Ch. 105.

(6) [1907] 1 Ch. 382.

(7) [1948] 1 All E.R. 541; [1948] Ch. 241.

(8) [1955] 3 All E.R. 71; [1956] Ch. 105.

(9) [1952] 1 All E.R. 1067; [1952] Ch. 534.

(10) (1842), 11 L.J.Ch. 176.

that they had not been carried out are next-of-kin rather than residuary legatees. Still, in my judgment, the scope of these cases (and I can call them anomalous because they have been so called both in the book which I have read and in the course of the argument) ought not to be extended. So to do I think would be to validate almost limitless heads of non-charitable trusts, even though they were not (strictly speaking) public trusts, so long only as the question of perpetuities did not arise; and, in my judgment, that result would be out of harmony with the principles of our law. No principle perhaps has greater sanction or authority behind it than the general proposition that a trust by English law, not being a charitable trust, in order to be effective, must have ascertained or ascertainable beneficiaries. These cases constitute an exception to that general rule. The general rule, having such authority as LORD ELDON, LORD PARKER and my predecessor LORD GREENE behind it, was most recently referred to in a case which we had mentioned to us today of *Leahy v. A.-G. of New South Wales* (11). I add also that, in my judgment, the proposition stated at p. 308 in Mr. MORRIS and Professor BARTON LEACH's book that if these trusts should fail as trusts they may survive as powers, is not one which I think can be treated as accepted in English law.

I, therefore, so far as this case is concerned, conclude that, though the gift is specific in the sense that it indicates a purpose capable of expression, yet it is of far too wide and uncertain a nature to qualify within the class of cases cited. It would go far beyond any fair analogy to any of those decisions. I do not wish to take time by much example, particularly because I am not unmindful of having already said that I do not wish to add to the future burden of citation; but, merely by way of example, I refer to the citation of *Re Hooper, Parker v. Ward* (12) by ROXBURGH, J., in *Re Astor's Settlement Trusts* (13). The former was a case where the purpose of the bequest was to provide for the care and upkeep of certain graves, a vault and monuments. MAUGHAM, J., said (14):

"This point is one to my mind of considerable doubt, and I should have felt some difficulty in deciding it if it were not for *Pirbright v. Salwey* (15) . . . That was a decision arrived at by STIRLING, J., after argument by very eminent counsel. The case does not appear to have attracted much attention of the text-book writers, but . . . it does not appear to have been commented on adversely, and I shall follow it."

It may be said that other cases in regard to monuments, which were closely on the facts in line, might similarly follow the decision of STIRLING, J.; but this case, as I construe the purposes of the gift, is very different from *Re Hooper* (12).

Re Drummond, Ashworth v. Drummond (16) is the only other case under this head to which I think I need refer. That was a case, as will be recalled, where EVE, J., held valid a gift by will and codicil for the Old Bradfordians Club. The report of his short judgment reads (17):

"There was, in his opinion, a trust, but there was abundant authority for holding that it was not such a trust as would render the legacy void as tending to a perpetuity: *Re Clarke* (18). The legacy was not subject to any trust which would prevent the committee of the club from spending it in any manner they might decide for the benefit of the class intended . . ."

That case was referred to at some little length by LORD SIMONDS in giving the judgment of the Privy Council in *Leahy v. A.-G. of New South Wales* (11); and, if I do not misread LORD SIMONDS' judgment, he thought that EVE, J., in treating the Old Bradfordians Club case as he did, had somewhat overlooked

(11) [1959] 2 All E.R. 300.

(12) [1931] All E.R. Rep. 129; [1932] 1 Ch. 38.

(13) [1952] 1 All E.R. at p. 1073; [1952] Ch. at p. 544.

(14) [1931] All E.R. Rep. at p. 130; [1932] 1 Ch. at pp. 39, 40.

(15) [1896] W.N. 86.

(16) [1914] 2 Ch. 90.

(17) [1914] 2 Ch. at p. 97.

(18) [1901] 2 Ch. 110.

A the ground of the earlier decision to which alone he referred in his judgment in *Re Clarke, Clarke v. Clarke* (19). LORD SIMONDS said (20):

B “He [EVE, J.] cited only *Re Clarke* (19), though other cases had been referred to in argument, and he ignored that BYRNE, J., had been able to reach his conclusion in that case just because he regarded the gift as a gift to the individual members of the corps who could together dispose of its assets as they thought fit.”

I do not propose to say more about *Re Drummond* (21) save this, that it seems on its facts to be a very widely different case from the present, and I am certainly not prepared to say that *Re Drummond* (21) is an authority which we should use as justifying an acceptance of the validity of this trust, making it (so to speak) a further addition to the anomalous number of cases classified in the way I have stated in Mr. MORRIS and Professor BARTON LEACH's book.

C I should perhaps, as it was referred to, not pass from this point without a mention of a recent case (not, I think, reported) of *Re Catherall, Lloyds Bank, Ltd. v. Griffiths*, decided by ROXBURGH, J. (22). It was a case in which the testator had made the following disposition, according to the citation in the affidavit of D which we have a copy:

E “Unto the Vicar and Wardens of St. John's Church, Great Harwood, £2,500 for a peal of bells and a clock for the tower in memory of my dear parents and devoted sister; (2) Unto the Vicar and Wardens of Great Harwood Parish Church £1,000 for a suitable memorial, at their discretion, in memory of my dear parents and devoted sister; (3) Unto the Vicar and Wardens of Great Harwood Parish Church £500 for the upkeep and attention to the family grave.”

The question arose as to the second of those gifts, £1,000 for a suitable memorial. According to the note with which counsel for the Attorney-General has provided us, ROXBURGH, J., thought that was valid. He said, according to the note:

F “It was argued whether this is a charitable disposition. I have reached no concluded opinion on that. Distinctions are very fine. I could construe the words as meaning such purposes (of a religious character) as they may think fit, being suitable as a memorial; that is charitable; or I could construe the words as meaning any purpose suitable as a memorial; that is non-charitable. But there is another ground on which this trust can be upheld. It is not perpetual. I went into these cases in *Re Astor's Settlement Trusts* (23). Such a trust as this is valid whether charitable or not. Purpose must embody a definite concept, and means to attain it must be described with sufficient certainty. In this case I should have no difficulty in deciding what would be a suitable memorial.”

G H Of course, we do not know much of the facts of that case, but the memorial was to be a “suitable” memorial in memory of the testator's parents and devoted sister, of whom we know nothing at all. I am not, therefore, saying that this decision was in any way decided on wrong grounds; but it does seem to me, in its context, that in any event the decision could be justified on the ground that, as I say, in its context the purposes were limited to religious (i.e., charitable) I purposes.

That brings me then back to the question of construction in relation to the point raised by counsel for the Attorney-General; and I have already largely anticipated my answer to it. It is true, as counsel pointed out, that there are several instances in the books of trusts expressed to be for the benefit of the inhabitants of a place or parish which have been held to be valid charitable

(19) [1901] 2 Ch. 110. (20) [1959] 2 All E.R. at p. 308. (21) [1914] 2 Ch. 90.
(22) June 3, 1959. Unreported. (23) [1952] 1 All E.R. 1067; [1952] Ch. 534.

trusts. They are somewhat discussed in *Williams' Trustees v. Inland Revenue Comrs.* (24) by LORD SIMONDS; and as regards these cases also, as LORD SIMONDS observed, there is some ground for saying that they are anomalous. Whether some owe an origin to the strict language (25) of LORD MACNAGHTEN's famous fourth category of charities or not, it is no doubt true to say that that particular formula, "for the benefit of the inhabitants of A", has been taken on several occasions to be one which inherently has the quality that it is within the intendment of the Statute of Elizabeth, that the benefit indicated is the sort of benefit which would make it a charitable disposition. But the formula is not the same as that here used. It may well be, as counsel observed, that purposes which are useful to a community will also benefit the community; but that, I think, is not the point. The formula is different, and I have stated already my conclusion that what the testator meant was that this council should provide a memorial to himself having the quality that it should be useful, which, as I said at the beginning of my judgment, I take to mean useful rather than (though not necessarily exclusive of) being ornamental. I only add that I cannot myself see that the utility is confined to the inhabitants of North Tawton. In the course of the argument a car park was suggested. Whether that is a good illustration, it is not for me to say; but if it were a suitable memorial in other respects, its utility certainly would not be confined, I should say, to the inhabitants of North Tawton. That being so, I think once more it would be wrong to treat this formula as being merely synonymous with "for the benefit of the inhabitants of North Tawton" and, therefore, so construing it (but, as I think, illogically), giving to this formula the inherent quality which the other has been held to have and holding it to be a charitable gift. Once more I think it would be contrary to the tenor of the law, more particularly as it has been recently expounded, and it would be carrying this case beyond (as I think) any limits which authority justifies.

Those, then, are my reasons for the conclusion which I stated at the beginning of this judgment, that in my view DANCKWERTS, J., rightly decided the case, and I therefore would dismiss the appeal.

SELLERS, L.J.: I agree with my Lord's judgment and find nothing which I wish to add.

HARMAN, L.J.: I agree. At first sight, my mind recoiled from the possibility of this gift being held valid, and I have not seen any cause in the course of the hearing to resile from that view. One must first construe the will; and my view of that is that this testator, as my Lord has said, intended by his will to provide himself with a memorial in his native town. He added that the memorial to himself should also be useful. In other words, it must not consist of a statue of the testator as he lived, unless that would serve some useful purpose; but it was not primarily of the benefit to the inhabitants of North Tawton that he thought but of perpetuation of his own memory. So read, it seems to me apparent that the law cannot uphold the will, unless connected with the fabric of a church, without throwing over every kind of authority on this subject. A gift for public purposes in the parish of North Tawton, a gift for patriotic purposes, a gift for benevolent purposes, are all universally now held to be bad. How then shall it be held that a gift for useful purposes is good without upsetting the whole structure so elaborately built up and, one had hoped after *Diplock's* case (26), so firmly established? I cannot think that charity has anything to do with this bequest. As for establishing it without the crutch of charity, I applaud the orthodox sentiments expressed by ROXBURGH, J., in *Re Astor's Settlement Trusts* (27) and I think, as I think he did, that though one knows there have been

(24) [1947] 1 All E.R. 513 at p. 519; [1947] A.C. 447 at p. 456.

(25) In *Income Tax Special Purposes Comrs. v. Pemsel*, [1891] A.C. 531.

(26) *Chichester Diocesan Fund & Board of Finance (Incorporated) v. Simpson*, [1944] 2 All E.R. 60; [1944] A.C. 341.

(27) [1952] 1 All E.R. 1067; [1952] Ch. 534.

- A decisions at times which are not to be satisfactorily classified, but are perhaps merely occasions when Homer has nodded, at any rate these cases stand by themselves and ought not to be increased in number, nor indeed followed, except where the one is exactly like another. Whether it would be better that some authority now should say that those cases were wrongly decided, this perhaps is not the moment to consider. At any rate, I cannot think that a case of this kind, the case of providing outside a church an unspecified and unidentified memorial, is the kind of instance which should be allowed to add to those troublesome, anomalous and aberrant cases.

In my judgment, DANCKWERTS, J., came to the right conclusion, and this appeal ought to be dismissed.

Appeal dismissed.

- C Solicitors: *Biddle, Thorne, Welsford & Barnes*, agents for *G. D. Cann & Hallett*, Exeter (for the third defendant); *Peacock & Goddard* (for the plaintiff and the first and second defendants); *Treasury Solicitor*.

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

D

PONOKA-CALMAR OILS, LTD. AND ANOTHER v. EARL F. WAKEFIELD CO. AND OTHERS.

[PRIVY COUNCIL (Viscount Simonds, Lord Reid, Lord Radcliffe, Lord Tucker and Lord Denning), July 7, 8, 9, October 7, 1959.]

- E *Privy Council—Canada—Alberta—Lien—Mechanics' lien—Oil well—Meaning of "owner"—Receiver appointed to receive proceeds of sale of oil—Renewal statement not filed—Rights against funds in receiver's hands—Mechanics' Lien Act (Alberta) (R.S.A. 1942 c. 236), as amended, s. 2 (g), s. 6 (1), s. 24 (6), s. 43.*

- F In May, 1948, the third respondent, who was the registered owner of an estate in fee simple in certain lands in Alberta, granted a lease of all petroleum, natural gas, natural gasoline and related hydrocarbons to be found within, on or under the lands to five individuals. By the lease, the lessees were obliged to commence a well for petroleum and natural gas within two years from the date of the lease, and thereafter continuously to carry on the work until either petroleum, oil or gas should be struck in a quantity of at least thirty barrels per day or the lessees should be reasonably convinced that no such production would be reached. The lessees were entitled to assign the lease. On Sept. 10, 1949, the first respondents, on the instructions of H. and M., began to drill an oil well on the lands. The drilling was commenced on the authority of a permit issued before drilling to a limited company (the second respondents), which was not incorporated until Sept. 19, and in which the only shareholders were H. and M. On Sept. 19, 1949, under an agreement made between the first and second respondents, the first respondents undertook to drill a well for the production of oil and gas on the lands. Drilling was to commence on or before Sept. 15, and terms of remuneration for the first respondents were laid down, which included a deposit of \$40,000 by the second respondents with the P.T. Co., on which the first respondents could draw as the work progressed. On Sept. 21 the lessees from the third respondent assigned all their right, title and interest in and to the oil and gas rights in the lands to the first appellants, who assumed all the lessees' obligations to the third respondent under the lease. On Sept. 23 the first respondents, having by then drilled the well to the depth of 2,570 feet, told the second respondents that they would drill no further until they were paid for the work which they had done in accordance with the agreement of Sept. 19. On Sept. 24, by an agreement

I

(to which the first respondents were not parties) made between the two appellants, the second respondents, the P.T. Co. and H. and M., the appellants assigned all their rights in the lands and in the production of natural gas and hydrocarbons therefrom to the P.T. Co., and it was provided that all the proceeds of the wells drilled in the lands under the agreement were to be divided by the P.T. Co. in certain defined proportions between the two appellants and H. and M. and the second respondents. The agreement further provided that on or before Sept. 20, 1949, the second respondents would commence to drill or cause to be commenced to be drilled one well on the lands, and would thereafter continuously and diligently carry on or cause to be carried on the work of drilling and casing the well. The agreement recited that H. and M. had assisted in arranging for drilling the well. On Sept. 26 the first respondents received a cheque from the second respondents which was dishonoured; they received no further payment for work done under the agreement of Sept. 19. Between Sept. 23 and Oct. 14 the first respondents did not drill the well, though they were ready and able to do so and would have done so had they received payment under the agreement of Sept. 19. The agreed value of the work done and materials supplied by the first respondents (not including compensation for the period Sept. 23 to Oct. 16) was \$30,000. On Oct. 12, 1949, the first respondents filed a mechanics' lien under the Mechanics' Lien Act against the lands and on Oct. 18 filed a second similar lien. On Oct. 14 the first appellants served notice on the second respondents of their default under the agreement of Sept. 24 and that, if the default were not remedied in thirty days, the agreement should thereupon cease and determine. On Oct. 22 the first respondents plugged and abandoned the well. On Dec. 5, 1949, the first respondents filed their statement of claim under the Act, all the other parties being defendants, for a declaration that the liens were valid liens and other relief. In January, 1950, the well was deepened and subsequently was completed; it produced a considerable quantity of oil. On June 22, 1950, by order made in the action, the P.T. Co. was appointed receiver to operate the well until the settlement of the action, and to collect the receipts from sale of oil and other production; subject to making certain payments, the moneys so received were ordered to be paid into a special trust account to the credit of the action. The action did not come on for trial until more than six years had elapsed from the registration of the lien and no renewal statement had been filed as required by s. 24 (6)* of the Act.

Held: (i) the appellants were "owners" within s. 2† and s. 6 of the Mechanics' Lien Act, as extended by s. 43†, in relation to the drilling work done by the first respondents because, though the work was done prior to the agreement of Sept. 24, 1949, that agreement contemplated the doing of the work vis-à-vis the second respondents and, in effect, ratified the prior doing of the work; therefore, the liens filed by the first respondents against the lands had been validly filed (see p. 577, letter C, post).

(ii) although the liens had ceased to exist by reason of s. 24 (6), the first respondents (as the former lienholders) had the same rights against the fund (the proceeds of the sale of oil etc. produced by the well) as they had against the land itself, including the oil and gas whether severed or not (see p. 579, letters A, B, and G, post).

Appeal dismissed.

[**Editorial Note.** The Mechanics' Lien Act as amended is now contained in the Mechanics' Lien Act (R.S.A. 1955 c. 197).]

* For the terms of s. 24 (6), see p. 578, letter I, post.

† The relevant terms of s. 2 and s. 43 are set out at p. 575, letters H and I, post.

A Appeal.

Appeal by special leave by Ponoka-Calmar Oils, Ltd. and American Leduc Petroleums, Ltd. from a judgment of the Supreme Court of Canada (KERWIN, C.J., RAND, LOCKE, FAUTEUX and ABBOTT, J.J.), dated Apr. 22, 1958, reversing in part a judgment of the Appellate Division of the Supreme Court of Alberta (FORD, C.J.A., MACDONALD, MCBRIDE, PORTER and JOHNSON, J.J.A.), dated June 25, 1957, allowing an appeal from a judgment of the Trial Division of the Supreme Court of Alberta (McLAURIN, C.J.T.D.), dated Mar. 14, 1956. McLAURIN, C.J.T.D., held that the first respondents, Earl F. Wakefield Co., had a good, valid, binding and subsisting lien under the Alberta Mechanics' Lien Act against all mines and minerals within, on or under certain lands in the province of Alberta, and the first respondents were held entitled to recover \$30,000 from funds held by a receiver appointed by the court. The other eight respondents were Oil City Petroleums (Leduc), Ltd., Harry Szpilak, Kaspar Haliva, Alvin M. Davis, Peter Matmichuk, Alvin M. Berg, Jacob B. Gauf and Alex John Pyrek. The facts are set out in the judgment of the Board.

W. G. Morrow, Q.C. (of the Canadian Bar), *J. G. Le Quesne* and *W. A. Stevenson* (of the Canadian Bar) for the appellants.

D *J. V. H. Milvain, Q.C.*, *R. A. Mackimmie, Q.C.*, *J. H. Laycraft* (all of the Canadian Bar), *W. P. Grieve* and *D. A. L. Smout* for the first respondents.

The other respondents did not appear and were not represented.

VISCOUNT SIMONDS: This appeal from a judgment of the Supreme Court of Canada raises questions of some difficulty on the true construction of the Mechanics' Lien Act and, in particular, on its application, where the lien alleged to arise under it attaches not only to certain land including the oil and gas therein but also to the oil and gas when severed, and where it is sought to enforce it against a fund representing the proceeds of sale of such oil and gas which have been realised by a receiver appointed by the court under the Act. On these questions there has been a difference of judicial opinion in the courts of Canada.

The facts can be shortly stated. They were agreed at the trial of the action, out of which this appeal arises, before the Court of First Instance in Alberta. What inferences can be drawn from such facts will be considered later. At all material times the third respondent, Harry Szpilak, was the registered owner of an estate in fee simple in certain lands in Alberta, eighty acres in extent, subject to a reservation in favour of the Canadian Pacific Railway Co. of all coal. On May 31, 1948, he granted to five named individuals (including one Duitman and one Morrisroe) a lease of all petroleum, natural gas, natural gasoline and related hydrocarbons to be found within, on, or under the said land. By the lease, the lessees were obliged to commence a well for petroleum and natural gas within two years from the date of the lease, and thereafter continuously to carry on the work until either petroleum, oil or gas should be struck in a quantity of at least thirty barrels per day or the lessees should be reasonably convinced that no such production would be reached. The lessees were entitled to assign the lease. On Sept. 10, 1949, the first respondents, Earl F. Wakefield Co., on the instructions of one Harding and one McMullen, began to drill an oil well on the said lands. It had, by Sept. 23, reached a depth of 2,570 feet. The drilling was commenced on the authority of a permit issued before drilling to the second respondents, Oil City Petroleums (Leduc), Ltd., which was in fact not incorporated until Sept. 19, the only shareholders being Harding and McMullen, of whom the former was treasurer, and the latter secretary, of the company. On Sept. 19, 1949, an agreement was made between the first respondents (described as "contractor") and the second respondents (described as "owner"), whereby the first respondents undertook to drill a well for the production of oil and gas on the said lands. Drilling was to commence on or before Sept. 15, and the first respondents were to be remunerated

by the payment of \$50,000 for the work therein mentioned and of certain other sums. It was further provided that the first respondents were to receive \$10,000 when the well was spudded and other periodic payments, and that the second respondents should deposit with the Prudential Trust Co., Ltd. a sum of \$40,000 on which the first respondents could draw as the work progressed. On Sept. 21 the lessees from the third respondent (1) assigned to the first appellants, Ponoka-Calmar Oils, Ltd., all their right, title and interest in and to the oil and gas rights in the said lands and the latter assumed all the obligations of the lessees to the third respondent under the lease. On Sept. 23 the first respondents, having by then drilled the well to the depth of 2,570 feet, told the second respondents they would drill no further until they were paid for the work which they had done in accordance with the agreement of Sept. 19. On the next day an agreement was made between the two appellants (described as "the owners") of the first part, the second respondents (described as "the operators") of the second part, the Prudential Trust Co., Ltd. of the third part and Harding and McMullen of the fourth part. Thereby the appellants assigned to the Trust Co. all their rights in the said lands and other lands and in the production of natural gas and hydrocarbons therefrom, and it was thereby provided that all the gross proceeds of wells drilled in the said and other lands under the said agreement were to be divided by the Trust Co., subject as therein mentioned, in certain defined proportions between the first and second appellants and Harding and McMullen and the second respondents. The agreement, which recited (*inter alia*) that the appellants desired to have the second respondents drill or have drilled wells for petroleum or natural gas on the said lands and that Harding and McMullen had assisted in arranging for the drilling of the said wells, provided (*inter alia*) that, on or before Sept. 20, 1949, the second respondents would commence to drill or cause to be commenced to be drilled one well on the said lands, and would thereafter continuously and diligently carry on or cause to be carried on the work of drilling and casing such well together with penalties in default of their doing so. On Sept. 26 the first respondents received from the second respondents a cheque for \$3,000 which was dishonoured. They have received no other payment for work done and services rendered under the agreement of Sept. 19. On Oct. 14 the first appellants served notice on the second respondents of their default under the agreement of Sept. 24, and that, if such default was not remedied within thirty days, the said agreement should thereupon cease and determine. On Oct. 22 the first respondents, having applied for and received a permit from the Petroleum and Natural Gas Conservation Board of the Province of Alberta, plugged and abandoned the said well. Between Sept. 23 and Oct. 14 the first respondents did not drill the well, though they were ready, willing and able to do so, and would have done so had they received the payment under the agreement of Sept. 19.

During the month of January, 1950, the well drilled by the first respondents was deepened and was subsequently completed and has produced a considerable quantity of oil. The work and services done and rendered by the first respondents were competent and skilful and for the benefit of the appellants and other respondents. The agreed value of the work done by the first respondents and the material supplied by them (not including compensation for the period from Sept. 23 to Oct. 16, 1949) was \$30,000. The agreed value of day work was \$14,075 and of material purchased by the first respondents for account of the second respondents was \$1,670.62. There was no agreement between the first respondents and the appellants or any of the other respondents that the first respondents should not be entitled to a mechanics' lien under the provisions of the Act. On Oct. 12, 1949, the first respondents filed a mechanics' lien under the Act against the said lands for the sum of \$28,849.33, and on Oct. 18 a further

(1) The third respondent was the owner, Harry Szpilak.

- A similar lien for the sum of \$36,896.29. On Dec. 5, 1949, the first respondents filed their statement of claim under the Act, all the other parties to this appeal being defendants, and thereby claimed a declaration that the said liens were good, valid and subsisting liens, judgment against the second respondents for \$65,745.62 and the appointment of a receiver pursuant to s. 36 of the Act. On June 22, 1950, an order in the action was made by SHEPHERD, J. It was
- B made on the application of the first appellants in the presence of the first respondents and with their assent. It recited that it appeared that a receiver should be appointed to preserve the property in the oil well therein described forming the subject-matter of that action and to collect the receipts from the said well and to otherwise manage and operate the said well until the settlement of the action, and it was thereby ordered that the Prudential Trust Co. should be
- C appointed receiver to collect, get in and receive all moneys presently receivable or which might become receivable from the sale of oil or other productions from the said well and the receiver was thereby authorised to pay out from any moneys which might be received from such sale the costs of production and of operating the well. Other directions were thereby given including a direction that the receiver (who was there called "the said trustee") should pay out
- D from his receipts to the respondent Szpilak the gross royalty of $12\frac{1}{2}$ per cent. reserved to him under the lease, and it was ordered that, except for the payment of the said operating expenses and royalty, the receiver should pay all other moneys received thereunder into a special trust account to the credit of the action, subject to further order. The said receiver duly entered on its duties and collected the moneys receivable from the sale of oil and other products
- E and, subject to the payments that he was directed to make thereout, paid the said moneys into a special fund to await further order. It is the destination of this fund which is the subject of the present dispute, and before further examining that question it is necessary to refer in some detail to some provisions of the Mechanics' Lien Act.

- For the purpose of determining the first question that appears to arise, viz.,
- F whether the first respondents validly filed a lien or liens against the said lands, only a few sections of the Act need be considered. Briefly, the question is whether the work done by the first respondents in respect of which the lien is claimed was done on behalf of any "owner, contractor or subcontractor" or of "any person having any estate interest or right in the oil or gas in place or in the oil or gas when severed" within the meaning of the Act (2) or with the
- G privity or consent of any such owner. Section 2 defines a "contractor" as a person contracting with or employed by an owner or his agent, to do work or perform services on or in respect of, or to place or furnish materials to be used for, any improvement. "Improvement" includes a gas, oil or other well. "Owner" is defined (3) as extending to

- H "every person . . . having any estate or interest in land, at whose request, express or implied, and,—(i) upon whose credit; or (ii) upon whose behalf; or (iii) with whose privity and consent; or (iv) for whose direct benefit,—any contract work is done and all persons claiming under him . . . whose rights are acquired after the commencement of the work."

This definition is extended by s. 43 to include

- I "every person having any estate, interest or right in the oil or gas in place or in the oil or gas when severed, notwithstanding that such person has not requested the contract work to be done, is only indirectly benefited thereby and has had no dealing or contractual relationship with the contractor or person claiming the lien"

with the proviso that where the oil or gas is held in fee simple, the holder of an interest in the first royalty in the oil or gas up to twenty per cent. thereof shall

not by reason of that section be deemed to be an owner. Section 6 (1) provides that unless he signs an express agreement to the contrary any person who performs any work or service on or in respect of, or places or furnishes any materials to be used in the making of any improvement for any owner shall by virtue thereof have a lien for so much of the price of the work, service or materials as remains due to him in the improvement and the land occupied or enjoyed therewith, or on or in respect of which the work or service is performed, or on which the materials are to be used. Section 7 provides that the lien shall arise at the date of the commencement of the work, or at the date of the first delivery of material. Section 19 provides for the method of registration. Section 44 provides that the lien provided under s. 6 shall not only attach to the land, including the oil and gas therein, but also to the oil and gas when severed, and s. 45 that all interests in the oil or gas under any lease, mortgage or agreement for sale relating to the oil or gas in excess of the first royalty up to twenty per cent. shall be subject to the lien in all respects. Other sections of the Act will be referred to in connexion with the other questions that arise.

On this first question there has been a difference of judicial opinion. The learned Chief Justice of the Trial Division of the Supreme Court of Alberta (McLAURIN, C.J.T.D.) held (4) that the first respondents had a valid lien for \$30,000, and ordered that that sum should be paid out of the funds held by the receiver. He did not give a reasoned judgment. In the Appellate Division of the Supreme Court, it was held by FORD, C.J.A., and MACDONALD and PORTER, JJ.A., that, from beginning to end of the drilling, the first respondents had not done any work for the owner as defined by the Act, while McBRIDE and JOHNSON, JJ.A., were content to assume the contrary, but for other reasons disallowed the first respondents' claim. On appeal to the Supreme Court of Canada, the learned judges of that court were unanimous in determining that the first appellants were to be regarded as owners within the meaning of the Act. In reaching this conclusion LOCKE, J. (with whom the Chief Justice (KERWIN, C.J.) and FAUTEUX, J., concurred) and to some extent RAND, J. (with whom also the Chief Justice and ABBOTT, J., concurred), relied on facts to some of which attention has been called, in particular that the drilling agreement of Sept. 19 required the drilling to commence on Sept. 15, that the agreement of Sept. 24 specified the date for commencement as four days earlier, that Harding and McMullen were intimately connected with the appellants, and other circumstances to which reference is made in their judgment. These facts led LOCKE, J., to infer (5) that

"Harding and McMullen had been authorised, either by the individual lessees from Harry Szpilak [the third respondent] or on behalf of the Ponoka-Calmar Co. [the first appellants] to request the appellant [the first respondents] to do the work, and, further, that the drilling done by the appellant from Sept. 10 onward was done with the privity and consent of the said lessees and of the said company."

This conclusion was challenged by the present appellants on the ground that such an inference of fact was not to be found in the agreed statement of facts and could not properly be drawn. If it was a fact, the first respondents should, it was said, have required the appellants to agree to its inclusion in the statement: they had not done so and it was not to be assumed that agreement would have been reached.

Their Lordships are not satisfied that the inferences drawn by LOCKE, J., could not fairly be drawn, but they do not think it necessary to determine this question. For in the judgment of RAND, J., there is what appears to them

(4) This action was heard on Nov. 2, 1955, and the hearing was resumed Mar. 14, 1956, judgment being entered on Mar. 16, 1956. All these dates were more than six years after the date of registration of the liens; cf. p. 574, letter I, to p. 575, letter A, ante.

(5) [1958] S.C.R. at p. 376.

A an alternative and decisive way of dealing with the question. That learned judge, after citing s. 43 of the Act, proceeded (6):

“The drilling work prior to the date of the contract [i.e., Sept. 19] having been expressly contemplated in the agreement of Sept. 24, these two companies [i.e., the present appellants] vis-à-vis Oil City [the second respondents] have ratified and bound themselves to the latter's recognition and inclusion of the work done previously to the 15th. Section 43 in its exceptional terms was undoubtedly passed to meet just such situations as are shown here, i.e., conditions brought about by the urgency to exploit the resource in which formal agreements could not keep pace with action and only by relation back were the rights of the parties intended to be determined.”

B
C In his opinion, therefore, the appellants clearly were “owners” within s. 2 and s. 6 as extended by s. 43. Their Lordships agree with this statement, which no elaboration can improve. This question must, therefore, be decided in favour of the first respondents.

It remains to determine whether, on the assumption that valid liens were created in favour of the first respondents, they were enforceable in the manner and to the extent directed by McLaurin, C.J. The consideration of this question requires the statement of other sections of the Act. Section 19 and the following sections prescribe the manner in which, and the time within which, liens must be registered. Section 24 provides for the expiry and discharge of a lien and must, in view of the opinion of McBride and Johnson, J.J.A., in the Appellate Division of the Supreme Court of Alberta and of the contention before the Board be stated in some detail. By sub-s. (1), it is enacted that every lien which is not registered shall absolutely cease to exist on the expiration of the time thereinbefore limited for the registration thereof. Subsection (2) provides for the cessation of a lien on notice. Subsection (6) is more relevant. It provides that every registered lien, whether a certificate of *lis pendens* has been filed or not, shall absolutely cease to exist on the expiration of six years from the date of registration of the lien unless before the expiration of that period and not more than two months before its expiration the lienholder, his assignee, agent or any person claiming through or under him files in the office of the Registrar of Land Titles a statement verified by affidavit setting out the interest of the lienholder and the amount still owing to him for principal and interest, which statement might be in Form 7 in the Schedule or to the like effect with such variations as the circumstances might require.

F
G Section 26 is significant. It provides (i) that, on application by originating notice, a judge having jurisdiction may allow security for or payment into court of the amount of the claim and such costs as he may think fit, and may thereupon order that the registration of the lien be vacated, and (ii) that any money paid into court shall take the place of the property discharged and be subject to the claim of all persons for liens to the same extent as if the money was realised by a sale of the property in an action to enforce the lien.

H
I Sections 30 to 37 deal elaborately with the enforcement of a claim for a lien. Proceedings to enforce a lien may be commenced either (as in the present case) by a statement of claim, or by originating notice, and in either case by the filing of *lis pendens* in the prescribed form. Service of the claim or notice is to be made on all persons who by the records of the land titles office appear to have any interest in the land in question, and such other persons as the judge may direct. All lienholders served with the statement of claim or notice are to be deemed parties to the proceedings and any lienholder failing to appear at the hearing after proof of notice duly served on him thereby loses his lien. Section 35 provides that on the hearing of the application the judge shall decide all questions which arise therein or which are necessary to be tried in order to completely

dispose of the action and to adjust the rights and liabilities of all persons concerned. He may (inter alia) order that the land charged with the lien be sold and, when a sale is held, must direct to whom the money in court shall be paid, and where a claimant fails to establish a valid lien may make a personal order against any party to the proceedings for such sum as may appear to be due to him and which he might recover in an action against such party.

By s. 36, the judge is empowered at any time prior to the sale of the property, on the application of any lienholder, to appoint a receiver to take charge of the property and rent it on such terms and conditions as he thinks fit and, after making such deductions as thereby prescribed, to apply the balance of the rents as directed by the judge. By s. 47 (where the improvement consisted of an oil or gas well), the judge might in appointing a receiver under s. 36 authorise him to take charge of the well and operate it and sell the production therefrom or, in the alternative, to take the oil and gas when produced and saved and sell the same, and receive and pay into court the proceeds of the gas and oil when sold.

Finally, it was by s. 37 (1) provided that all moneys realised by proceedings under the Act, including as therein mentioned, should be applied and distributed in the following order, that is to say, in paying (a) the costs of all lienholders of and incidental to the proceedings, and of registering and proving the liens; (b) six weeks' wages (if so much be owing) of all labourers employed by the owner, contractor or subcontractor; (c) the several amounts owing to other lienholders other than the contractor; (d) the amount owing to the contractor; sub-s. (2) provided for the methods of distribution between the lienholders inter se, and sub-s. (3) for the payment of the balance to the owners or other persons legally entitled thereto.

Their Lordships can now deal with the contention which found favour with two of the learned judges of the Appellate Division of the Supreme Court of Alberta, viz., that the two liens which had been registered on Oct. 12 and 19, 1949, absolutely ceased to exist (7) on Oct. 13 and 20, 1955, by virtue of s. 24 (6) of the Act, and that the lienholders had no longer any rights by virtue of their liens against the fund representing the proceeds of sale of the oil. On this question, their Lordships are so fully in agreement with the judgment given by RAND, J., in the Supreme Court of Canada that they can state their own opinion shortly. The object of a mechanics' lien is to give a security to those who have by work or services effected an improvement on land by way of a charge on that land. Its registration is for the purpose of protecting the title to an estate or interest in land which is created by the lien. It is thus part of the law affecting title to land, as the prescribed form of claim for registration clearly indicates. The extension of the lien by s. 44 from the land "including the oil and gas therein" to the oil and gas when severed, creates a new situation. It is not necessary to consider what are the rights of the parties so long as the oil and gas, though severed, remain on the land. That is not the position here. The relevant question is what are their rights when the oil and gas, formerly subject to the lien, pass into the hands of a receiver appointed by the court and are sold by him and the proceeds paid into a fund to await the further order of the

(7) No statement had been filed to comply with s. 24 (6) of the Mechanics' Lien Act, which provided as follows:—"every registered lien, whether a certificate of *lis pendens* has been filed or not, shall absolutely cease to exist on the expiration of six years from the date of registration of lien unless before the expiration of that period and not more than two months before its expiration the lienholder, his assignee, agent or any person claiming through or under him, files in the office of the Registrar of Land Titles a statement verified by affidavit setting out the interests of the lienholder and the amount still owing for principal and interest which statement may be in Form 7 in the Schedule or to the like effect with such variations as the circumstances may require."

The six years' period under s. 24 (6) had expired before the date of the trial of the action; see note (4), p. 576, letter I, ante. The point under s. 24 (6) was left out of consideration before the trial judge.

- A court. In the first place, it is clear that the original lien can no longer subsist; it is equally clear in the second place that there is no longer anything, so far as the oil and gas thus sold are concerned, in respect of which a new lien can be registered or an old lien renewed. But from this it does not follow that the lienholders have no rights against the fund representing the proceeds of sale. It may not be correct to say that a new charge against the fund is substituted for the old
- B lien—though the language of s. 26 (2) goes far to justify it. But this is a matter of words. The scheme of the Act is that, where land subject to a lien is sold in an action to enforce a claim, the lienholder is not to be prejudiced by the fact of sale and, subject always to prior claims, which may now include the costs and expenses arising out of the action, has the same rights as he would have had against the land itself including the oil and gas whether severed or not.
- C It may be pointed out that, if it were otherwise, the action of the lienholder in obtaining the appointment of a receiver with a view to the preservation of the property subject to the lien would or might result in the loss of the rights which the lien was intended to preserve. In the present case, it appears that the application for a receiver was made not by the lienholder but by the owner. But it was made with the consent of the former, and it is not to be
- D supposed that his rights were thereby prejudiced. The appointment is contemplated by the Act as being made, and was in fact made, in an action by the lienholder to enforce his claim and is part of the statutory machinery for doing so. It further appears to their Lordships that any doubt that might otherwise exist is set at rest by the provisions of s. 37 of the Act, which provides for the application of moneys “realised by proceedings under this Act”. It is clear
- E that the moneys paid into court or into a special fund by the receiver are moneys “realised by proceedings under this Act”. If so, they must be applied and distributed in the prescribed order to the persons therein named. But it was urged that the lienholders therein mentioned meant only those persons who had subsisting liens on the land at the date of distribution. This contention cannot be accepted. For the land subject to the lien had been sold and, under s. 26 (2),
- F the lienholder was relegated to the claim to a lien “to the same extent as if the money was realised by a sale of the property in an action to enforce the lien”. It follows that the lienholders mentioned in s. 37 are those persons who had at the time of sale a lien on the property sold and brought their action to enforce it. The only consistent interpretation of the Act is to treat the proceeds of sale of oil and gas realised by the receiver in the same way as the proceeds
- G of sale of the land itself. This may be described as creating a charge on the fund; but equally it is the method which a court administering a fund under its control must employ in order to preserve and give effect to the rights of the parties and it is that principle that is embodied in s. 37.
- H For these reasons, their Lordships are of opinion that the judgment of the Supreme Court of Canada was correct. They will, therefore, humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the costs of the appeal.

Appeal dismissed.

Solicitors: *Charles Russell & Co.* (for the appellants); *Lawrence Jones & Co.* (for the first respondents).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

WINSTONE v. WINSTONE.

[VACATION COURT (Winn, J.), September 17, 1959.]

*Divorce—Petition—Petition within three years of marriage—Leave to present—
Injunction to restrain husband from molesting wife—Jurisdiction of court
in proceedings begun by originating summons for leave to present petition.*

*Injunction—Husband and wife—Restraining husband from molesting wife—
Wife's application for injunction pending leave to present petition for
dissolution of marriage within three years—Jurisdiction of court to entertain.*

In proceedings initiated by originating summons by the wife for leave to present a petition for divorce within three years of the celebration of the marriage, the High Court has no jurisdiction to grant an application for an injunction restraining the husband from molesting the wife in the matrimonial home, since the matrimonial suit, in which the whole matrimonial relations of the parties will be before the court, will not begin until a petition is filed and the injunction falls outside the ambit of the proceedings by originating summons which are merely for leave to present a petition.

[As to injunctions in divorce proceedings, see 12 HALSBURY'S LAWS (3rd Edn.) 477, para. 1067; and for cases on the subject, see 27 DIGEST (Repl.) 683, 6518-6528.]

Cases referred to:

Morgan v. Hart, [1914] 2 K.B. 183; 83 L.J.K.B. 782; 110 L.T. 611; 21 Digest 666, 2463.

Silverstone v. Silverstone, [1953] 1 All E.R. 556; [1953] P. 174; [1953] 2 W.L.R. 513; 3rd Digest Supp.

Motion.

The wife applied by originating summons for leave to present a petition for dissolution of her marriage within three years after the date on which it was celebrated and on July 28, 1959, the application was adjourned by STEVENSON, J. The wife issued a summons in the proceedings calling on her husband to show cause why he should not be restrained from interfering with or molesting the wife in her occupation of the matrimonial home, flat No. 7, Cleveland Gardens, Lancaster Gate, W.2, until the hearing of the originating summons.

D. S. Hunter for the wife.

D. A. Fairweather for the husband.

WINN, J.: In this case a serious question arises whether or not, sitting as I am in the Vacation Court acting for the Divorce Division, I have jurisdiction to entertain the application for an injunction made by the wife. The proceedings today arise within proceedings which are pending in the Divorce Court. The proceedings which are pending in that court, and which now stand adjourned by STEVENSON, J., on July 28 of this year, were initiated by an originating summons seeking the leave of the court to present a petition for dissolution of the marriage within three years after the date of its celebration. The wife desiring to present the petition is Mrs. Myrtle Winstone, the husband being Eric Henry Winstone; the wife, as she was required to do by s. 2 of the Matrimonial Causes Act, 1950, has sought the leave of the court to present that petition. Section 2 (1) provides:

"No petition for divorce shall be presented to the court unless at the date of the presentation of the petition three years have passed since the date of the marriage: Provided that a judge of the court may, upon application being made to him in accordance with rules of court, allow a petition to be presented before three years have passed on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent..."

- A There are other provisos to that subsection. Rule 2 of the Matrimonial Causes Rules, 1957, prescribes how an application to present a petition within three years of the date of the marriage must be made, and certain procedure must be followed as prescribed by the rule. That section and those rules clearly show that at that stage of the matter Parliament and the rules committee both intended that the court should lean in favour of any possibility of reconciliation between persons who have been married to one another for less than three years.

- B The wife, being unable to present a petition for divorce, though she is able to present a petition for judicial separation, and waiting as she must at the moment wait, for an appointment either before STEVENSON, J., or, it is suggested, before me, for the determination of the question whether she should have leave to present her petition within three years, seeks the assistance of the court. She would contend if the matter were gone into that protection is needed by her against the conduct of her husband by way of an injunction in the pending proceedings initiated by the originating summons.

- C The question which troubles me, and the question on which I invited counsel to help me, is whether, before the filing of a petition for divorce, the court has become so seised of the control of the matrimonial relations of these two parties that it has jurisdiction to grant such relief as is asked for today. It is said by counsel for the wife that, according to RAYDEN ON DIVORCE, which is the accepted text-book authority in these matters (7th Edn. at p. 435):

- “When a matrimonial suit is pending . . . the court will restrain one spouse from forcing his or her society upon the other, and from other acts of molestation”;

- E It is plain, however, under the Matrimonial Causes Rules, 1957, that a matrimonial cause is commenced by the filing of a petition which is before the court. That means that a matrimonial suit cannot be considered to have been commenced until a petition is filed under the rules. By analogy, it is plain that no action is pending in the Queen's Bench Division until a writ is at least issued; therefore, in the special circumstances where an individual is required by some statutory provision to obtain leave before he issues a writ, that individual cannot commence and cannot be regarded as having commenced an action until he has with the leave of the court issued a writ.

- F I have been referred by counsel for the wife to s. 45 of the Supreme Court of Judicature (Consolidation) Act, 1925, which provides that “The High Court may grant . . . an injunction . . . in all cases in which it appears . . . convenient so to do”; and I have also been referred to the words of BUCKLEY, L.J., with reference to a predecessor statute, in *Morgan v. Hart* (1). In my view those words are to be construed and understood as limited to the granting of an injunction ancillary to and comprised within the scope of the substantive relief sought in the proceedings in which the application for the injunction is made.
- H I find myself unable to accede to the cogent and helpful submissions of Mr. Hunter that, once any proceedings have been competently and effectively commenced, as these proceedings for leave to file a petition within three years have been commenced, an injunction may be granted for relief on a subject-matter falling outside the ambit, scope and effect of the proceedings in which the injunction is sought. Here the pending proceedings have as their only object the obtaining of the leave of the court to file a petition within three years. Once that leave is obtained, then of course the whole matrimonial relations of the parties will be the subject-matter of any petition which is filed.

I am unable, and I say this with regret, to accede to the submission that the Divorce Court has jurisdiction arising from the pendency of the originating summons enabling it to make orders affecting the general matrimonial relations of the parties. I regret that I feel myself compelled to take that view on this

preliminary issue, because, if it had been within my power to do so, I would have desired to follow and apply what PEARCE, J., declared in *Silverstone v. Silverstone* (2) in the present case; but I do not feel that it is within my power to do so. That judgment sets out the reasons why the Divorce Court should exercise any jurisdiction it has to prevent one party to a marriage from adversely influencing the approach of the other party to the court, or unreasonably interfering in the living conditions of the other party, pending the determination of the matrimonial dispute between them. I find myself regretfully compelled to take the view that that jurisdiction lies outside the jurisdiction relating to obtaining the leave of the court to file a petition within three years. I think that, just as Parliament enacted that without obtaining the leave of the court a wife not yet married for three years could not commence proceedings for dissolution of the marriage, so it is part of the intention of Parliament that the Divorce Court should not, before such leave has been obtained, entertain applications of this kind in less time than that indicated, save in the case of a petition for judicial separation which is not affected by that parliamentary prohibition, and it may be in proceedings under s. 23 of the Married Women (Maintenance) Act, 1949, where periodical payments are sought.

My conclusion on this preliminary issue is that, whilst it may well be regrettable, and it may well be that the contrary conclusion might have been the better one in the interests of the parties, I cannot accept jurisdiction to entertain this application for an injunction.

Counsel for the wife has suggested that the originating summons should be treated as adjourned to me and that I should proceed to consider first that summons and then the application for an injunction. I am unable to accede to that, for a double reason. I do not think that jurisdiction to grant this injunction arises or can be competently invoked until a petition for dissolution has been filed, or, of course, a petition for judicial separation. The second reason is that I feel it would be an unwarrantable interference with the control of this matter by STEVENSON, J., and that it would be most irregular for me to consider the summons today when the relevant evidentiary material may not all be assembled. The application is dismissed.

Application dismissed.

Solicitors: *Kenneth Brown, Baker, Baker* (for the wife); *A. E. Hamlin, Brown, Veale & Twyford* (for the husband).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

A SCHNEIDER v. DAWSON.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Ashworth and Hinchcliffe, JJ.),
October 6, 7, 22, 1959.]

*Customs—Fraudulent evasion of duty—"Dealing with" uncustomed goods—
Keeping uncustomed goods—Misuse of goods imported duty free for American
troops—Forfeiture—Time at which duty becomes payable—Customs and
Excise Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 44), s. 304, s. 257.*

Customs duties attach to goods when they are brought into the country and, where duty is not then paid because the goods are allowed in free of duty for the use of privileged persons, the duty becomes leviable later if and when the goods pass into other than a privileged person's hands.

A.-G. v. Thornton (1824), M'Cle. 600 and *M'Queen v. M'Cann* (1945 S.C. (J.) 151) applied.

S. had bought fifty cigars from H., an American serviceman, and four bottles of spirits from P., another American serviceman. Subsequently S. again met H. and 2,420 cigars were transferred by H. to S.'s car to be looked after until the following day. S. decided to buy one hundred of the cigars and to return 2,320. S. knew that the goods had been allowed into the country free of duty for consumption by American servicemen, and that H. intended to sell the 2,320 cigars. No duty was paid on the goods. S. was charged under s. 304* of the Customs and Excise Act, 1952, with two offences of fraudulent evasion of duty, viz., one offence of keeping forty-five (part of the fifty) cigars and the four bottles of spirits with such intent, and the other offence of dealing with the 2,420 cigars with such intent. Under s. 257† of the Act of 1952, if goods were allowed to be delivered without payment of customs duty on a condition that was not observed the goods were liable to forfeiture.

Held: (i) the charge under s. 304 of the Customs and Excise Act, 1952, lay notwithstanding the specific provision in s. 257 for forfeiture of the goods, since the latter enactment did not, as a matter of construction, provide the sole penalty for misuse of the goods.

(ii) in accordance with the principles stated at letter B, above, customs duties became payable on the 2,420 cigars when they were put into S.'s car and, S.'s conduct in relation to these cigars having amounted to a dealing with them within s. 304 of the Act of 1952, he had been rightly convicted of the second charge.

Appeal dismissed.

[For the Customs and Excise Act, 1952, s. 304, s. 257, see 32 HALSBURY'S STATUTES (2nd Edn.) 892, 854.]

Cases referred to:

A.-G. v. Thornton, (1824), M'Cle. 600; 13 Price, 805; 2 State Tr. N.S. 129; 147 E.R. 1161; 39 Digest 234, 102.

M'Queen v. M'Cann, 1945 S.C. (J.) 151; 2nd Digest Supp.

R. v. Cohen, [1951] 1 All E.R. 203; [1951] 1 K.B. 505; 115 J.P. 91; 2nd Digest Supp.

Sayce v. Coupe, [1952] 2 All E.R. 715; [1953] 1 Q.B. 1; 116 J.P. 552; 3rd Digest Supp.

* By s. 304: "Without prejudice to any other provision of this Act, if any person—
(a) knowingly and with intent to defraud Her Majesty of any duty payable thereon . . .
is in any way concerned in . . . keeping . . . or in any manner dealing with any goods . . .
which are chargeable with a duty which has not been paid . . . he may be detained and, save
where, in the case of an offence in connexion with a prohibition or restriction, a penalty
is expressly provided for that offence by the enactment . . . imposing the prohibition or
restriction, shall be liable to a penalty of . . . or to imprisonment . . ."

† The relevant part of this section is printed at p. 585, letter D, post.

Case Stated.

This was an appeal by Case Stated from convictions of the appellant of two offences by R. Geraint Rees, Esq., a metropolitan magistrate sitting at Old Street Magistrates' Court, on Jan. 31, 1959. The facts are stated in the judgment.

J. A. S. Hall for the appellant.

J. R. Cumming-Bruce for the respondent, the prosecutor.

Cur. adv. vult.

Oct. 22. **ASHWORTH, J.**, read the judgment of the court: This is an appeal by way of Case Stated from a decision of Mr. R. Geraint Rees, one of the metropolitan magistrates, before whom the appellant was charged in respect of two offences under s. 304 of the Customs and Excise Act, 1952. In the first charge it was alleged that at his house at 37, Cephas Avenue, E.1, he knowingly and with intent to defraud Her Majesty of the duty payable thereon was concerned in keeping certain goods, namely, forty-five cigars and four bottles of spirits which were chargeable with a duty which had not been paid. In the second charge it was alleged that in Spelman Street, E.1, where his business premises were situate, he knowingly and with intent to defraud Her Majesty of the duty payable thereon was concerned in dealing with certain goods, namely, 2,420 cigars which were chargeable with a duty which had not been paid.

So far as the first charge is concerned, the forty-five cigars formed part of a parcel of fifty cigars which the appellant bought from an American serviceman named Hyme for the sum of £2. The appellant was introduced to Hyme by Miss McLean a friend of one of his employees, who told the appellant that an American serviceman with whom she was acquainted had some cigars for sale. The four bottles of spirits were bought by the appellant from another American serviceman named Peace with whom he was on friendly terms.

About a month after the purchase of the parcel of fifty cigars the appellant asked Miss McLean if she could arrange for him to obtain one or two further boxes of cigars. As a result of this request the appellant met Hyme, again at Miss McLean's house, at about 9 p.m. on Dec. 4, 1958. Hyme was a passenger in another American's car and he asked the appellant to look after a large quantity of cigars until he could collect them on the following day. The appellant agreed and it was arranged that the appellant was to extract whatever number of cigars he required and that Hyme would collect the remainder from the appellant's premises in Spelman Street on the following day. Hyme then transferred 2,420 cigars (which were the subject of the second charge) to the appellant's car. Hyme told the appellant that he intended to sell these cigars which he had bought from his mates. The appellant decided to buy one hundred cigars as a Christmas present for a customer and to return the balance of 2,320 cigars to Hyme. He did not succeed in delivering the hundred cigars and on his return to his business premises he was met by the police who discovered the cigars. On being questioned he admitted that he knew that United States airmen received a ration of spirits and cigars imported free of duty, and at the hearing before the magistrate he further admitted that he knew that they were not supposed to sell these cigars but did not think that this was important. In the Case Stated it is further found that no duty had been paid on any of the goods the subject of the charges and that such goods had been admitted into the United Kingdom free of duty for the use of United States Armed Forces under an agreement between the British and American governments. Moreover, in the course of expressing his opinion (in the Case Stated) the learned magistrate said that in the case of each charge the appellant knew that the goods were chargeable with duty and, in regard to the 2,420 cigars, that such duty had not been paid.

This is not the first case in which this court has had to consider the effect in regard to customs duty of a sale or disposal by an American serviceman of goods which have been imported into the United Kingdom duty free for the use

A of American forces stationed here. As LORD GODDARD, C.J., said in *Sayce v. Coupe* (1):

B “The importance of the case is this: it is well known that at the present time when large numbers of American soldiers and airmen are in this country, by an arrangement which Her Majesty’s Government have made with the American Government, dutiable articles are allowed to be imported into this country for the use of the American troops without payment of duty. The result is that there are a good many sales of duty-free articles taking place surreptitiously . . . with the consequence that this country loses the benefit of the customs duty payable . . .”

C In the course of his able argument on behalf of the appellant *Mr. Hall* contended that if goods, which have been imported duty free for the use of American troops, are used for some other purpose, as, for example, if they are sold to members of the public, s. 257 of the Customs and Excise Act, 1952, is applicable and provides the only consequence of such misuse, namely, forfeiture of the goods. Subsection (1) of that section reads as follows:

D “If by virtue of any provision of this or any other Act or under any practice whereby—(a) goods chargeable with a duty of customs are allowed to be delivered without payment of that duty on condition that they will not be sold or will be re-exported or upon any other like condition; or (b) the amount of customs duty payable on any goods depends on their being imported on any such condition, any goods are allowed to be delivered without payment of duty or on payment of duty calculated in accordance with that provision or practice, and the condition is not observed, the goods shall, unless the non-observance was sanctioned by the commissioners, be liable to forfeiture.”

E It is to be noted that by way of contrast to s. 44 and s. 45 of the Act s. 257 is not followed by a section providing for a penalty in the event of such misuse of goods imported duty free as is alleged in the present case. Moreover, s. 257 does not contain any words referring to other possible consequences apart from forfeiture of the goods and, indeed, in sub-s. (2) care has been taken to preserve the liability of any person who has given an undertaking or security for the observance of the condition on which the goods have been admitted into the country duty free. In our judgment, however, this argument is met by the opening words of s. 304 under which the appellant was charged: “Without prejudice to any other provision of this Act . . .” Further, we should have been surprised if the consequences of misuse were limited to forfeiture of the goods, since in many cases the goods would have been consumed before steps could be taken to forfeit them. On this point, therefore, we are of opinion that it was open to the respondent to charge the appellant under s. 304, notwithstanding the provisions of s. 257.

H Counsel for the appellant also contended that it was incumbent on the prosecution to establish that duty was payable and had not been paid at the time when the appellant was concerned in keeping or dealing with the goods, and that this onus had not been discharged. So far as actual payment of duty is concerned, it is found as a fact that no duty had been paid on any of the goods the subject of the charges and that finding was not contested. The question whether at the material times duty had become payable is more difficult. In *M’Queen v. M’Cann* (2) the word “uncustomed” in s. 186 of the Customs Consolidation Act, 1876, was being considered in relation to facts not unlike those in the present case. LORD NORMAND, then Lord Justice-General, said (3):

“There might have been a considerable difficulty about the construction of the word ‘uncustomed’ were it not for the decision in *A.-G. v. Thornton* (4) that wines, which were a dutiable commodity but which had been brought

(1) [1953] 1 Q.B. 1 at p. 5.
(3) 1945 S.C. (J.) at p. 153,

(2) 1945 S.C. (J.) 151.
(4) (1824), M’Cle. 600.

into the country free of duty for the use of an ambassador and his family, must, when afterwards sold, bear the appropriate duty, and that the auctioneer was bound to pay such duty out of the proceeds of their sale. The ground of the judgment is that duties attach to goods brought into the country and that, though the duty is not paid at the moment of bringing in because they are by special arrangement allowed to come in free of duty, the duty is leviable later when the commodities pass into other than the privileged person's hands."

The principle of that decision was applied in *Sayce v. Coupe* (5). It is true that since Jan. 1, 1953, the Act of 1952 has become applicable and that in s. 304 the expression "chargeable with a duty which has not been paid" has been substituted for the word "uncustomed", but in our judgment the alteration in wording has not affected the principle of the earlier decisions. So far as the first charge is concerned, which relates to spirits and cigars admittedly bought by the appellant from American servicemen, we are of opinion that at the material time duty had clearly become payable.

In the second charge the appellant was alleged to have been concerned in dealing with 2,420 cigars, of which he only bought one hundred. The circumstances in which the full quantity of 2,420 cigars came into the appellant's possession have already been described and it is enough for us to hold that at least when the appellant put the cigars into his car on the footing that he could buy as many as he wanted and return the balance, the privilege under which the cigars were not dutiable ceased to apply and the goods became chargeable to duty. It was also argued that what the appellant did in relation to the goods did not amount to "dealing with" them within the meaning of s. 304. The relevant words are very wide, "in any manner dealing with", and without attempting any precise definition of their meaning we are of opinion that the appellant's conduct clearly fell within them.

Counsel for the appellant further contended that, assuming the goods to have become dutiable, there was no finding that the appellant knew that duty was payable and that accordingly the charges ought to have been dismissed. It is true that there is no such finding in the second paragraph (6) of the Case Stated, where such a finding might have been expected, but in the sixth paragraph the learned magistrate in stating his opinion says in terms—"In the case of each charge the appellant knew that the goods were chargeable with duty"—and in our opinion the evidence before him was quite sufficient to enable him to take that view. In regard to the point that no intent to defraud was proved, the principle laid down in *R. v. Cohen* (7) is applicable and in our view there was ample evidence to show such intent.

For these reasons we are of opinion that the learned magistrate came to a correct conclusion and this appeal is accordingly dismissed.

Appeal dismissed.

Solicitors: *Judge & Priestley* (for the appellant); *Solicitor of Customs and Excise* (for the respondent).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

(5) [1952] 2 All E.R. 715; [1953] 1 Q.B. 1.

(6) I.e., the paragraph in which the magistrate found the facts to be as summarised at p. 584, letters D to I, ante.

(7) [1951] 1 All E.R. 203; [1951]]1 K.B. 505.

A LAYTON v. SHIRES.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Ashworth and Hinchcliffe, J.J.), October 7, 22, 23, 1959.]

Road Traffic—Notice of intended prosecution—Notice sent to defendant's residence by registered post—Defendant away on holiday unknown to police—Notice received by person in defendant's employ—Whether there had been compliance with Road Traffic Act, 1930 (20 & 21 Geo. 5 c. 43), s. 21 (c)—Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 26.

The acceptance by the defendant, or by someone authorised to accept delivery of letters on his behalf, of a notice under s. 21* of the Road Traffic Act, 1930, sent by registered post to the defendant's address satisfies the requirement of para. (c) of the section.

A notice of intended prosecution for alleged offences contrary to s. 12 of the Road Traffic Act, 1930, committed on Aug. 31, 1958, was sent by registered post to S., the driver and owner of the car, at his home address on Sept. 11, 1958. On that day he left for a holiday abroad. The registered packet containing the notice was received and signed for by a person in his employ on Sept. 12, 1958. S. first saw the notice on his return from his holiday on Oct. 1, 1958.

Held: there had been compliance with s. 21 (c) of the Road Traffic Act, 1930.

Appeal allowed.

[As to notice of prosecution, see 31 HALSBURY'S LAWS (2nd Edn.) 680, para. 1008.

For the Road Traffic Act, 1930, s. 21, see 24 HALSBURY'S STATUTES (2nd Edn.) 594; for the Interpretation Act, 1889, s. 26, see *ibid.* 224.]

Cases referred to:

Beer v. Davies, [1958] 2 All E.R. 255; [1958] 2 Q.B. 187; 122 J.P. 344; [1958] 2 W.L.R. 920; 3rd Digest Supp.

Money v. Bicknell, (Apr. 10, 1959), Unreported.

R. v. London Quarter Sessions, Ex p. Rossi, [1956] 1 All E.R. 670; [1956] 1 Q.B. 682; 120 J.P. 239; [1956] 2 W.L.R. 800; 3rd Digest Supp.

Case Stated.

This was an appeal by way of Case Stated from a decision of the justices for the petty sessional division of Dorking, sitting at Reigate, before whom informations were preferred by the appellant against Mr. Wellburn Bertram Shires, the respondent, that he on Aug. 31, 1958, did drive a motor car on a road without due care and attention, alternatively that he drove it without reasonable consideration for other persons using the road, in each case contrary to s. 12 of the Road Traffic Act, 1930. At the hearing before the justices on Dec. 10, 1958, the respondent contended that the provisions of s. 21 of the Road Traffic Act, 1930, had not been complied with and the justices tried this preliminary issue. The following facts were found. That at the time and place of the alleged offences the respondent was informed by the police officer on duty that the respondent would be reported for failing to keep to the left when meeting oncoming traffic. That the summonses which were served on the respondent in respect of the alleged offences were served after the statutory period of fourteen days had expired. That on Sept. 10, 1958, the appellant caused a notice to be prepared under s. 21 of the Road Traffic Act, 1930, giving notice to the respondent that it was intended to take proceedings against him for the alleged offences. That the notice was posted by registered post to the respondent at his home address on Sept. 11, 1958. That on Sept. 12, 1958, a registered postal packet containing the notice was delivered at his address and was received and signed for by a member of his family or by a "nanny" in his employ. That the respon-

* Section 21 is printed at p. 588, letter E, post.

dent in accordance with the arrangements made some time previous to the date of the alleged offences went abroad on Sept. 11 for a holiday and first became aware of the notice when he opened the registered packet on his return on Oct. 1, 1958. That the respondent did not inform the police authority of his intention to go abroad. It was contended by the appellant that written notice of intended prosecution had been served on or sent by registered post to the respondent within fourteen days of the commission of the alleged offences, in accordance with the provisions of s. 21. The appellant conceded that the verbal warning given by the police officer at the time did not satisfy the provisions of the section, failure to keep to the left when meeting oncoming traffic being a specific offence under s. 78 of the Highway Act, 1835. The respondent contended that written notice of intended prosecution had not been served or sent by registered post to him in respect of the alleged offences within the period of fourteen days. The justices held that the decision in *Beer v. Davies** was in favour of the respondent's contention and that accordingly the provisions of s. 21 in regard to notice of intended prosecution had not been complied with, and that in going abroad the respondent had not contributed to the failure to serve the notice within the period of fourteen days. They decided the preliminary issue in favour of the respondent.

J. B. R. Hazan (for *A. C. L. Lewisohn*) for the appellant.

R. Stock for the respondent.

Cur. adv. vult.

Oct. 23. **ASHWORTH, J.**, read the judgment of the court: This is yet another case raising the question whether the provisions of s. 21 of the Road Traffic Act, 1930, had been complied with. At the trial the solicitor for the respondent took the preliminary point that there had been no compliance with the section and the justices upheld that contention. Section 21 provides as follows:

"Where a person is prosecuted for an offence under any of the provisions of this Part of this Act relating respectively to the maximum speed at which motor vehicles may be driven, to reckless or dangerous driving, and to careless driving he shall not be convicted unless either—(a) he was warned at the time the offence was committed that the question of prosecuting him for an offence under some one or other of the provisions aforesaid would be taken into consideration; or (b) within fourteen days of the commission of the offence a summons for the offence was served on him; or (c) within the said fourteen days a notice of the intended prosecution specifying the nature of the alleged offence and the time and place where it is alleged to have been committed was served on or sent by registered post to him or the person registered as the owner of the vehicle at the time of the commission of the offence:

"Provided that—(i) Failure to comply with this requirement shall not be a bar to the conviction of the accused in any case where the court is satisfied that—(1) neither the name and address of the accused nor the name and address of the registered owner of the vehicle, could with reasonable diligence have been ascertained in time for a summons to be served or for a notice to be served or sent as aforesaid; or (2) the accused by his own conduct contributed to the failure; and (ii) the requirement of this section shall in every case be deemed to have been complied with unless and until the contrary is proved."

It is agreed that there was no sufficient warning at the time when the alleged offences were committed and the summonses were not served until the statutory period of fourteen days had expired. The sole question, therefore, is whether the provisions as to the service of a notice of intended prosecution were complied with subject of course to the proviso.

The facts can be shortly stated. The respondent was not only the driver but

* [1958] 2 All E.R. 255; [1958] 2 Q.B. 187.

- A also the registered owner of the motor car. He lived at No. 16, Holland Park Avenue, London, W.11. On Sept. 11, 1958, the appellant, after causing the necessary notice to be prepared, posted it by registered post to the respondent at that address. On the same day the respondent in accordance with arrangements made before the date of the alleged offences went abroad for a holiday and the letter was received and signed for by a member of the family or by a "nanny"
- B in his employ. The respondent first became aware of the notice when he opened the registered letter on his return from abroad on Oct. 1, 1958, which was, of course, after fourteen days had expired.

The first question, therefore, is as to the meaning of the words "sent by registered post to him" bearing in mind s. 26 of the Interpretation Act, 1889, which provides:

- C "Where an Act passed after the commencement of this Act authorises or requires any document to be served by post, whether the expression 'serve', or the expression 'give' or 'send', or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the document, and unless the contrary is proved to have been effected at the
- D time at which the letter would be delivered in the ordinary course of post."

- E It is, we think, clear that ever since the decision of this court in *Beer v. Davies* (1), the requirement of the section is not complied with if the registered letter is not taken in at the address to which it is sent, but is returned. That decision, which is binding on this court, followed the decision of the Court of Appeal in *R. v. London Quarter Sessions, Ex p. Rossi* (2), and on this point departed from the interpretation put on the words in previous decisions.

- F In the present case, however, the letter was in fact taken in and signed for and was not returned. It is true that the letter did not reach the hands of the respondent until after the statutory period of fourteen days had expired but in our judgment the decisions in *R. v. London Quarter Sessions, Ex p. Rossi* (2) and *Beer v. Davies* (1) do not compel us to hold that in such circumstances the section was not complied with. If a notice under s. 21 (c) of the Act of 1930 is sent by registered post to a defendant and delivery of it is accepted either by him or by someone authorised to accept delivery of letters on his behalf, we are of opinion that the section is complied with, even if the letter does not reach his hands within the statutory period. This view is in accordance with the decision of this court in the unreported case of *Money v. Bicknell* (3) which was decided on Apr. 10, 1959, that is to say, after the decisions in *Ex p. Rossi* (2) and *Beer v. Davies* (1). Moreover, it is to be noted that s. 21 (c) provides that a notice may be served on or sent to the proposed defendant or alternatively the person registered as the owner of the vehicle at the time of the commission of the offence. If the latter alternative is adopted, there is no certainty that the proposed defendant will himself become aware of the intended prosecution within the statutory period. The existence of this alternative method of complying with the section serves to confirm our opinion that actual receipt within the period of a notice addressed to a proposed defendant is not required. This is enough to decide this case and it is unnecessary to consider provisos (1) and (2).

- H In these circumstances the case must go back to the magistrate with an intimation that the requirement of the section has been complied with.

I

Appeal allowed.

Solicitors: *Wontner & Sons* (for the appellant); *J. B. Izod* (for the respondent).
[Reported by E. COCKBURN MILLAR, Barrister-at-Law.]

(1) [1958] 2 All E.R. 255; [1958] 2 Q.B. 187.

(2) [1956] 1 All E.R. 670; [1956] 1 Q.B. 682.

(3) (Apr. 10, 1959), Unreported.

ABBOTT v. PHILBIN (INSPECTOR OF TAXES).

[COURT OF APPEAL (Lord Evershed, M.R., Sellers and Harman, L.J.J.), October 2, 5, 6, 1959.]

Income Tax—Income—Option to purchase its shares sold to company's employee—Subsequent exercise of right of purchase—Increase in value of shares after date of option—Whether increase taxable at date of exercise of option—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), s. 156, Sch. E, Case I, r. 1.

Income Tax—Assessment—Option to purchase its shares sold to company's employee—Subsequent exercise of right of purchase—Increase in value of shares after date of option—In what year value of option assessable—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), s. 156, Sch. E, Case I, r. 1.

In accordance with an offer made by a limited company to certain of its responsible officers, the taxpayer on Oct. 7, 1954, applied for and was granted in return for a payment of £20 an option (not transferable) to purchase up to two thousand £1 shares in the company at their then market price of 68s. 6d. a share. He exercised the option in respect of 250 shares in March, 1956, when their value had risen to 82s. per share. He was assessed to income tax under Sch. E for the tax year 1955-56 in the sum of £166 in respect of the increase in value less a proportion of the £20 option payment.

Held (applying *Forbes' Executors v. Inland Revenue Comrs.* ((1958), 38 Tax Cas. 12), LORD EVERSLED, M.R., and HARMAN, L.J., dubitantibus): the value of the option should be assessed to income tax in the year in which it was exercised, i.e., 1955-56, not in the year in which it was granted.

Per LORD EVERSLED, M.R. (SELLERS and HARMAN, L.J.J., concurring): in the case of a revenue statute of this kind (the Income Tax Act, 1952) it is the duty of this court, unless there are compelling reasons to the contrary and while expressing such doubts as the court feels that it should, to follow a decision of the Court of Session on the same point (cf. p. 601, letter B, post).

Decision of ROXBURGH, J. ([1959] 2 All E.R. 270) reversed.

[**Editorial Note.** The doubts of LORD EVERSLED, M.R., and HARMAN, L.J., as to the correctness of the decision of the Court of Session in *Forbes' Executors v. Inland Revenue Comrs.* (1958), 38 Tax Cas. 12 (see p. 597, letters H and I, and p. 602, letters E and F, post) were not fully shared by SELLERS, L.J. (see p. 601, letters G and H, post).]

As to emoluments chargeable to tax under Sch. E, see 20 HALSBURY'S LAWS (3rd Edn.) 311-313, paras. 573, 574; and for cases on the subject, see 28 DIGEST (Repl.) 225-237, 971-1040.

As to the basis of charge to Sch. E, see 20 HALSBURY'S LAWS (3rd Edn.) 311, para. 572.

For the Income Tax Act, 1952, s. 156, Sch. E, Case I, see 31 HALSBURY'S STATUTES (2nd Edn.) 149; and for r. 1 of the Rules applicable to Sch. E, see *ibid.*, 522.

For the Finance Act, 1956, s. 10 and Sch. 2, see 36 HALSBURY'S STATUTES (2nd Edn.) 408, 448.]

Cases referred to:

Bridges (Inspector of Taxes) v. Hewitt; *Bridges (Inspector of Taxes) v. Bearsley*, [1956] 3 All E.R. 789; [1957] 1 W.L.R. 59; *revsd.* C.A., [1957] 2 All E.R. 281; 37 Tax Cas. 289, 306; [1957] 1 W.L.R. 674; 28 Digest (Repl.) 227, 985.

Forbes' Executors v. Inland Revenue Comrs., (1958), 38 Tax Cas. 12; [1958] S.L.T. 161; 28 Digest (Repl.) 241, 590.

- A *Salmon v. Weight*, [1935] All E.R. Rep. 904; 153 L.T. 55; sub nom. *Weight v. Salmon*, 19 Tax Cas. 174; 28 Digest (Repl.) 230, 1002.
Tennant v. Smith, [1892] A.C. 150; 61 L.J.P.C. 11; 66 L.T. 327; 56 J.P. 596; 3 Tax Cas. 158; 28 Digest (Repl.) 216, 916.

Appeal.

- B The taxpayer appealed to the Special Commissioners of Income Tax against an assessment for 1955-56 made on him under Sch. E to the Income Tax Act, 1952, in respect of emoluments of his employment. The question for determination was whether he was assessable for 1955-56 in respect of an option granted to him by his employing company to subscribe for shares, such option having been exercised in 1955-56, or whether he was not so assessable (as he contended) but was assessable in the previous year in which he purchased the option. The
 C commissioners held that the taxpayer was assessable in 1955-56 and that the appeal failed. On appeal to the High Court by way of Case Stated, ROXBURGH, J., held that the option was not additional remuneration but was a perquisite for which any assessment to income tax fell to be made in 1954-55; and that any increase in value of the option was of a capital nature and was not taxable. He therefore allowed the appeal ([1959] 2 All E.R. 270). The Crown appealed to the Court of Appeal.

Heyworth Talbot, Q.C., and *D. C. Miller* for the taxpayer.

R. E. Borneman, Q.C., and *A. S. Orr* for the Crown.

- E LORD EVERSHED, M.R.: This appeal is concerned with the question whether the respondent in this court, Mr. Abbott, the taxpayer, is, in respect of the tax year 1955-56, liable for a certain sum under Sch. E to the Income Tax Act, 1952. As may happen in these cases, the taxpayer was the appellant named in the Case Stated; he is now the respondent and, for avoiding confusion, I shall refer to him as "the taxpayer", and to the other party as "the Crown".

- F For the year of assessment in question the relevant statutory provisions are contained in the Income Tax Act, 1952. Section 156 of that Act imposed (under the heading "Sch. E") a charge for tax in respect of every employment of profit and made applicable thereto the provisions of Sch. 9 to the Act. So far as relevant that schedule provides:

- G "Tax under Sch. E shall be annually charged on every person having . . . an . . . employment of profit mentioned in Sch. E . . . in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom for the year of assessment . . ."

after making the deduction indicated.

- H In the course of the argument both in this court and below the subject-matter alleged to be taxable for the year I have named in the taxpayer's case has been called a perquisite, and I will, as ROXBURGH, J., did, use that convenient description. But, in order that a "perquisite therefrom", i.e., from the employment, for the year of assessment should be taxable, it must have also an additional quality. That quality has been stated in the House of Lords by both LORD HALSBURY, L.C., and LORD WATSON in *Tennant v. Smith* (1). LORD HALSBURY said, in reference to the corresponding tax provision (2):

- I "I come to the conclusion that the Act refers to money payments made to the person who receives them, though, of course, I do not deny that if substantial things of money value were capable of being turned into money they might for that purpose represent money's worth and be therefore taxable."

LORD WATSON's language was not much different, and as it has been, perhaps, more often cited, I will read it. It is as follows (3):

(1) (1892), 3 Tax Cas. 158.

(2) (1892), 3 Tax Cas. at p. 164.

(3) (1892), 3 Tax Cas. at p. 167.

"... that word [i.e., 'profits'] in its ordinary acceptation appears to me to denote something acquired which the acquirer becomes possessed of, and can dispose of to his advantage, in other words money, or that which can be turned to pecuniary account."

I can therefore restate the problem in this case as follows: Whether during 1955-56 the taxpayer was rightly charged in his assessment in respect of what was for that year said to be a perquisite arising from his employment, being something which was capable of being turned to pecuniary account. The advantage which he reaped in that year, or put himself in a position to reap, had its origin eighteen months further back, and a great deal of the argument has turned on this: Assuming that there was here a perquisite, whether that perquisite arose to the taxpayer, not in the year in which he has been assessed, but eighteen months earlier, when he acquired a right from which sprang the later advantage.

The taxpayer was the secretary of a public company in Bristol associated with the name of Robinson. In 1954 the directors of that company came to the conclusion that it would be to the advantage of the company, and I dare say of those they employed in responsible positions, if they gave to those persons certain options to take up shares. Not less than 250,000 unissued shares in the company were available, and the scheme was that the taxpayer and other responsible officers should get options to take up at any time during the next ten years, provided they remained in the service of the company, a certain number of those unissued shares which for the purpose were created ordinary shares. The number of shares any individual servant was entitled to have depended, I gather, on his status in the company, but the number of shares to which the taxpayer was to be entitled, if he wished to take them up, was 2,000.

I incorrectly used the word "gave" when I earlier described the directors' scheme. In actual fact, the option to the taxpayer was offered for a pecuniary consideration, viz., £20, and that figure represented £1 per 100 shares; and the corresponding sums paid, I assume, by other officers of the company were similarly calculated. If it were necessary to reach any precise conclusion on the matter, it might be relevant to consider at some length the actual documents which came into existence and to arrive at a conclusion when the contract of option exactly was made, in what documents its terms were contained, and what is its date. The argument in this case has relieved me of any necessity of that kind. The relevant date for the purpose of the option contract may be taken as being Oct. 7, 1954.

Owing to the necessity of obtaining Treasury sanction, there was delay before a certificate certifying that the taxpayer had this option could be given to him, but Oct. 7 I take as the date because that was the date of the form which the taxpayer signed accepting the suggestion of taking up this option contained in the company's letter of the previous day, and which he accompanied with £20 sent to the company. The letter of Oct. 6 contained at some length the terms of the option, but for convenience I will refer to the terms and conditions as they appear on the back of the certificate when it was later issued—later for reasons already indicated. There were certain other qualifications beyond the one I am going to read, but for present purposes they can be ignored. The important conditions are contained in the first clause in these terms:

"The option is not transferable and to the extent not previously exercised will expire upon the holder's death or retirement, upon his service with the company and/or its subsidiaries ending, or on the tenth anniversary of the date of grant of the option, whichever first occurs."

The taxpayer took advantage of what the company had suggested. He paid £20 to the company, and from Oct. 7 he became entitled to take up 2,000 of the unissued shares in the company at any time within the period indicated in cl. 1 indorsed on the certificate, and to do so at the market price at which those shares

A stood on Oct. 7, 1954, which was 68s. 6d. He did not immediately take up any shares, but in March, 1956, the shares having risen on the Bristol Stock Exchange to the market price of 82s., or 13s. 6d. above what I will call the option price, he took advantage of his rights. He filled in an application form in respect of 250 out of his 2,000, and he accompanied that application form by his cheque for £856 5s., which is 68s. 6d. multiplied by 250, and he had issued to him 250 of these shares worth then the 82s. per share. It is that event which has brought down on him the charge of the Inland Revenue, for it has been their case that, when the taxpayer exercised that contractual right under the option and when as a consequence he obtained for £856 5s. a number of shares which were worth £1,025, he then and in respect of that year got from his employment a perquisite, as that word is expanded by LORD HALSBURY (4) and LORD WATSON (5), worth the difference between £856 5s. and £1,025, with a slight further deduction which was, rightly or wrongly, permitted in respect of a proportionate amount of the option price of £20. Put in simple terms, he was for his income tax liability for that year charged in respect of £166 as being the monetary value of the perquisite which he is said to have obtained in that year.

D Relating my original statement of the question to the facts—is the Crown's claim to tax the taxpayer under Sch. E in the sum of £166 arrived at as I have indicated justifiable under the relevant language of the Income Tax Act?

E At this stage I think that I should briefly state what I conceive to be the nature of the rights in the eye of the law and their source both in October, 1954, when the taxpayer got his option, and in March, 1956, when he applied for and obtained his 250 shares. The option was a right founded in contract and, as ROXBURGH, J., observed, of a proprietary nature; it was a right which the taxpayer obtained, no doubt, because he was the secretary of the company. Subject to the conditions which were attached to its exercise, he became thereafter entitled as a matter of right, within the time stipulated, to apply for any number up to 2,000 of this block of unissued shares, and to pay for them the price of 68s. 6d. at which they stood when the option came into existence. The option was expressed to be non-assignable, but there was no limitation on what dealings the taxpayer might make with any shares which he acquired by virtue of it, and, as was said with some force, immediately it was granted it was capable of being turned to money account. What, if anything, the taxpayer might have obtained in any dealings that he entered into is a matter on which there is no evidence, and it might be purely speculative. I should assume, although again there is no evidence about it, that the grant of these options had an attraction to those to whom they were granted on the footing that there was, at any rate, a fair prospect that the shares in the company would appreciate in the future. As a matter of common sense it was not likely that the taxpayer would pay £20 unless he had some hope that thereafter he would reap some reward. The legal rights in the option were not transferable, but the taxpayer might have been able to find someone prepared to pay him some monetary consideration on the terms that the taxpayer would thenceforth wholly or in part exercise the option as and when that person required. To that extent it must be said that the option, if it had any inherent value, was capable of being turned to money account.

I I have already said that the grant of the option to the taxpayer no doubt depended on the fact that he was, and was a reward for the fact that he was, secretary of the company; and so counsel for the taxpayer has throughout conceded that the grant of this option did constitute a "perquisite" of the taxpayer's office; and if, but, of course, only if, the option when granted was of a value greater than the price of £20 the taxpayer paid, and if, as I am assuming, it could have been turned to money account one way or other for a sum in excess of £20, then, as counsel concedes, the perquisite would have had the necessary quality to make it then assessable under Sch. E for income tax. But it was

counsel's argument on that footing that no subsequent appreciation in the value of the option or of any rights that could be acquired by its exercise could thereafter constitute some other taxable subject-matter. A

That brings me to the second question: What was the nature of the rights the taxpayer obtained in March, 1956, and whence were they derived? The former question is not, I think, difficult to answer. He obtained for £856 5s. the issue of shares worth £1,025. He was able to obtain that valuable asset because by virtue of the contract of option he had a right to get it so long as he complied with the conditions and paid the 68s. 6d. per share. The company was bound to issue those shares notwithstanding that their then present value was in excess of the price the taxpayer paid. Whence, then, did that benefit or advantage arise? I have already said that *prima facie*, as it seems to me, it arose because the taxpayer had an already existing contractual right to get it; but, no doubt, it is equally true to say, looking further back, that that contractual right was related to the origin in 1954 of its grant, viz., to the circumstance that the taxpayer was then and still remained secretary of the company. That I conceive to be the nature of the rights which on those two dates the taxpayer obtained. B C

Now, if the submission of counsel for the taxpayer is correct, the perquisite was obtained by the taxpayer once and for all in October, 1954, and anything that happened after is irrelevant for tax purposes. On the other side, the argument of the Crown has been that, particularly having regard to its non-transferability, the option was something not capable of being called a perquisite, or at least not a perquisite within the meaning of Sch. E, in October, 1954; it was something incomplete and imperfect. But, says the Crown, when the option and to the extent to which the option was exercised eighteen months later, then for the first time the taxpayer did get a perquisite which should be related to his employment as secretary, and it is on that footing that liability in the year 1955-56 is alleged. D E

The case on the face of it would appear not very difficult; the point may at least be simply stated; but quite properly we have had our attention drawn to certain cases, to the third of which, a Scottish case (6), I shall have to refer at greater length because in the view I take that case ought to be decisive in this court. But we were first referred to *Salmon v. Weight* (7), which serves rather as illustration of the kind of point that arises than as any direct authority in the present case. The substance of the matter was that a company at an appropriate directors' meeting each year, feeling a debt to those who managed its affairs, resolved that certain of its officers if they liked to apply should be entitled to have allotted to them at par a certain number of shares in the company. The officers in many cases took advantage of that suggestion, applied for shares, had them allotted to them, and obtained in the event shares which were worth at the date of allotment considerably more than par value. It was there held that the officers got a perquisite, viz., the excess in value of the shares which they got attributable to and arising from their office, and were taxable accordingly. In that case there was no grant of any precedent right. The offer was made and accepted, and it all occurred within the scope of a short period and certainly within a single tax year. F G H

A little more important but, again, as I think, not conclusive in the present case, is a case in this court, *Bridges (Inspector of Taxes) v. Hewitt*; *Bridges (Inspector of Taxes) v. Bearsley* (8). The facts of that case were somewhat unusual. I The respondent Bearsley and another gentleman (two cases were tried at the same time) had been for many years managers or directors of a company, the control of which belonged to a Mr. Hornby. When Mr. Hornby died he left his controlling shares in trust for his widow for life and thereafter to his two sons. There was no gift to either Mr. Bearsley or his colleague of shares, nor any grant

(6) *Forbes' Executors v. Inland Revenue Comrs.* (1958), 38 Tax Cas. 12.

(7) [1935] All E.R. Rep. 904; 19 Tax Cas. 174.

(8) [1957] 2 All E.R. 281; 37 Tax Cas. 289.

- A to them of an opportunity of acquiring them. They obviously took the view—Mr. Bearsley and his colleague—that, if they were going to continue to serve this company, they wanted some proper security in the way of further shareholding, and the end of it all was that in December, 1945, the two Hornby sons entered into deeds of covenant with Mr. Bearsley and his colleague. The arrangement as recorded in the deeds (and it was somewhat loosely framed) was that, if Mr.
- B Bearsley and his colleague continued to serve the company for another four years, then at a short interval after the death of Mrs. Hornby the two Hornby sons would transfer free of any consideration to Mr. Bearsley and his colleague certain shares. Time passed, because Mrs. Hornby lived to a considerable age; and eventually before she died, and to that extent in advance of any covenanted obligation, the two Messrs. Hornby did transfer to Mr. Bearsley and his colleague the requisite shares. A charge was made against both Mr. Bearsley and his
- C colleague on the footing that the value of the shares which they had got for nothing should be taxed as perquisites of their offices as directors for the year when they received them. It was claimed on their behalf, among other things, that that was the wrong approach, that one should look to the date of the covenant, and that, if they were chargeable at all, Mr. Bearsley and his colleague
- D should be charged at that date, for it was from that covenant that sprang the later transfers.

- I have dealt a little at length with the facts because much reliance has been placed on the way in which DANCKWERTS, J., at first instance and JENKINS, L.J., and SELLERS, L.J., in this court dealt with the point I have last mentioned. It was DANCKWERTS, J.'s view that these gentlemen were taxable under the
- E schedule for the year in which the transfers were made and in respect of the value of the shares. As regards the suggested alternative basis of taxation, viz., that they should be charged, if at all, at the date when the covenants were entered into, DANCKWERTS, J., as I understand his argument (9) said in effect: "No, the covenants were really a promise that if they served four more years at fx, then at the end of that period and as additional remuneration for the next period they
- F would get this added benefit", as though, to take a simple example, one is employed at £1,000 a year for four years and £6,000 for the fifth year.

- This court by a majority, JENKINS, L.J., dissenting, decided that Mr. Bearsley and his colleague were not taxable at all on the ground that one could not really relate these gift shares to the contract of service. It was nothing other than generous bounty on the part of the two Hornby sons, and as such not liable to
- G income tax assessment. But JENKINS, L.J. (10), affirmed the view which DANCKWERTS, J., had taken in regard to the alternative suggested assessment, viz., an assessment at the time of the deeds of covenant in December, 1945, and on the basis of the value then existing, if any. In other words, he followed DANCKWERTS, J., in thinking that the deeds constituted merely a promise
- H of future additional remuneration and the covenants themselves could not be treated as a distinct item, a separate perquisite capable of being turned to pecuniary account and taxable as such in the year 1945-46. SELLERS, L.J., dealt with it more briefly by the phrase (11):

- "It is not, in my view, in harmony with the tax provisions that, if the transactions fell within the terms of Sch. E the income was the value of the rights acquired by the [appellants] when the deeds were entered into",
- I and he, too, expressed concurrence with DANCKWERTS, J. The third member of the court, MORRIS, L.J., was silent on this point.

Now, that case on those facts is plainly different in many ways from the present. This is admittedly not a case merely of bounty. The option is, as I have indicated, a contractual proprietary right which was obtained in 1954. It was not a mere

(9) [1956] 3 All E.R. at p. 798; 37 Tax Cas. at pp. 305, 306.

(10) [1957] 2 All E.R. at p. 294; 37 Tax Cas. at p. 316.

(11) [1957] 2 All E.R. at p. 304; 37 Tax Cas. at p. 327.

promise of future remuneration, as were the deeds in *Bridges (Inspector of Taxes) v. Bearsley* (12) in 1945. But the idea of future additional remuneration is one that emerges in ROXBURGH, J.'s judgment in the present case when he deals with the third and most important of the three cases, the Scottish case of *Forbes' Executors v. Inland Revenue Comrs.* (13). I have already indicated that my view is that in this court we should follow the decision in *Forbes' case* (13), and counsel for the taxpayer conceded clearly in his argument before us that on the essential facts this case is not distinguishable. A

That being so, I shall not deal at too great length with the facts in *Forbes' case* (13). As in the present case, an option was first granted and then at a later date the option was exercised. As in this case, the question arose, was the grantee of the option liable to be charged in respect of a previous year for the value of the shares which he had got when he had exercised the option? The option again was in essential respects similar to that in the present case. It was limited in time, it was subject to Mr. Forbes continuing as a director of the named companies, it was non-transferable. One other distinction may be made, a distinction to which ROXBURGH, J., I think, attached importance, but to which (if I may say so, rightly) counsel for the taxpayer did not himself attach significance. In the present case the taxpayer paid £20 for his option. In the case of *Forbes' Executors v. Inland Revenue Comrs.* (13), Mr. Forbes paid nothing. There is perhaps just this further point, though for present purposes I conceive it to be irrelevant: in the taxpayer's case there was no restriction on what the taxpayer might choose to do with any shares he took out. I assume that it was contemplated that he might wish to realise the profit if they increased in value, as has happened. There was no restriction in terms in *Forbes' Executors v. Inland Revenue Comrs.* (13), but, as the general purpose of the transaction was to enable Mr. Forbes to acquire a share control, it was obviously not contemplated that he would sell, at any rate to any appreciable extent. But, as I have said, in considering the rights and the legal consequences, I cannot think that that matter is relevant, and it has not been suggested in argument that it is. B C D E

Those being the essential facts indistinguishable from those in the present case, what was the conclusion of the Scottish court? The conclusion was twofold. The Court of Session held that, because of the restrictions on dealing with the option, its non-transferability and so forth, the option when granted to Forbes did not fall within the scope of Sch. E because it had not the necessary quality expressed in the passages from LORD HALSBURY'S speech (14) and LORD WATSON'S speech (15) that it could be turned to pecuniary account. Having arrived at that conclusion, the opinion of the Lord President (LORD CLYDE) proceeded as follows (16): F G

"From this it would follow that it is only in 1946, when Mr. Forbes applied for allotment, paid the par value and received shares which he could have sold at a profit in the market, that tax under the rules becomes exigible."

He then deals with a suggestion that it was at the date of the option that the legal right had vested in Mr. Forbes in respect of which, if at all, he was liable to assessment (16). H

"The argument for the appellants was that in 1944 a legally enforceable right had vested in Mr. Forbes when he signed the agreement, which he could have converted into cash forthwith by securing an allotment of shares which he could sell in the market." I

As to that he says there are two fallacies.

"In the first place, the right which Mr. Forbes got under the agreement was not a right to shares which sounded in money but a mere right to apply

(12) [1957] 2 All E.R. 281; 37 Tax Cas. 289.

(13) (1958), 38 Tax Cas. 12.

(14) (1892), 3 Tax Cas. at p. 164.

(15) (1892), 3 Tax Cas. at p. 167.

(16) (1958), 38 Tax Cas. at p. 18.

- A for shares which he never exercised in that year and which in itself had no market value at all. But in the second place the right which he obtained under the agreement was not an unconditional one. He could not effectively exercise it unless he complied with its conditions, one of which was the payment to the companies of the par value of the shares applied for. These two considerations appear to me to point necessarily to the year 1946 when
- B the right was effectively exercised as the year in which the profit accrued."

I need not, I think, read further passages, except perhaps to refer briefly to an earlier part of the Lord President's opinion where he says (17):

- C "Moreover—and this appears to me to be fatal to the appellants' contention—there was no pecuniary value in the mere right which he got by virtue of the agreement. For it was not a right to any shares and could not be disposed of or sold by him."

The opinions of LORD CARMONT and LORD RUSSELL were to the same effect. I read only a passage from LORD RUSSELL. He states the appellants' contention and says (18):

- D "In my opinion, whatever may be the rights vested in the holder of an option in the abstract, it is essential to have regard to the nature and the quality of the right created in Mr. Forbes's favour in 1944. As previously stated, that right was personal and unassignable and was qualified by the condition that he must tender cash in payment, while still remaining managing director, before being in a position to enforce compliance by the companies with their conditional obligation to allot. It appears to me that
- E the latter contingency coupled with the personal and unassignable nature of the right prevents it from being something which could be 'turned to pecuniary account' . . ."

—words which appear in quotation marks and which are, of course, taken from LORD WATSON's formula (19)—

- F "unless and until the right was exercised and the condition purified."

- It follows, therefore, that in *Forbes' Executors v. Inland Revenue Comrs.* (20) the Scottish Court of Session decided two things. It first decided that an option having the essential characteristics of the present taxpayer's option had not itself the necessary quality at the date of its grant to make it a perquisite within Sch. E liable to tax. It went on to hold, and from the language of Lord President
- G CLYDE it may be said that it held as a consequence, that the option-holder was liable to be charged for the profit, the gain, the advantage he got, when he turned this option to account, as he did, by getting by its exercise something worth a good deal more than he paid.

- The basis of that reasoning has been severely and, if I may say so, by no means ineffectively impugned both in the court below and in this court. It is said
- H that the Scottish judges took altogether too narrow a view of the nature of the rights which the option gave to Mr. Forbes. More particularly it is said that the judges omitted to notice the fact (obvious enough, as counsel for the present taxpayer has said) that the holder of such an option could turn it to account, not by assigning the option itself (which he could not do), but by covenanting for a money consideration that he would exercise it in a particular way and at a
- I particular time as the covenantee required; and that, had that fact been present to the judges' minds, they might well have concluded differently on the first point, and, if so, the second point would have fallen down. Counsel for the taxpayer has obtained for us copies of the report of the case in Session Cases, and the argument of the appellants before the Inner House certainly does not make it plain that the appellants took the point that, in the way I have indicated,

(17) (1958), 38 Tax Cas. at p. 17.
(19) (1892), 3 Tax Cas. at p. 167.

(18) (1958), 38 Tax Cas. at p. 21.
(20) (1958), 38 Tax Cas. 12.

Mr. Forbes could have turned his option to money account, albeit it was non-transferable. But I think that it is difficult to say that the terms of the report of the argument are such as to exclude that argument, nor do I think that really it greatly matters. Apart from that form of transaction it is plain—and I cannot think that the Lords of Session could have failed to observe it—that the option-holder could have sold the shares before and not after he had exercised the option. But the fact is that the Inner House has decided in the clearest terms that an option in terms in all material respects identical with the present taxpayer's option cannot be brought into charge under Sch. E at the date of its grant. A B

Having attended to the arguments, I am conscious of the difficulties which present themselves on that view of it. With the emphasis laid, as the Scottish judges laid it, on the point of non-transferability, one may ask what would be the right answer if an option of this kind were granted which was transferable. Counsel for the Crown not unnaturally was unwilling to commit himself to what would happen if such a case arose for consideration. But if an option which was assignable would attract tax at the date of its grant (assuming that it had a bonus value which was calculable), then it would seem to follow that the Crown could not afterwards seek to tax the benefit or the further gain which was achieved by the exercise of the option, and there would be a somewhat strange anomaly where the option was expressed to be assignable and where the option was expressed to be non-assignable. Other somewhat similar cases might arise. D
Supposing, for example, a man acquires an option of this kind at a price in the market, being a servant of the company, but acquiring it in the ordinary course of commercial dealing. Nobody could then suggest that he was taxable either in respect of any value of the option when he bought it or, still less, in respect of any capital gain which he got on the exercise of it wholly or partly thereafter; and, as counsel for the taxpayer pointed out, what in its essence is the difference? Here the taxpayer for £20 got a right, and he later exercised that right and obtained a valuable asset. The answer, right or wrong, of course, is that the taxpayer only got the right because, being one of the valued servants of the company, the directors resolved that he should have it, and he would not otherwise have got it. But that still leaves unanswered the problem that, if it could be turned to pecuniary account and if so turned it was worth more than £20, then he should be assessed in respect of the perquisite. If it was not at that time capable of being turned to pecuniary account at more than £20, then that is the end of it, because thereafter it is merely a matter of capital gain. E F

My difficulties, I confess, do not end there, for, with all possible respect to the Scottish judges, I am troubled by the line of reasoning which seems inherent in the passage I have read from the Lord President's opinion that, because the option when granted could not be turned to money account and for that reason is not taxable, therefore (21) G

“it would follow that it is only in 1946, when Mr. Forbes applied for allotment . . . that tax under the rules becomes exigible.” H

With all respect, I confess that I am not satisfied of the logic of that statement. It may be—and I so put it because the Scottish court has so held—that, when the present taxpayer got his advantage in 1956, it ought to have been treated as attributable to something granted to him qua servant and therefore as a perquisite. But I find difficulty in thinking that the liability arises because the option when granted could not be turned then to pecuniary account. I also ask myself the question, on the footing of the Crown's case, what is it for which the taxpayer is being taxed? According to the Case Stated, his assessment includes the sum of £166 in respect of the share transaction, such sum being made up as follows: 250 shares taken up on Mar. 28 when the actual market price was 82s., £1,025; deduct option price, so much, net £166. The alleged perquisite, I

- A therefore, appears *ex facie* to be a share transaction entered into in March, 1956. The perquisite, in other words, is the gain represented by the fact that the taxpayer then got for £859 shares worth £1,025, and gained the balance of £166. The taxpayer's advantage which he got in 1956 was attributable to the fact that, in October, 1954, having been a faithful servant, he had been given an option contract which entitled him to do what he did, and to get the advantage he got, in 1956. But I find nowhere in any contract or elsewhere any provision that (as a perquisite for that year) the taxpayer was entitled to get £166 or the difference between the value of any specified number of shares at their then market price of 82s. and the option price of 68s. 6d.

- C Those are my doubts, and if they are well founded they reinforce the view that what the taxpayer got in 1956 was a valuable piece of property, which he got because then he had, and had had for eighteen months, an absolute contractual right to get it—qualified, no doubt, to the extent that he had still to be a servant of the company in order to enjoy it, but still attributable to a legal right granted to him eighteen months earlier.

- D I have mentioned these doubts because I have thought that, if this matter were to go further, it might be of some assistance if I were to state them. I have also mentioned them because it is now right that I should say something about the judgment of the learned judge, ROXBURGH, J. The learned judge came to the conclusion that the taxpayer was not taxable in respect of the year 1955-56 for this sum of £166. He came to that conclusion, as I follow it, largely because the taxpayer had paid £20 for the option contract. I will read a passage from the judgment. After referring to LORD RUSSELL's opinion and saying that he could not accept what LORD RUSSELL formulated as a proposition in English law, he said (22):

- F “My view of the benefit of this option contract is that it is not to be assimilated to and is not additional remuneration. It is a chose in action, which the employee was enabled to purchase on beneficial terms because of his employment, and that is why it is a perquisite. None the less, it is not in my view in any sense remuneration for his services. I have not heard before of any employee having to pay for his own remuneration, and that is why I think this £20 is so important. It is not the amount, it is the effect. Who has ever heard before of an employee paying for his own remuneration, whether additional or anything else? In fact, that feature is absent from every case which has hitherto been decided on this topic. After all, it might have been a dead loss, the opposite of additional remuneration. The figure here was £20 and the shares went up to 82s. we know. That did enable a profit to be made. However, the shares conceivably might have gone down until the company went into liquidation and then, so far from being additional remuneration, the £20 which had been spent would have been a dead loss. Nor can you say that it was only £20. It might have been £20,000 and exactly the same principle would apply. It cannot possibly be treated as additional remuneration, as far as I can see. In my view, it was a perquisite and it was a perquisite which could be turned to pecuniary account.”

- I If I have followed it correctly, that led to this, that the learned judge thought that, when the option was granted (and in this he followed argument of counsel for the taxpayer), a perquisite was granted to the taxpayer, but, as he had paid £20 for it, as there was no evidence that it was worth more and as it had never been turned to account for anything more at that date, it had attracted no tax, and that was the end of it. What occurred later, the benefit of the shares, said ROXBURGH, J., could not be regarded as additional remuneration, as DANCKWERTS, J., and JENKINS, L.J., thought in *Bridges (Inspector of Taxes) v. Beasley* (23), because the taxpayer paid £20 for what he got, or for the source of what he

got, and, as ROXBURGH, J., said, he might have paid £20,000 for it. At any rate, A
having been paid for, it could not be treated as additional remuneration.

The consequence, or one particular consequence, was that in the learned
judge's opinion *Forbes' Executors v. Inland Revenue Comrs.* (24) was rightly
decided but on the wrong grounds, or, at any rate, on grounds which he, as an
English judge, could not accept. He, ROXBURGH, J., took the view that Forbes'
executors were liable for the tax they were charged because, nothing having been B
paid for the option, it was a matter merely of additional, albeit postponed,
remuneration, as was suggested in *Bridges (Inspector of Taxes) v. Bearsley* (25).
He said he would have so decided *Forbes' Executors v. Inland Revenue Comrs.* (24)
himself had the matter come before him in England. But he felt that the grounds
on which the Lord President, LORD CARMONT and LORD RUSSELL decided it, C
though they might well be good grounds in Scottish law, were not sustainable in
English law.

With all respect to ROXBURGH, J., I cannot agree that *Forbes' Executors v.*
Inland Revenue Comrs. (24) could be supported on the ground that the shares
when issued were additional remuneration comparable to the additional re-
muneration suggested to have been promised and granted in, e.g., *Bridges* D
(Inspector of Taxes) v. Bearsley (25). I am unable to agree with that. I think
that what Mr. Forbes got was not additional remuneration which had been
promised, but something which he became entitled to get as a result of a valid
and effective right, viz., the option. I am also unable to agree with ROXBURGH,
J., that the learned judges in Scotland applied propositions of Scottish law which
have no application in England and which, therefore, leave us to decide this case
without regard to *Forbes' Executors v. Inland Revenue Comrs.* (24). I cannot
see that there are any propositions of Scottish law which form the basis of the
decision and which are distinct from anything which we have to apply here. E
The question before the Scottish court was the same as the question before us:
Was the sum of money for which Forbes was charged and for which here the
taxpayer is charged, representing the value of what he got, was that a perquisite
within the meaning of Sch. E; and, as a prelude to that question, was the option F
granted to Mr. Forbes, as the option granted to the present taxpayer, a per-
quisite liable to be charged within the meaning of Sch. E? The Scottish court
purported to answer this latter question by applying the test which had been laid
down in the House of Lords by LORD HALSBURY (26) and LORD WATSON (27).
There was nothing esoteric in the bargains made. They were straightforward G
commercial bargains. That being their nature, it seems to me incontrovertible
that what the Scottish court decided was that an option in all relevant respects
the same as the present taxpayer's option could not be turned to pecuniary
account at the date of its grant and, therefore, whether or not it might otherwise
be a perquisite, could not be taxed at that date and in respect of that year, the
year of its grant, under Sch. E.

It further decided, whether consequentially or not, that, when the rights
given were exercised and brought, so to speak, to fruition, or to the extent that
they were exercised and brought to fruition, in that year a perquisite arose which
was capable of being turned to pecuniary account in the year when the exercise
was made. H

Those two things the Scottish court has, I think, plainly decided. I ask myself, I
therefore, having expressed such doubts as I have, with all respect to the learned
judges in Scotland, ought this court now to answer those two questions in a
precisely opposite sense? We in this court are not bound to follow the decisions
of the Court of Session, but the Income Tax Act and the relevant Finance Act
apply indifferently both north and south of the border, and, if we were to decide

(24) (1958), 38 Tax Cas. 12.

(25) [1957] 2 All E.R. 281; 37 Tax Cas. 289.

(26) (1892), 3 Tax Cas. at p. 164.

(27) (1892), 3 Tax Cas. at p. 167.

- A those questions in a sense diametrically opposite to the sense which appealed to the Scottish judges, we should lay down a law for England in respect of this not unimportant matter which was completely opposite to the law which was being applied on exactly the same statutory provisions north of the border. I cannot think that that is right. In a case of a Revenue statute of this kind, I think it is the duty of this court, unless there are compelling reasons to the contrary, and while expressing such doubts as we feel we ought to do, to say that we follow the Scottish decision.

- C Counsel for the taxpayer put forward an argument that we could treat the case as having been decided per incuriam, mainly, if not entirely, on the ground that it was never brought to the attention of the Scottish judges that this option, if it was worth anything, could have been turned to pecuniary account by the simple device of the option-holder's saying to whoever was interested: "For a consideration of £x I will exercise this option as and when you require and on your behalf". But I have not been satisfied that we could or should properly dissent and depart from the Scottish decision on that ground.

- D It comes therefore in the end to this, I think, that we ought to treat the Scottish case as governing our decision, and taking that view and disagreeing, with all respect, with ROXBURGH, J.'s view that the Scottish decision depended on some special peculiarities of Scottish law, I would allow the appeal.

- E **SELLERS, L.J.:** I agree, for the reasons which my Lord has just given, that *Forbes' Executors v. Inland Revenue Comrs.* (28) ought to be held by us to be decisive of the point raised before us in the present case. The question there for decision, in the words of LORD RUSSELL in the course of his opinion, was (29)

"... whether that perquisite accrued to and was acquired by Mr. Forbes at the date of the agreement, viz., September, 1944, or whether it accrued to and was acquired by him only when—and not before—he exercised his right and received an allotment of the shares in 1946."

- F The issue in that case seems to me to be indistinguishable from the issue in this case and the relevant and material facts likewise have no different effect. Secondly, with respect to ROXBURGH, J., it seems to me that it is not shown that there is any difference in the law which the Inner Court of Session invoked to decide that case from the law of our own country. Thirdly, the case was argued on all the points which were taken here and which, so it would appear, were all in the mind of the court.

- G In those circumstances, I feel that we ought to accept that decision and follow it, and I may say that I do so with more satisfaction perhaps than my Lord because I take a more favourable view of the decision at which that court arrived and do not share, at any rate not with the same emphasis, many of the doubts which my Lord has expressed. I do not wish to speak with finality because I H apprehend that, having regard to the impact of *Forbes' Executors v. Inland Revenue Comrs.* (28) on our decision, we discouraged counsel for the taxpayer from pursuing the whole of his argument, but as far as it had gone I have not been persuaded that the opinions in that case were wrong. Indeed, as at present advised, agreeing with the opinions as a whole, I might particularly say I should have been prepared to follow the way in which the matter is put by I LORD RUSSELL from the bottom paragraph of p. 20 of the report to the middle of p. 21 (30). If the option was never exercised, it seems axiomatic that there would be no profit and no accrued benefit. The contractual right given by the company to the servant, the taxpayer, in this case could not be transferred, and the view that I should be inclined to take of the case, which, I think, is in harmony with *Forbes' Executors v. Inland Revenue Comrs.* (28), is that that

(28) (1958), 38 Tax Cas. 12.

(29) (1958), 38 Tax Cas. at p. 20.

(30) (1958), 38 Tax Cas. at pp. 20, 21.

merely set up the machinery for creating a benefit—that was its intention—which benefit ultimately accrued. It is an ingenious device to avoid the incidence of taxation. In my view it does not achieve it, or, at any rate, it is doubtful whether it has achieved it. On the date of the option there was no money payment which was a gain. The £20 paid by the taxpayer was an expenditure. A notional use of the option or a use unintended and undesired by the company, unrealised and unvalued, does not seem to me to have the quality required by the accepted standard set by LORD HALSBURY (31) and LORD WATSON (32), already quoted by my Lord, to make it a taxable perquisite, if indeed it was a perquisite at all at that date.

Not only have we the authority of *Forbes' Executors v. Inland Revenue Comrs.* (33), but the observations in this court of JENKINS, L.J. (34), agreeing with DANCKWERTS, J. (35) (as I did myself, I believe) have been rightly assessed in *Forbes' Executors v. Inland Revenue Comrs.* by the Lord President (LORD CLYDE) when he says (36): "These observations appear to me to confirm the conclusion to which I have come in the present case", or in the words of LORD RUSSELL (37): "Those opinions are clearly adverse to the appellants' submission in this case". It may be said in the particular circumstances that they were obiter dicta, but, in effect, I think they support the point on behalf of the Crown in their argument in this case.

For those reasons, and without going into the matter in greater detail, I agree that this appeal should be allowed on the basis of the decision of *Forbes' Executors v. Inland Revenue Comrs.* (33).

HARMAN, L.J.: I agree in the result which my Lords have announced. I confess to sharing the doubt expressed with such circumspection, if I may say so, by the Master of the Rolls. The Lords of Session decided *Forbes' Executors v. Inland Revenue Comrs.* (33), as I see it, on a construction they put on the option document there existing. No doubt that option, like the option in the instant case, was hedged about by a number of conditions; but I cannot see that the number of conditions alters the nature of the right, nor understand why some options appear to their Lordships to come within LORD WATSON's formula (38) and others not. They all seem to me to be rights of property more or less valuable according as the conditions are more or less onerous. The Crown's contention here and the decision of the Lords of Session ignore altogether the option and treat the case as being in line with *Salmon v. Weight* (39), already mentioned by my Lord, where there was no antecedent agreement at all (see the observations of LORD ATKIN (40)). I find this hard to accept. On the other hand, I cannot justify to my mind the suggestion of ROXBURGH, J., that the Lords of Session decided *Forbes' case* (33) on some unknown principle peculiar to Scottish jurisprudence. That court, as I see it, construed a document of option indistinguishable from that in the instant case and, therefore, for reasons of policy it would not be right that this court should express a diametrically opposite view.

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Allen & Overy* (for the taxpayer); *Solicitor of Inland Revenue.*

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

(31) (1892), 3 Tax Cas. at p. 164.

(32) (1892), 3 Tax Cas. at p. 167.

(33) (1958), 38 Tax Cas. 12.

(34) [1957] 2 All E.R. at p. 294; 37 Tax Cas. at p. 316.

(35) [1956] 3 All E.R. at p. 798; 37 Tax Cas. at p. 304.

(36) (1958), 38 Tax Cas. at p. 19.

(37) (1958), 38 Tax Cas. at p. 22.

(38) (1892), 3 Tax Cas. at p. 164.

(39) [1935] All E.R. Rep. 904; 19 Tax Cas. 174.

(40) [1935] All E.R. Rep. at p. 909; 19 Tax Cas. at p. 193.

A

GREY AND ANOTHER v. INLAND REVENUE COMMISSIONERS.

[HOUSE OF LORDS (Viscount Simonds, Lord Reid*, Lord Radcliffe, Lord Cohen and Lord Keith of Avonholm), July 22, 23, 27, November 2, 1959.]

B

Stamp Duty—Voluntary disposition—Inter vivos—Disposition by declaring new trusts—Transfer of shares—Transfer by settlor to trustees of settlement—Subsequent oral direction to trustees on what trusts shares to be held—Deed of declaration by trustees subsequently confirming trusts—Whether direction a “disposition” of settlor’s interest—Whether deed liable to ad valorem stamp duty—Stamp Act, 1891 (54 & 55 Vict. c. 39), Sch. 1—Finance (1909-10) Act, 1910 (10 Edw. 7 & 1 Geo. 5 c. 8), s. 74 (1)—Law of Property Act, 1925 (15 & 16 Geo. 5 c. 20), s. 53 (1) (c).

C

Statute—Construction—Consolidating statute—Recent amending legislation included in the consolidation—Meaning of “disposition” in a section of the consolidating statute not limited to the meaning of corresponding words in the original enactment thereby superseded as altered by the intervening legislation—Law of Property Act, 1925 (15 & 16 Geo. 5 c. 20), s. 53 (1) (c).

D

Though the Law of Property Act, 1925, was a consolidating Act, the consolidation included property legislation of 1922 and 1924 by which the law of real and personal property was profoundly changed, and accordingly the principle of construction that a consolidating Act is not intended to alter the law does not apply as between the Law of Property Act, 1925, and enactments amended by the legislation of 1922 or 1924; in the particular instance of s. 53 of the Law of Property Act, 1925 (which reproduced provisions of the Statute of Frauds as incorporated with alterations by para. 15 of Part 2 of Sch. 3 to the Law of Property (Amendment) Act, 1924) the word “disposition” in sub-s. (1) (c) of s. 53 bears its natural meaning and is not limited to the same meaning as may have been attributed to the words “grant” or “assignment” in s. 9 of the Statute of Frauds.

E

F

On Feb. 1, 1955, a settlor transferred eighteen thousand shares belonging to him in a company to trustees to hold as nominees and to his order. On Feb. 18, 1955, he orally and irrevocably directed the trustees to divide the shares into six equal parcels of three thousand shares each and to hold one of such parcels on the trusts contained in each of six settlements made by him in 1949 and 1950 in favour of his grandchildren. The directions were given to the intent that they should result in the entire exclusion of the settlor from all future right, title and benefit to or in the shares or any of them and the income thereof. On Mar. 25, 1955, the trustees, who were also the trustees of the six settlements, executed six deeds of declaration of trust, each of which recited the settlor’s directions of Feb. 18, 1955, and the trustees’ acceptance of them, and the trustees in each case declared that they had been holding the shares since Feb. 18, 1955, and were then holding them on the trusts of the relevant settlement of 1949 or 1950. Each deed was executed by the settlor to testify that he had given the directions. On the question whether the six deeds of declaration were chargeable with ad valorem stamp duty as voluntary dispositions within the Finance (1909-10) Act, 1910,

G

H

I

Held: construing the word “disposition” in s. 53 (1) (c) of the Law of Property Act, 1925, in its ordinary meaning for the reason stated at letter D above, the oral directions given by the settlor on Feb. 18, 1955, were purported dispositions of equitable interests within s. 53 (1) (c) and were thereby rendered invalid as they were not in writing; therefore the deeds

* LORD REID was present at the hearing of the appeal, but, as he was prevented by illness from taking his seat in the House in the present Parliament, he was not present when the opinions of the House were delivered.

of declaration of trust were the effective dispositions and attracted ad valorem stamp duty. A

Decision of the COURT OF APPEAL ([1958] 2 All E.R. 428) affirmed.

[**Editorial Note.** Although the opinions in the House of Lords do not refer to the terms of the marginal note to para. 15 of Part 2 of Sch. 3 to the Law of Property (Amendment) Act, 1924, but are based on the words of that paragraph, yet it may be observed that the marginal note read: "Amendment of ss. 1-3 and 7-9 of the Statute of Frauds", thus indicating that the re-statement of the enactments was not pure consolidation. The schedule was repealed by the Law of Property Act, 1925, s. 207 and Sch. 7. B

As to the principle of construing words in consolidating Acts to the same effect as the enactments thereby replaced, see 31 HALSBURY'S LAWS (2nd Edn.) 492, para. 624. C

As to stamp duty on a transfer operating as a voluntary disposition inter vivos, see 28 HALSBURY'S LAWS (2nd Edn.) 475, 476, para. 1005; and for cases on the subject, see 39 DIGEST 284, 285, 667-671.

As to the need for writing on the transfer of an equitable interest, see 11 HALSBURY'S LAWS (3rd Edn.) 336, para. 542.

As to a trust being able to be constituted by parol, see 33 HALSBURY'S LAWS (2nd Edn.) 93, para. 151. D

For the Stamp Act, 1891, Sch. 1, and the Finance (1909-10) Act, 1910, s. 74, see 21 HALSBURY'S STATUTES (2nd Edn.) 652, 770.

For the Law of Property Act, 1925, s. 53, see 20 HALSBURY'S STATUTES (2nd Edn.) 551.]

Cases referred to: E

Gilbert v. Gilbert & Boucher, [1928] P. 1; 96 L.J.P. 137; 137 L.T. 619; 27 Digest (Repl.) 641, 6040.

Turner's Will Trusts, Re, District Bank, Ltd. v. Turner, [1936] 2 All E.R. 1435; [1937] Ch. 15; 106 L.J.Ch. 58; 155 L.T. 266; 28 Digest (Repl.) 569, 843.

Appeal.

Appeal by Arthur William Grey and Leslie Richard Randolph, trustees of six deeds of declaration of trusts each dated Mar. 25, 1955, from an order of the Court of Appeal (LORD EVERSHERD, M.R., MORRIS and ORMEROD, L.JJ.), dated May 15, 1958, and reported [1958] 2 All E.R. 428, reversing an order of UPJOHN, J., dated Dec. 3, 1957, and reported [1958] 1 All E.R. 246, on an appeal by the Crown by way of Case Stated by the Commissioners of Inland Revenue under the Stamp Act, 1891, s. 13. The facts are set out in the opinion of VISCOUNT SIMONDS. F
G

John Pennycuick, Q.C., and *W. T. Elverston* for the appellants.

R. O. Wilberforce, Q.C., and *E. Blanshard Stamp* for the Crown.

Their Lordships took time for consideration.

Nov. 2. The following opinions were read. H

VISCOUNT SIMONDS: My Lords, this appeal raises a question on which there has been a difference of opinion in the courts below. It is whether certain instruments which were presented for adjudication to stamp duty under s. 13 of the Stamp Act, 1891, are or are not chargeable with ad valorem duty. The Court of Appeal (MORRIS and ORMEROD, L.JJ., LORD EVERSHERD, M.R., dissenting) held that they are so chargeable. UPJOHN, J., had decided to the contrary. I

The facts as stated in the Case Stated by the Commissioners of Inland Revenue may be summarised as follows:—(A) The appellants are trustees of six settlements, each of which was made between a Mr. Hunter as settlor of the one part and the appellants as trustees of the other part. Four of these settlements were respectively dated July 22, 1949, and a fifth was dated Aug. 9, 1949, and each settlement directed the appellants to stand possessed of the property comprised therein on the trusts thereby declared for the benefit of a named

- A grandchild of Mr. Hunter and such other trusts as therein appearing. All the said five settlements are in similar form. The sixth settlement was dated May 1, 1950, and the appellants were thereby directed to stand possessed of the property comprised therein on the trusts thereby declared for the benefit of the then existing and future grandchildren therein specified of Mr. Hunter. (B) By an instrument of transfer dated Feb. 1, 1955, Mr. Hunter transferred to the appellants eighteen thousand ordinary shares of £1 each in Sun Engraving Co., Ltd. (hereinafter called "the company") to be held by the appellants as nominees for and to the order of Mr. Hunter. (C) At a meeting held on Feb. 18, 1955, at the offices of the company at which there were present Mr. Hunter and the appellants and Mr. Graham Wyatt Williams, solicitor, Mr. Hunter orally and irrevocably directed the appellants to divide the said eighteen thousand shares in the company into six equal parcels of three thousand shares each and to hold one of such parcels on the trusts and with and subject to the powers and provisions respectively declared and contained in each of the said six settlements to the intent that such directions should result in the entire exclusion of Mr. Hunter from all further right, title and benefit to or in the said shares or any of them and the income thereof. (D) By six deeds of declaration of trust each dated Mar. 25, 1955, and executed by the appellants and Mr. Hunter, after reciting in each such deed that the appellants were the holders of three thousand ordinary shares in the company and that on Feb. 18, 1955, Mr. Hunter orally and irrevocably directed the appellants to hold the said shares on the trusts and subject to the powers and provisions in such one of the said settlements as was therein mentioned and that the appellants had thereupon assented to and accepted the trusts reposed in them by the said direction and that the giving of the said direction on Feb. 18, 1955, and in manner aforesaid and the nature thereof were testified by the execution by Mr. Hunter of that deed, it was witnessed and the appellants thereby acknowledged and declared (in each of the said deeds) that they had been since Feb. 18, 1955, and were then holding three thousand shares therein mentioned and the income thereof on such trusts and with and subject to such powers and provisions as were in the relevant settlement declared and contained concerning the trust fund as therein defined to the intent that the said shares should since the said Feb. 18, 1955, form an addition to and be one fund with the said trust fund for all purposes.

These facts give rise to the plain question whether the oral directions given by Mr. Hunter, which are recited in each of the instruments, were effective or were, having regard to s. 53 (1) (c) of the Law of Property Act, 1925, wholly ineffective. In the former event the instruments would not, and in the latter would, be chargeable with ad valorem duty. Section 53 (1) of the Act is as follows:

"Subject to the provisions hereinafter contained with respect to the creation of interests in law by parol— . . . (c) a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will."

Briefly then, were the several oral directions given by Mr. Hunter dispositions by him of the equitable interest in the shares held by the appellants as nominees for him? If the word "disposition" is given its natural meaning, it cannot, I think, be denied that a direction given by Mr. Hunter whereby the beneficial interest in the shares theretofore vested in him became vested in another or others is a disposition. But it is contended by the appellants that the word "disposition" is to be given a narrower meaning and (so far as relates to inter vivos transactions) is to be read as if it were synonymous with "grants and assignments" and that, given this meaning, it does not cover such a direction as was given in this case. As I am clearly of the opinion, which I understand to be shared by your Lordships, that there is no justification for giving the word "disposition" a narrower meaning than it ordinarily bears, it will be unnecessary

to discuss the interesting problem that would otherwise arise. It was for this reason that your Lordships did not think it necessary to hear learned counsel for the appellants in reply on this part of the case. A

My Lords, the argument for narrowing the meaning of "disposition" was that the Law of Property Act, 1925, was a consolidating Act, that among the Acts which it consolidated was the Statute of Frauds (29 Car. 2 c. 3), s. 9, that that section enacted that B

"all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by such last will or devise, or else shall likewise be utterly void and of none effect",

and that, therefore, the word "disposition" in s. 53 (1) (c) of the Act of 1925 is to be given the same meaning as would be given to "grants and assignments" in s. 9 of the Statute of Frauds. My Lords, the principles applicable to the construction of a consolidating Act are not in doubt. The presumption is that such an Act is not intended to alter the law, but this *prima facie* view must yield to plain words to the contrary: see *Gilbert v. Boucher*, per SCRUTTON, L.J. (1). If the Law of Property Act, 1925, was a typical consolidating Act, the question would be whether the alteration from "grants and assignments" to "disposition" changed the law by enlarging the area of void transactions—a question that might not be easy to answer. But the Act of 1925 cannot be thus regarded. It was, it is true, a consolidating Act, but it was, with a number of other Acts, the culmination of a body of legislation by which a large part of the law of real and personal estate was profoundly altered. The story opens with the Law of Property Act, 1922, the title of which begins with the words: "An Act to assimilate and amend the law of Real and Personal Estate". It in fact effected comprehensive changes in the law. Section 191 (2) enacted that it should come into operation on Jan. 1, 1925. But it did not, and was never intended to, come into operation at all. In 1924 a second Act was passed (2). It was entitled: C

"An Act to amend the Law of Property Act, 1922, and the enactments thereby affected, and to facilitate the consolidation of the law relating to conveyancing and property . . . " D

and other matters. This Act, which was the result of a prolonged examination of the Law of Property Act, 1922, by a committee presided over by the late LORD ROMER, paved the way for the Act of 1925. It was, as has already appeared, an Act amending an Act which had itself radically changed the law. Section 3 is, for our present purpose, the only relevant section. It provided that E

"The amendments and provisions, for facilitating the consolidation of the statute law relating to conveyancing and property, contained in Sch. 3 to this Act, shall have effect." F

This schedule was in two parts, the first part being entitled "Amendments" and the second part "Provisions facilitating consolidation of the law of property and conveyancing". Paragraph 15 of the second part is, so far as is material, as follows: G

"Sections 1 to 3 and 7 to 9 of the Statute of Frauds shall take effect as if inserted in the principal Act and be read as follows": H

there then follow the provisions which are exactly reproduced in s. 53 of the Act of 1925. It was provided by s. 12 (3) that the Act should come into operation on Jan. 1, 1926. In the meantime the Law of Property Act, 1925, was drafted embodying the alterations in the law relating to conveyancing and property made by the Acts of 1922 and 1924. It repealed s. 3 of and Sch. 3 to the Act of I

(1) [1928] P. 1 at p. 8.

(2) The Law of Property (Amendment) Act, 1924.

- A 1924 and itself came into force on Jan. 1, 1926. I have only dealt in rough outline with the complicated scheme of legislation which transformed the law of real and personal property. But I have said enough to show that the Act of 1925, though in a sense a consolidating Act, in fact consolidated Acts which themselves were amending Acts. While, therefore, as LORD ROMER (then ROMER, L.J.) indicated in *Re Turner's Will Trusts, District Bank, Ltd. v. Turner*
- B (3) in the comparable case of the Trustee Act, 1925, it is incredible that the legislature intended in the Act of 1925 to make further and radical changes in the law as enacted in the preceding Acts, the question is what changes had been effected in those Acts. And, since they purported to be and were amending Acts, there is no principle of construction which should impose on them an interpretation appropriate to a consolidating Act. They must, and, therefore,
- C so must the Act of 1925, be construed so as to give each word the meaning proper to it in its context. So construed, the word "disposition" in s. 53 (1) (c) has the natural meaning which I attributed to it at the opening of this opinion.

- I have not, my Lords, forgotten the contention that, as the relevant provision substituting what became s. 53 of the Act of 1925 for certain sections of the Statute of Frauds are to be found in Part 2 of Sch. 3 to the Act of 1924, whereas
- D Part 1 was headed "Amendment", the provisions in Part 2 ought not to be read as amending the existing statutory law if any other reasonable interpretation is possible. But I cannot give any weight to this argument, for the most cursory glance reveals that the provisions in Part 2, even those in para. 15 itself, contain what are undeniably amendments of the law. Accordingly, I cannot allow this argument to prevail and must read s. 53 of the Act of 1925 as I read para. 15
- E of Part 2 of Sch. 3 to the Act of 1924 in the sense which I have already indicated. I think it right to add that the argument for the Crown which has brought me to this conclusion does not appear to have been put before UPJOHN, J., or the Court of Appeal.

The appeal must, in my opinion, be dismissed with costs.

- F My noble and learned friend, LORD REID, who is unable to be here today, has intimated to me that he agrees with this opinion.

- LORD RADCLIFFE: My Lords, if there is nothing more in this appeal than the short question whether the oral direction that Mr. Hunter gave to his trustees on Feb. 18, 1955, amounted in any ordinary sense of the words to a
- G "disposition of an equitable interest or trust subsisting at the time of the disposition", I do not feel any doubt as to my answer. I think that it did. Whether we describe what happened in technical or in more general terms, the full equitable interest in the eighteen thousand shares concerned, which at that time was his, was (subject to any statutory invalidity) diverted by his direction from his ownership into the beneficial ownership of the various equitable owners, present
- H and future, entitled under his six existing settlements. But that is not the question which has led to difference of opinion in the courts below. Where opinions have differed is on the point whether his direction was a "disposition" within the meaning of s. 53 (1) (c) of the Law of Property Act, 1925, the argument for giving it a more restricted meaning in that context being that s. 53 is to be construed as no more than a consolidation of three sections of the Statute of Frauds, s. 3, s. 7 and s. 9. So treated "disposition", it is said, is merely the
- I equivalent of the former words of s. 9, "grants and assignments", except that testamentary disposition has to be covered as well, and a direction to a trustee by the equitable owner of the property prescribing new trusts on which it is to be held is a declaration of trust but not a grant or assignment. The argument concludes, therefore, that neither before Jan. 1, 1926, nor since did such a direction require to be in writing signed by the disponent or his agent in order to be effective.

In my opinion, it is a very nice question whether a parol declaration of trust of this kind was or was not within the mischief of s. 9 of the Statute of Frauds. The point has never, I believe, been decided and perhaps it never will be. Certainly it was long established as law that, while a declaration of trust respecting land or any interest therein required writing to be effective, a declaration of trust respecting personalty did not. Moreover, there is warrant for saying that a direction to his trustee by the equitable owner of trust property prescribing new trusts of that property was a declaration of trust. But it does not necessarily follow from that that such a direction, if the effect of it was to determine completely or pro tanto the subsisting equitable interest of the maker of the direction, was not also a grant or assignment for the purposes of s. 9 and, therefore, required writing for its validity. Something had to happen to that equitable interest in order to displace it in favour of the new interests created by the direction; and it would be at any rate logical to treat the direction as being an assignment of the subsisting interest to the new beneficiary or beneficiaries or, in other cases, a release or surrender of it to the trustee. I do not think, however, that that question has to be answered for the purposes of this appeal. It can only be relevant if s. 53 (1) of the Law of Property Act, 1925, is treated as a true consolidation of the three sections of the Statute of Frauds concerned and as governed, therefore, by the general principle, with which I am entirely in agreement, that a consolidating Act is not to be read as effecting changes in the existing law unless the words it employs are too clear in their effect to admit of any other construction. If there is anything in the judgments of the majority of the Court of Appeal which is inconsistent with this principle I must express my disagreement with them. But, in my opinion, it is impossible to regard s. 53 of the Law of Property Act, 1925, as a consolidating enactment in this sense. It is here that the premises on which *UPJOHN, J.*, and the Master of the Rolls (*LORD EVERSHERD*) founded their conclusions are, I believe, unsound.

The Law of Property Act, 1925, itself was, no doubt, strictly a consolidating statute. But what it consolidated was not merely the Law of Property Act, 1922, a statute which had itself effected massive changes in the law relating to real property and conveyancing, but also the later Law of Property (Amendment) Act, 1924. The Statute of Frauds sections had not been touched by the Act of 1922; but they were, in effect, repealed and re-enacted in altered form by the operation of s. 3 of the Act of 1924 and the provisions of Sch. 3 to that Act. The schedule is divided into two Parts, the contents of Part 1 being described simply as "Amendments" and the contents of Part 2 being headed by the description "Provisions for facilitating the consolidation . . ." I suppose that the authors of the Act of 1924 understood what was the significance of the division of Sch. 3 into these two Parts under their different headings. I cannot say that I do. Each Part, when examined, is seen to contain numerous amendments of various previous statutes relating to real property and conveyancing, apart from the Act of 1922 itself, and in this sort of matter I cannot see how one can satisfactorily measure the degrees of substance involved in the various changes. The point is that they were avowedly changes. It is para. 15 of Part 2 of Sch. 3 which deals with the Statute of Frauds; and though the introductory words do seem to suggest that the sections concerned are only being re-enacted in different words, it is apparent, when they are read through, that this is not so, and that alterations of more or less moment are in fact being made. This new wording is what is carried into s. 53 of the Act of 1925.

For these reasons, I think that there is no direct link between s. 53 (1) (c) of the Act of 1925 and s. 9 of the Statute of Frauds. The link was broken by the changes introduced by the amending Act of 1924, and it was those changes, not the original statute, that s. 53 must be taken as consolidating. If so, it is

A inadmissible to allow the construction of the word "disposition" in the new Act to be limited or controlled by any meaning attributed to the words "grant" or "assignment" in s. 9 of the old Act. I agree that the appeal should be dismissed.

LORD COHEN: My Lords, I also agree.

B LORD KEITH OF AVONHOLM: My Lords, I agree.

Appeal dismissed.

Solicitors: *Speechly, Mumford & Soames* (for the appellants); *Solicitor of Inland Revenue*.

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

C

LANG v. LONDON TRANSPORT EXECUTIVE AND ANOTHER.

[QUEEN'S BENCH DIVISION (Havers, J.), October 12, 19, 1959.]

D

Road Traffic—Negligence—Collision at cross-roads—Major and minor road—"Slow. Major road ahead" sign in minor road—Motor cyclist emerging from minor road without observing sign and without slowing down, at speed of twenty miles an hour—Omnibus travelling on major road at speed of not more than twenty miles an hour—Possibility of danger emerging—Duty to take precautions—Contributory negligence.

E

L., while riding a solo motor cycle, emerged from a minor side road on to a major road and collided, at the junction of the two roads, with an omnibus which was travelling along the major road. L. was killed. About 180 feet from the mouth of the side road there was a "Slow. Major road ahead" sign, and it was the duty of traffic approaching the junction to observe this sign and to keep a look-out for traffic on the major road before emerging from the side road. The traffic on the major road was clearly visible from the side road from a distance of forty yards from the mouth of the side road. L. was travelling at twenty miles an hour along the side road; when he approached the junction, he did not slow down but carried on at the same speed, straight out on to the major road. The bus was travelling along the major road at a

F

G

speed of not more than twenty miles an hour. Just after passing a "Slow" sign, painted on the major road about 190 feet away from the junction, the bus driver glanced in the direction of the side road, as was his usual custom, and saw that there were some cyclists moving along it, although he could not identify L. as one of the cyclists; he did not look into the side road again. The bus driver knew that there was a major road ahead sign in this side road, but he was aware from experience (he had been driving buses for thirty-two years and had an exceptionally good driving record), that people would suddenly emerge from a side road when it was unwise to do so. In an action by L.'s widow claiming damages from the bus driver and his employers, L. was found guilty of a high degree of negligence. On the question whether the bus driver was also negligent in failing to see L. approaching the junction and in failing to slow down at the junction in case L. himself did not slow down,

H

I

Held: the possibility of danger was reasonably apparent and the bus driver was negligent in not taking the precaution of looking at the traffic in the side road as he approached it to see whether L. was still moving at twenty miles an hour and obviously intending to cross the major road; L., however, was much more responsible for the accident than the bus driver, and the responsibility would be apportioned as to two-thirds to L. and one-third to the defendants.

Principle stated by LORD DUNEDIN in *Fardon v. Harcourt-Rivington*

([1932] All E.R. Rep. at p. 83), and dicta in *London Passenger Transport Board v. Upson* ([1949] 1 All E.R. at pp. 63, 70, 72, 75) applied. A

Browne v. Central S.M.T. Co. (1949 S.C. 9) not followed.

[Editorial Note. Negligence is the failure to take reasonable care, and thus the decision whether in any case a driver has been negligent is a decision on the facts of the particular case; but in the present case a principle, viz., a duty to take precautions where the possibility of danger is apparent, is applied and in relation to that the present case may be compared with and distinguished from *Joseph Eva, Ltd. v. Reeves* ([1938] 2 All E.R. 115, see at pp. 125, 126). B

As to the duty of a driver at cross roads, see 28 HALSBURY'S LAWS (3rd Edn.) 68, para. 67.]

Cases referred to:

Browne v. Central S.M.T. Co., 1949 S.C. 9; 36 Digest (Repl.) 103, 755. C

Fardon v. Harcourt-Rivington, [1932] All E.R. Rep. 81; 146 L.T. 391; Digest Supp.

Grant v. Sun Shipping Co., Ltd., [1948] 2 All E.R. 238; [1948] A.C. 549; [1949] L.J.R. 727; 36 Digest (Repl.) 126, 634.

London Passenger Transport Board v. Upson, [1947] 2 All E.R. 509; [1947] K.B. 930; 177 L.T. 475; *affd.* H.L., [1949] 1 All E.R. 60; [1949] A.C. 155; [1949] L.J.R. 238; 2nd Digest Supp. D

M'Allester v. Glasgow Corpn., 1917 S.C. 430; 36 Digest (Repl.) 176, 1532.

Action.

This was a claim by the plaintiff, Kathleen Lang, suing as the widow of, and administratrix of the estate of, David Ronald Lang (hereafter referred to as "the deceased"), under the Fatal Accidents Acts, 1846 to 1908 and the Law Reform (Miscellaneous Provisions) Act, 1934, for damages arising from the death of the deceased on July 20, 1956, as a result of a collision between a motor cycle which the deceased was riding and a single-decker omnibus driven by the second defendant, Walter Carlile White, who was the servant and agent of the first defendant, London Transport Executive. By the statement of claim the plaintiff alleged that on July 20, 1956, the deceased was riding a solo motor cycle along South Lane towards the junction of South Lane and Malden Road at Malden in the County of Surrey and that, E

"3. . . At the said time the second defendant . . . was driving an omnibus the property of the first defendants . . . along Malden Road in a northerly direction and was approaching the junction. G

"4. At the said time the deceased rode his motor cycle along South Lane towards and into the junction at a speed of about 20 m.p.h. without slowing down or appreciably slowing down as he approached or entered the junction and the deceased there collided with or was struck by the omnibus. The said collision was caused by the negligence of the second defendant . . . in that he: (a) failed to see or heed the approach of the deceased; (b) failed to slow down in case the deceased should fail to stop at the junction; (c) failed to observe or heed the fact that as the second defendant was approaching the junction the deceased was approaching the same and was obviously or probably not going to slow down or stop before or at the junction; (d) drove too fast in the circumstances hereinbefore set out; (e) failed to give any or any proper warning of his approach." H I

As a result of the collision the deceased suffered injuries from which he died. The defendants admitted that the deceased died as a result of the collision but denied that they were guilty of negligence and alleged that the collision was caused by the deceased's own negligence or alternatively that the deceased's negligence was a contributory cause of the collision.

The particulars of the alleged negligence of the deceased were—(i) in riding too fast; (ii) in failing to keep a proper look-out; (iii) in failing to give any or any

A proper warning of his approach or indication of his course or intentions; (iv) in riding into or across the path of the omnibus; (v) in emerging from a minor into a major road at a time and in a manner which was unsafe; (vi) in failing to heed or to observe the "Slow. Major road ahead" sign situate in South Lane; (vii) in failing to stop, slow down, turn aside, swerve or otherwise avoid the collision.

B The facts were as follows. Malden Road, which is a well-known road in Surrey, leading from Sutton to the Kingston By-pass, is a restricted road with a speed limit of thirty miles per hour. At the time of the accident, which occurred at 6.30 p.m. in July, there was heavy traffic on the road. There was painted in white letters on Malden Road, the word "Slow" at about 190 feet in either direction from the junction of Malden Road with South Lane. At the junction, C there was a sharp bend in Malden Road and beyond the junction there was a pedestrian crossing; beyond that there was a request bus stop. As between Malden Road and South Lane, Malden Road was the major road. In South Lane, about 170 to 180 feet west of the junction, there was a statutory sign, "Slow. Major road ahead". From a distance of forty yards from the mouth of South Lane there was a clear view of the traffic coming along Malden Road as far D back as fifty yards from the junction. It was the duty of traffic approaching the junction from South Lane to observe the sign in South Lane, "Slow. Major road ahead", to keep a good look-out for traffic on Malden Road, and not to come out on to Malden Road unless it were seen that it was safe to do so.

The following evidence was given at the trial and was accepted by the judge. When the deceased was about 150 yards away from the junction, he overtook E another motor cycle travelling in the same direction as himself, along South Lane towards the junction. When he overtook the motor cycle the deceased was travelling at a speed of about twenty miles per hour; he did not slacken this speed after overtaking but continued travelling at the same speed, twenty miles per hour, along South Lane, towards the junction and straight out on to Malden Road where he collided with the bus driven by the second defendant. Had the F deceased been looking out when he approached the junction he would have seen the bus coming along Malden Road, from the direction of Sutton, as did the two men who were riding on the motor cycle overtaken by the deceased when it slowed down in South Lane, on approaching the junction. There was no obstruction to the view. When the deceased started to cross Malden Road the bus was then so close to him that he had no chance of avoiding it and getting across the G road. At the time of the collision the second defendant, the driver of the bus, had put on his brakes, and it was clear from a sketch of the position of the bus on the road, made by police constable Jepps who came on the scene shortly after the collision, that the bus had pulled out to the right and had stopped just as it was getting on to the crossing. The second defendant had what the trial judge described as a marvellous driving record. The second defendant had been driving H buses for thirty-two years; he had a completely clean driving record and had won several awards for safety including the gold medal. The bus which he was driving at the time of the accident was in good order, including the tyres. The second defendant was driving the bus five to six feet from the kerb, at a speed of not more than twenty miles per hour. The surface of the road was wet and in those circumstances the second defendant agreed that he could have pulled up I the bus in forty to forty-five feet. He had a clear view of the traffic in South Lane when he was at least as far away as forty yards from the mouth of South Lane. Just after passing the "Slow" sign in Malden Road he had glanced to his left, according to his usual custom when approaching a side road, and had seen the movement of a few cyclists in South Lane, although he was unable to identify the deceased as one of those cyclists. The second defendant had not looked again into South Lane and had not seen the deceased until he came out from South Lane suddenly, at about twenty miles per hour, in front of the bus; the bus was then on top of the crossing. Until this happened the second defendant had not

decreased his speed which was not more than twenty miles per hour. The second defendant had known the junction well for fourteen years; he knew that there was a "Slow. Major road ahead" sign in South Lane, and from Malden Road he had an unobstructed view of traffic in South Lane. From his experience, the second defendant knew also, so he said in evidence, that anything could happen when approaching a side road leading on to a main road, for instance children could come out in a moment of excitement, or a driver could come out; it was for this reason that he had glanced to his left.

R. B. Gibson for the plaintiff.

Montague Berryman, Q.C., and *J. D. Stocker* for the defendants.

Cur. adv. vult.

Oct. 19. **HAVERS, J.**, read the following judgment: I reserved my judgment because I found it difficult to reconcile the decision of the Court of Session in Scotland in *Browne v. Central S.M.T. Co.* (1) and the dicta of the House of Lords in *London Passenger Transport Board v. Upson* (2).

The allegations of negligence in the statement of claim are of a somewhat unusual character. [HIS LORDSHIP, having referred to the allegations of negligence and to the defence (for which see p. 610, letter H, and p. 610, letter I, to p. 611, letter A, ante), set out the main facts of the accident (for which see p. 611, ante) and continued:] The Highway Code which was then current (1954) contains three passages. The first is r. 34:

"When approaching a road junction where there is a 'Slow' sign, slow down and be ready to stop when you get there."

Counsel for the plaintiff also relied on that, and invited me to say that the two signs "Slow" which are painted on the Malden Road were signs to which this rule applies. I do not think that is so. The code contains an example of this very sign "Slow. Major road ahead", and I think r. 34 was dealing with that sign and that sign only, namely, the one which occurs in South Lane. Rule 36 is:

"At a road junction, look right, then left, then right again. Do not go on until you are sure that it is safe to do so."

Rule 37 is:

"At a road junction, give way to traffic on the major road. If in doubt, give way."

[HIS LORDSHIP then referred to the evidence regarding the manner in which the deceased was driving at the time of the accident (see p. 611, letter E, ante), and continued:] On the independent evidence of the sketch which was made by the police constable (3) alone, without taking into account the other evidence, it was clear that the deceased did not see, or else completely disregarded, the "Slow" sign (4), and either did not see the bus at all (which he clearly ought to have done) or if he did see it he hopelessly misjudged the distance that the bus was away, and its speed. I am rather inclined to think that he did not look and did not see it. The deceased came out of the minor road at twenty miles per hour at a time when it was extremely dangerous to do so, and when the bus was so close that collision was inevitable, or at any rate highly probable. It is clear, therefore, in my view, that the deceased was guilty of a very high degree of negligence, and that this negligence was substantially the cause of the accident. Counsel for the plaintiff has said, as he was bound to do—as indeed it is pleaded—that the deceased was guilty of negligence. One is always reluctant to find negligence against a man who has died and who has not had the opportunity to go into the witness-box and give his evidence before the court.

In this particular case it may well be that the illness from which the deceased

(1) 1949 S.C. 9.

(2) [1949] 1 All E.R. 60; [1949] A.C. 155.

(3) As to this evidence, see p. 611, letter G, ante.

(4) Viz., the "Slow. Major road ahead" sign in South Lane.

A was suffering (5) might have affected his judgment, and he might therefore not be morally very much to blame, but that, of course, does not in the least degree affect his legal position.

As I said, the deceased was guilty of a high degree of negligence, but notwithstanding that, it was contended for the plaintiff that the bus driver, the second defendant, was equally to blame and substantially caused, or contributed towards, the accident.

B [HIS LORDSHIP then referred to the evidence regarding the manner in which the second defendant, the bus driver, was driving (for which see p. 611, letter H, ante), and continued:] The defendants relied very strongly on the decision in the Court of Session, *Browne v. Central S.M.T. Co.* (6). That was a case in which the facts bore a very close resemblance to the facts of this case, although there were, as there always are in these cases, points of difference. The headnote in that case reads:

C “A collision occurred at the junction of a major road and a minor road between an omnibus which was travelling on the major road and a motor cycle which, emerging from the minor road, attempted to cross the major road. A boy who was a pillion passenger on the motor cycle was killed. At the trial of an action brought by the boy’s father against the owners of the omnibus on the ground of the driver’s negligence, the evidence established gross fault on the part of the motor cyclist. He had, as he admitted, failed to notice a ‘Slow, Major Road Ahead’ sign erected a short distance from the junction, and had not seen the omnibus which was approaching the junction, although it must have been plainly visible. The omnibus had approached the crossing at its ordinary moderate speed of some twenty-five miles an hour, and the driver, when a collision seemed to be imminent, had braked and swerved in an unsuccessful effort to avoid the motor cycle”.

E That headnote shows that the facts approximate very closely to the facts in this case. It was held by the Court of Session

F “that the driver of the omnibus had not been negligent, seeing that, as a driver on a main road, he was entitled, in the absence of any indication to the contrary, to assume that the motor cyclist, a driver on a side road, would conform to the warning signal and either stop or slow down and give him the right of way; and a verdict of the jury in favour of the pursuer [the deceased boy’s father] set aside.”

G The Lord Justice-Clerk (LORD THOMSON) said this (7):

H “The real difficulty in the case is whether it was open to a reasonable jury to take the view that the omnibus was not entitled to maintain its course or speed in view of the presence in Gallowflat Road of a motor bicycle which, in order to proceed on its way, would have to cross the omnibus’s line of traffic either in front of the omnibus or behind the omnibus. It being open to the cyclist to cross the omnibus’s line of traffic either in front of or behind the omnibus, ought the driver reasonably to have anticipated that the motor cyclist might choose the dangerous of these two alternatives? It seems to me that there is no doubt at all that the bicycle could have passed safely and conveniently behind the omnibus. There was nothing to prevent it, and indeed it was his plain duty to do so. The question still remains:— Was the omnibus driver justified in assuming that the cyclist would take that course? The omnibus driver was not entitled to rely absolutely on the fact that he was on a major road and had the right of way. He was bound to exercise the right of being on the main road in a reasonable way. He had to watch and conform to the movement of other traffic which was in the offing,

(5) See p. 618, letter B, post.

(6) 1949 S.C. 9.

(7) 1949 S.C. at p. 12.

and he must take due care to avoid collision with it. So it comes to this, was the jury entitled to think that the omnibus, despite its prima facie right of way, should have surrendered that right in anticipation of possible failure on the part of the cyclist to note the safe course?

"The answer to this must turn on the conduct of the motor bicycle and on the opportunities which the omnibus driver had of observing it. There must be something in the conduct of the bicycle which the omnibus driver ought to have seen and which would have certiorated him, had he been taking proper care, that the motor bicycle was not going to pass behind but was going to try to pass in front of the omnibus. What then is the evidence on this issue?"

He held in the circumstances that it was not a reasonable verdict. LORD MACKAY said this (8):

"The driver was well entitled, keeping a position on the main road in full daylight and seeing a vehicle at least as far away as he himself was, to proceed on the footing that that vehicle would obey the sign which it was bound to do. In short, I think the evidence as to both vehicles' behaviour at this point brings the case into an exact equation with the well-known decision of *M'Allester v. Glasgow Corpn.* (9). There the Lord Justice-Clerk is reported as reviewing the evidence and stating it as his opinion that there was no evidence of fault on the part of the driver of the tramway car (10). I find the case of the present omnibus indistinguishable."

Then, a little further on, LORD MACKAY said this (11):

"I have no doubt that anyone driving on a road such as this Cambuslang-Glasgow road, which of course is the main road too for motor as well as tramway traffic, is entitled to go on that road in proper position and is entitled to keep his proper place on that road, and to do so in reliance on side road traffic behaving itself as the rules of the road desired, until it may be at the very last moment some observation of a gross infringement by others calls for a special attempt to deal with it. Such duty arises only pro re nata and cannot be stated as a universally present obligation. I am prepared to agree with what [counsel for the pursuer] said, that there *may* be exceptional cases (as where you see a man swaying from side to side as if out of control)—you must then take exceptional measures."

LORD JAMIESON said this (12):

"In my view, while he was of course not entitled to disregard the presence of the cyclist, he could not, and was not bound to, anticipate that the cyclist was going to take the rash course which he did take."

LORD BIRNAM said (13):

"Speaking for myself, I think it would be a pity if the court were to give any countenance to the view that the driver of a vehicle on a major road when approaching a side road such as the one in question in broad daylight must slow down to a pace of ten miles per hour or otherwise share the blame for any collision that may happen."

Unfortunately this case was tried on Oct. 15, 1948. That was after the hearing of the appeal in the House of Lords in *London Passenger Transport Board v. Upson* (14) but before the House of Lords had announced its decision and the law lords had given their opinions. So the Court of Session had not the advantage of seeing what the House of Lords had decided in *Upson's* case (14); nor, in the House of Lords, had their Lordships had their attention called to the decision in *Browne v. Central S.M.T. Co.* (15). I should be happy to follow and adopt the reasoning of the Court of Session in that case if I am not precluded by the dicta in the House of Lords in *Upson's* case (14).

(8) 1949 S.C. at p. 14. (9) 1917 S.C. 430. (10) 1917 S.C. at pp. 431, 432.

(11) 1949 S.C. at p. 15. (12) 1949 S.C. at p. 17. (13) 1949 S.C. at p. 18.

(14) [1949] 1 All E.R. 60; [1949] A.C. 155. (15) 1949 S.C. 9.

- A *Upson's* case really turned on the fact that the bus in that case was approaching a crossing which was regulated by the Pedestrian Crossing Places (Traffic) Regulations, 1941, and the driver's view was obscured by a taxicab. The case came originally before HUMPHREYS, J., and he found the driver of the omnibus guilty of negligence at common law. The Court of Appeal (16), by a majority, reversed this finding: LORD GREENE, M.R., dissented, but COHEN and ASQUITH, L.JJ., reversed the finding of HUMPHREYS, J., on the question of common law negligence and found the driver guilty of a breach of the Pedestrian Crossing Places (Traffic) Regulations, 1941. LORD GREENE dissented and attached neither blame nor liability to the driver or the appellants.
- B

- The House of Lords unanimously approved the decision of the Court of Appeal as regards the liability of the bus driver under the Pedestrian Crossing Places (Traffic) Regulations, 1941. LORD PORTER agreed with the Court of Appeal that there was no negligence; LORD WRIGHT did not express any opinion on the question of negligence, but he criticised the judgment of the Master of the Rolls; LORD UTHWATT again did not find it necessary to give any decision on the question of negligence, but there is a passage in his opinion to which I must refer. The other two law lords both thought that the driver was negligent. LORD PORTER said
- D this (17):

“My Lords, if the driver could and ought to have seen [the plaintiff] hurrying towards the crossing before she reached the taxicab and to have anticipated that she was about to, or might, hasten across the crossing, and did not do so, undoubtedly he would be guilty of negligence at common law.”

- E Counsel for the plaintiff relied on that passage and, applying it to the facts of this case, he said that if the second defendant, the bus driver, could and ought to have seen the deceased, the driver of a motor cycle hurrying down towards this crossing, the bus driver should have anticipated that the deceased was about to or might hasten across the crossing, and as he did not do so undoubtedly he was guilty of negligence at common law.
- F LORD WRIGHT found there was a breach of the regulations and, as I have said, he did not decide the question of negligence, but said this (18):

“I ought to add that I agree with LORD DU PARCQ in criticising . . . the passages which he quotes from the judgment of LORD GREENE, M.R., in the present case.”

- G LORD UTHWATT said it was not necessary for him to deal with the question of negligence as he agreed with the majority as regards liability under the Pedestrian Crossing Places (Traffic) Regulations, but he said (19):

“In the view that I have formed, it is not necessary for me to deal with the question of negligence. I desire only to register my dissent from the view expressed by LORD GREENE, M.R. (20), that drivers are: ‘. . . entitled to drive on the assumption that other users of the road, whether drivers or pedestrians, would behave with reasonable care’. It is common experience that many do not. A driver is not, of course, bound to anticipate folly in all its forms, but he is not, in my opinion, entitled to put out of consideration the teachings of experience as to the form these follies commonly take.”

H

- I LORD DU PARCQ, in dealing with the question of negligence, said this (21):

“My Lords, the learned Master of the Rolls has stated with great clarity a view of the law of negligence which, in my opinion, ought not to receive the

(16) [1947] 2 All E.R. 509; [1947] K.B. 930.

(17) [1949] 1 All E.R. at p. 63; [1949] A.C. at p. 162.

(18) [1949] 1 All E.R. at p. 69; [1949] A.C. at p. 172.

(19) [1949] 1 All E.R. at p. 70; [1949] A.C. at p. 173.

(20) [1947] 2 All E.R. at p. 512; [1947] K.B. at p. 938.

(21) [1949] 1 All E.R. at p. 71; [1949] A.C. at p. 175.

approval of your Lordships' House. The Master of the Rolls said (22): 'The driver of the omnibus was entitled to assume that the plaintiff, like other pedestrians, would conform to common sense and ordinary care in the presence of an adverse signal, particularly in view of the provisions of the Highway Code'. The Master of the Rolls then quoted the instruction to pedestrians in para. 98 of the Highway Code in force at the material time . . ."

LORD DU PARCQ went on (23):

"My Lords, if the premises are granted, this reasoning is impeccable, but I do not accept the premises as sound."

He explained why. LORD DU PARCQ then said (24):

"Apart from this assumption, the propositions advanced by the learned Master of the Rolls do not, I think, accord with the law as it has been laid down in your Lordships' House. The correct principle was stated by LORD DUNEDIN in *Fardon v. Harcourt-Rivington* (25) when he said: 'If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions.' I regard this statement and that of LORD MACMILLAN in the same case, which was to the like effect, as applying generally to actions in which the negligence alleged is an omission to take due care for the safety of others. It must follow that (if I may repeat what I said in *Grant v. Sun Shipping Co., Ltd.* (26) in this House), '... a prudent man will guard against the possible negligence of others, when experience shows such negligence to be common.' The driver of the appellants' omnibus agreed in cross-examination that he knew '... that people in London have a habit of crossing a road when the lights are not in their favour'. Even apart from the duty imposed on him by the regulations, he was, therefore, bound to take precautions against the possibility that some person was concealed from his view by the stationary cab and might suddenly emerge from its protection. On this ground alone, it must at least be said that there was evidence to support the conclusion that the driver had failed to take reasonable care for the safety of others and was, therefore, negligent. A driver is never entitled to assume that people will not do what his experience and common sense teach him that they are, in fact, likely to do. It is true that in some circumstances it is not reasonably possible for a driver to do anything to save a pedestrian from the consequences of the pedestrian's own act, just as the pedestrian can sometimes truly say that, although he knows that drivers are sometimes negligent, he could not reasonably have been expected to avoid the particular act of negligence which has caused him injury. These are questions for a jury, but I must say, with all respect, that a direction to a jury in the terms of the propositions enunciated by the learned Master of the Rolls would be, in my opinion, unduly favourable to a defendant driver."

LORD MORTON OF HENRYTON, as I said, found also that there was a breach of the regulations, and he found also that there was negligence. He, too, criticised the judgment of the Master of the Rolls; he said (27):

"The learned Master of the Rolls said in the course of his judgment (28): 'The true view, in my opinion, is that a driver approaching a controlled crossing, whether it be controlled by lights or by the police, with the

(22) [1947] 2 All E.R. at p. 511; [1947] K.B. at p. 935.

(23) [1949] 1 All E.R. at p. 72; [1949] A.C. at p. 175.

(24) [1949] 1 All E.R. at p. 72; [1949] A.C. at p. 176.

(25) [1932] All E.R. Rep. at p. 83.

(26) [1948] 2 All E.R. at p. 247; [1948] A.C. at p. 567.

(27) [1949] 1 All E.R. at p. 75; [1949] A.C. at p. 181.

(28) [1947] 2 All E.R. at p. 511; [1947] K.B. at p. 937.

- A light signal or the police signal in his favour, is entitled to proceed on the assumption that pedestrians will conform to the indications given to them as to what their behaviour should be when the signals are against them; and that he is under no duty to keep a lookout for the possibility of a pedestrian disobeying the signals or to drive upon the assumption that a pedestrian may at any minute do so'. The Master of the Rolls proceeded (29): 'But let me not be misunderstood. If a driver approaching such a crossing does, in fact, see that a pedestrian is crossing, or, apparently, is intending to cross against the signals, it is the duty of the driver to do everything that he can reasonably do in the circumstances to avoid running the pedestrian down. Failure to take all reasonable steps to avoid injuring someone who is himself seen to be negligent is itself negligent...' With the later passage I entirely agree, but I am unable to accept the earlier passage without qualification."

In view of these dicta I do not think I can follow the reasoning in the Scottish case *Browne v. Central S.M.T. Co.* (30). I feel bound to follow the principle enunciated by LORD DUNEDIN (31) and which was referred to by LORD DU PARCQ (32):

- D "If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions."
- E The question, therefore, which I have to consider in this case is: was the possibility of danger reasonably apparent? The second defendant said he had seen the movement of cyclists in South Lane, so that he knew there were some cyclists approaching the main road from South Lane. He said, in cross-examination, that he was aware, from his experience, that sometimes persons would suddenly emerge from a side road even when it was not prudent to do so, and sometimes children in exceptional circumstances did the same thing. I think, therefore, that he was under a duty to take some precautions against that possibility. He ought, as he approached South Lane, to have looked at the traffic in South Lane to see whether the deceased was still moving at twenty miles per hour and obviously intending to cross, or whether he was slowing down and going to wait for the traffic in the major road. If he had looked in my view the possibility of danger occurring would have been reasonably apparent to him. If he had looked, he could have stopped in time to allow the deceased to cross in front of him. He did not do so, and never saw the deceased again until the two vehicles were on top of one another. In this respect I find that he failed to take reasonable care for the safety of other traffic on the road, and was therefore negligent. He made a mistake in assuming that the deceased would not do what his experience should have taught him that persons in fact sometimes do.

- I have come to this conclusion very reluctantly because he was on the major road, and he was driving at a moderate speed, and especially in view of his very fine record. I find, however, that the deceased was far more to blame than the second defendant, and that his share of responsibility was far greater. I find the deceased two-thirds to blame and the second defendant one-third to blame.

[His LORDSHIP then considered the question of damages. At the date of his death the deceased was twenty-nine years of age. His widow, the plaintiff, was now aged thirty-eight, and she had one daughter born on July 24, 1951. The deceased was an electrician and his net wage per annum was £671 5s. While

(29) [1947] 2 All E.R. at p. 512; [1947] K.B. at p. 937. (30) 1949 S.C. 9.

(31) See *Fardon v. Harcourt-Rivington*, [1932] All E.R. Rep. at p. 83.

(32) [1949] 1 All E.R. at p. 72; [1949] A.C. at p. 176.

the plaintiff had said that the deceased gave her £12 per week, His LORDSHIP could not accept that she received as much as this. It was not disputed that the cause of the deceased's death was a fractured skull and intercranial haemorrhage. He was, however, suffering from an advanced pulmonary disease, hypertrophic and bullous emphysema, which had affected his right lung. The disease was advanced for the deceased's age but had not yet had a secondary effect on the heart although this could be expected to develop shortly. At the time of his death the deceased was also suffering from acute suppurative broncho-pneumonia (which could have affected his judgment while driving). The expert evidence was that if the deceased had had further attacks of pneumonia he might have died at any time but that if he had followed a sheltered occupation he might have lived to between the age of sixty and sixty-five. In these circumstances His LORDSHIP would have awarded damages of £3,000, apportioned as to £200 under the Law Reform (Miscellaneous Provisions) Act, 1934 (for loss of expectation of life) and as to £2,800 under the Fatal Accidents Acts, 1846 to 1908 (for the pecuniary loss of the widow), assuming that the deceased was wholly free from blame. The plaintiff would therefore recover one-third of this amount, namely, £1,000, apportioned as to £66 13s. 4d. under the Act of 1934, and as to £933 6s. 8d. under the Fatal Accidents Acts.]

Judgment for the plaintiff.

Solicitors: *Rowley Ashworth & Co.* (for the plaintiff); *M. H. B. Gilmour* (for the defendants).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

HARRIS v. YARM.

[CHANCERY DIVISION (Roxburgh, J.), October 13, 1959.]

Solicitor—Charging order—Taxation—Special circumstances need not be shown—

Solicitors Act, 1957 (5 & 6 Eliz. 2 c. 27), s. 69 (2) (b) proviso (i), s. 72.

Costs—Taxation—Solicitor and own client costs—Special circumstances.

A taxation of costs as between solicitor and own client for the purposes of a charging order under s. 72* of the Solicitors Act, 1957, can be directed without "special circumstances" being shown notwithstanding that, if the taxation were being sought under s. 69, it would be necessary for the client to show "special circumstances" in order to obtain the order for taxation by reason of the expiry of more than a year since the bill of costs was delivered.

A solicitor acted for H. in a partnership action. There were negotiations for the purchase by H. of her partner's share and H. paid £100 to the solicitor to provide the deposit for the purchase, but the negotiations failed. Subsequently the partnership business was sold in March, 1955, by a receiver appointed in the action. The receiver's accounts in the action included a sum of £67 10s. as costs in respect of the sale, which sum was disallowed by the master in March, 1956. On Sept. 27, 1956, the solicitor delivered to H. his bill of costs for work in the action and by letter reserved to himself the right to deliver a subsequent bill for further costs in connexion with the sale. The solicitor's retainer was withdrawn by the client. In a letter written to the Law Society the solicitor stated that it was agreed with H. that the £100 was to be security for costs. On a summons issued in 1959 by the solicitor for a charging order on H.'s share of partnership funds in court for costs as between the solicitor and his client, H.,

* The relevant terms of s. 72 of the Solicitors Act, 1957, are printed at p. 621, letter G, post.

A **Held:** (i) in the exercise of the court's discretion under s. 72 of the Solicitors Act, 1957 (it being unnecessary for H. to establish "special circumstances" in order to obtain taxation under s. 72), the charging order would be for the costs to be taxed as between solicitor and client, not for the balance of the costs without a taxation.

B (ii) if, however, it were necessary to establish special circumstances in order to obtain an order for taxation, special circumstances were established in the present case, viz., the solicitor's conduct in relation to the £100 and the reservation of the right to deliver a further bill of costs in respect of the costs of the sale which were intimately connected with the costs in the partnership action.

C **[Editorial Note.** If twelve months have expired from the delivery of a bill of costs, as had happened in this case, no order for taxation may be made on the application of the party chargeable except in "special circumstances" (see Solicitors Act, 1957, s. 69 (2) (b), proviso (i)). The decision in the present case shows that the power to direct taxation under s. 72 for the purposes of a charging order is independent of this proviso.

D As to charging orders for costs properly incurred in recovering or preserving property, see 31 HALSBURY'S LAWS (2nd Edn.) 261, para. 282.

For the Solicitors Act, 1957, s. 69 and s. 72, see 37 HALSBURY'S STATUTES (2nd Edn.) 1111 and 1116.]

Adjourned Summons.

E This was an application by a solicitor by summons (issued in or about May, 1959) in a partnership action in which a Mrs. Harris was plaintiff and a Mrs. Yarm was defendant, asking that a charging order should be made on a moiety of the fund in court in the partnership action for the sum of £144 19s. 2d., being the balance of a bill of costs for £244 19s. 2d. delivered by the solicitor to his client, Mrs. Harris, in respect of the costs of the action. In 1955 Mrs. Harris, the respondent to the summons, and Mrs. Yarm were in partnership in the business of a coffee bar. The applicant acted as solicitor for Mrs. Harris in the action and in negotiations for the purchase by her of Mrs. Yarm's partnership interest. A sum of £100 was handed by Mrs. Harris to the applicant or to a clerk on his behalf for the special purpose of paying a deposit on the proposed sale to Mrs. Harris. The negotiations for the sale fell through and a receiver was appointed in the action who eventually negotiated a sale to other persons. G A completion statement as at May 19, 1955, was produced in which £67 10s. was charged towards the costs of the solicitor in connexion with that sale. At that time the special purpose for which the £100 was provided by Mrs. Harris came to an end and the money was held to her order. The amount of £67 10s. for costs was included in the receiver's accounts but was disallowed by the master on Mar. 16, 1956. On Sept. 27, 1956, the solicitor sent Mrs. Harris a bill of costs H with the following covering letter:

I "Dear Madam, 'Yourself v. Yarm'. Having regard to the series of unpleasant incidents to which we have been subjected, we have taken the trouble of having drawn by an independent costs draftsman a detailed bill of costs on a solicitor and client basis as against yourself in the above proceedings. We enclose it to you herewith. You will observe that it totals £244 19s. 2d. The bill, you will note, does not take into account any costs to us in connexion with the sale of the business, and we reserve the right in due course to carry in a bill to you in respect thereof. Will you be good enough, please, to acknowledge receipt at your early convenience and let us have whatever observations you have to make in the matter? At the same time we take the opportunity of reminding you that in the Theodorou matter you have ignored our most recent communication, and if you so continue to ignore it, no allowance will be made for either Mr. Harris's

or your witnesses' fees on the taxation as against Theodorou and the expenses thereof will have to be borne by you. Additionally, we are entitled to claim solicitor and client costs against you over and above the party and party costs in the Theodorou action. We did offer, we think generously, to meet you substantially on agreement of costs. We are still willing to renew our offer, but it must be upon the basis that you will guarantee to us that we will not be subjected either by you, your son-in-law, your husband or any other party to the insults and embarrassments of the nature which has been our experience in the past . . . You are entitled to credit for the sum of £100 received by us from you at the outset of this litigation."

Thereafter Mrs. Harris withdrew the retainer to the solicitor and on Apr. 28, 1959, filed a notice of intention to act in person. Mrs. Harris then issued a summons that the funds in court, realised in the partnership action, be paid as to one-half to each of the parties and that the proceedings in the action be stayed. This summons came before the master on May 27, 1959, when he also had before him the summons first previously referred to (issued in or about May, 1959) by which the solicitor asked for a charging order on a moiety of the funds for the sum of £144 19s. 2d., being the balance of the £244 19s. 2d. shown by the bill of costs delivered to Mrs. Harris with the letter of Sept. 27, 1956, after allowing for the £100 received at the beginning of the litigation. The master made a charging order in favour of the solicitor for his costs, to be taxed to date.

Two matters were relevant as special circumstances for the purpose of justifying an order for taxation, if it were necessary to show special circumstances. First, in a letter written by the solicitor to the Law Society, and admitted in evidence before the court, the solicitor alleged that he had agreed with Mrs. Harris that the £100 should be treated as security for costs, though he did not allege this in affidavit evidence on the summons. Secondly, in accounts carried in on behalf of the receiver in the partnership action the sum of £67 10s. had been included in respect of costs of the sale completed on Mar. 19, 1955, and this sum had been disallowed by the master. No bill of costs in relation to the sale or the negotiations for the sale of Mrs. Yarm's partnership interest was delivered at any time by the solicitor, who thus had never put his full bill of costs before Mrs. Harris, yet he reserved in his letter of Sept. 27, 1956, the right to deliver a further bill in relation to the sale which was a matter intimately connected with the action. At the hearing before HIS LORDSHIP each of these two sets of circumstances was held to amount to special circumstances, if it were necessary to show special circumstances in order to obtain an order for taxation.

E. J. T. G. Bagshawe for the applicant, the solicitor.

The respondent appeared in person.

ROXBURGH, J., reviewed the facts and read the letter set out at p. 619, ante. Having stated that in his view there were two special circumstances, namely, the £100 and the reservation of the right to deliver a further bill in relation to a matter intimately connected with the action, and having intimated that the guarantee requested by the letter of Sept. 27, 1956 (see letter B, supra) was unreasonably wide in extending to "any other party" and that the requesting of so wide an indemnity was not a normal method in which solicitors conducted business and thus would itself also constitute a special circumstance, continued: The story can be told in the words of the master's note from which I now read—

"On Apr. 28, 1959, the plaintiff [Mrs. Harris] filed a notice of intention to act in person in place of [the solicitor], who had been her solicitor throughout the proceedings. Shortly after this the plaintiff issued a summons asking that the funds in court [those were what was realised in the partnership action] be paid as to one-half to each of the parties and that the proceedings be stayed. That summons came before me on May 27, 1959. At the same time

- A I had before me the present summons issued by [the solicitor] asking for a charging order upon a moiety of the funds for the sum of £144 19s. 2d., being the balance of a solicitor and client bill of costs of this action delivered to the plaintiff on Sept. 27, 1956, after allowing for £100 received at the beginning of the litigation. This summons was twice adjourned to enable the plaintiff to file evidence. In the meantime I made a charging order in favour of the [solicitor] for [his] costs, to be taxed to date. The plaintiff eventually filed evidence (1)—but it appeared to me that [the solicitor] was entitled to the order asked for, and I accordingly proposed to make a charging order in [his] favour in the terms of the summons.”
- B

The terms of the summons are:

- C “That [the solicitor] shall have a charge upon the moiety of the funds in court to the credit of this action for the sum of £144 19s. 2d. and that the costs of this application be taxed as between solicitor and client and added to the amount for which the said charge is granted, and for an order that in the meantime the said funds do stand charged as aforesaid.”

The master referred to s. 69 (2) (b), proviso (i) of the Solicitors Act, 1957, and said: “I did not think that [the client] had shown any special circumstances”. Then he cited s. 72, and said:

- “I did not think it necessary, notwithstanding a reference to ‘taxed costs’ in s. 72, to have the costs taxed having regard to the provisions of s. 69. At the request of the plaintiff I adjourned the summons into court for argument.”
- E Therefore, the question before me is whether the master ought to have directed a taxation of the costs of the action as between a solicitor and his client, or whether he ought to have directed (as the summons asked) that the specified sum of £144 19s. 2d. should be charged on a moiety of the fund in court, which is a pure question of law, except in so far as the question of what are special circumstances does depend, as many judges have said hitherto, on the facts of each case.
- F

I regret to say that I think that the Chief Master was wrong on both points. Section 72 of the Solicitors Act, 1957, reads like this:

- G “Any court in which a solicitor has been employed to prosecute or defend any suit, matter or proceeding may at any time declare the solicitor entitled to a charge on the property recovered or preserved through his instrumentality for his taxed costs in reference to that suit, matter or proceeding, and may make such orders for the taxation of the said costs and for raising money to pay, or for paying, the said costs out of the said property as they think fit, and all conveyances and acts done to defeat, or operating to defeat, that charge shall, except in the case of a conveyance to a bona fide purchaser for value without notice, be void as against the solicitor: Provided that no order shall be made if the right to recover the costs is barred by any statute of limitations.”
- H

The word “may” in the second line of that quotation imports, as a great many judges have held, a complete discretion. After it come important words on which, I think, there is no authority.

- I Though there is no authority on the point, first of all there is nothing anywhere to suggest that s. 72 is in any way subordinate to s. 69. There is nothing in the ANNUAL PRACTICE and nothing in any of the reported cases to suggest that. The words “at any time” were introduced into s. 69 of the Solicitors Act, 1932. They were not in s. 28 of the Solicitors Act, 1860. In my view, they must mean what they say—“at any time”—provided that the right to recover the costs is not barred by any statute of limitations; and that operates both for and against

(1) That evidence was before the court, and the facts are summarised at p. 619, ante.

solicitors. In one of the reported cases it operated for solicitors who had been very dilatory; in another case (indeed, in this case) it will operate in favour of a client who undoubtedly has been very dilatory. A

I cannot see how s. 69 of the Solicitors Act, 1957, could be paramount to s. 72 of that Act, because s. 72 says "may make such orders for the taxation of the said costs", and those costs are the costs of the action. To say that the court may make orders for taxation of the costs of the action at any time, B provided that the statute of limitations does not intervene, is quite inconsistent with the hypothesis that it cannot make them after twelve months "except in special circumstances". The two things cannot stand together. The point really seems to me to be clear.

This is a point of law affecting the whole of the profession of solicitors. It is unfortunate that argument was presented by Mrs. Harris in person, but I have had a very careful argument from Mr. Bagshawe. It seems to me that it is entirely a matter of discretion. C

Looking at the case as a whole, taking into account those things which, as I have already said, are in my view special circumstances (2), and taking into account a great many things which may or may not be special circumstances, but certainly afford a background to the picture, such as the general way in D which the solicitor has conducted the matter, not yet having delivered his final bill of costs for something which was finished many years ago, his obvious distaste for the client, her obvious distaste for him, and every feature showing how unfortunate the relations between the solicitor and his client were—I certainly exercise my discretion (which I believe to be quite unfettered, except by those E rules by which every judicial discretion is fettered) in favour of ordering the charge to be for such sum as shall be found on taxation to be due to the solicitor. The taxing master understands these things much better than I do, but s. 72 is very strictly limited.

In my judgment, s. 69 of the Solicitors Act, 1957, has nothing whatever to do with the matter, but, if I am wrong, in my judgment there are special circumstances in this case, and even if s. 69 does apply, I consider that, in the special F circumstances, I am entitled to make the order which I propose to make.

I propose to declare that the solicitor is entitled to a charge on the moiety of the fund in court for his taxed costs in reference to the partnership action, and to order taxation accordingly.

Order accordingly.

[Reported by E. COCKBURN MILLAR, Barrister-at-Law.]

(2) See p. 620, letters E and F, ante, where the two principal matters that were special circumstances are indicated; see also p. 620, letter H, ante, for a third set of circumstances that were special circumstances.

A OUGHTRED v. INLAND REVENUE COMMISSIONERS.

[HOUSE OF LORDS (Lord Radcliffe, Lord Cohen, Lord Keith of Avonholm, Lord Denning and Lord Jenkins), October 5, 6, November 4, 1959.]

Stamp Duty—Conveyance on sale—Transfer of shares—Shares subject to settlement—Oral agreement to exchange reversionary interest in settled shares for shares owned by life tenants—Trustees' subsequent transfer of shares to life tenant—Whether conveyance of beneficial interest—Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 54, Sch. 1—Law of Property Act, 1925 (15 & 16 Geo. 5 c. 20), s. 53 (1), (2).

Under a settlement, shares in a limited company were held by trustees on trust for O. for life with remainder to her son, P. By an oral agreement made on June 18, 1956, between O. and P., it was agreed that P. would, on June 26, 1956, exchange his interest under the settlement for shares in the limited company then owned by O., to the intent that O.'s life interest in the settled shares should be enlarged into absolute ownership. On June 26, 1956, three documents were executed. They were a deed of release made between O., P. and the trustees of the settlement, giving a release to the trustees in respect of any "act deed matter or thing done" by the trustees in the execution of the trusts of the settlement; a transfer of her shares by O. to P.'s nominees in consideration of 10s.; and a transfer (called hereafter "the disputed transfer") by which the trustees vested the legal title in the settled shares in O. in consideration of 10s. Recital (F) of the deed of release, after acknowledging that the settled shares were then held on trust for O., recited that it was intended that they should forthwith be transferred to O. Stamp duty ad valorem was claimed on the disputed transfer assessed on the value of the shares transferred to O.

Held (LORD RADCLIFFE and LORD COHEN dissenting): the disputed transfer was a transfer on sale of property within s. 54 of the Stamp Act, 1891, and attracted ad valorem duty on the consideration given by O. (viz., the value of the shares which she transferred) for her acquisition of P.'s reversionary interest in the settled shares for the following reasons—

(i) assuming that the oral agreement of June 18, 1956 (which was a contract for sale), created a constructive trust of P.'s equitable reversionary interest in the settled shares in favour of O., nevertheless a transfer of the shares to O., executed in performance of the contract for sale, would be a transfer on sale for the purposes of stamp duty, notwithstanding that the constructive trust in O.'s favour existed before the transfer was executed, and

(ii) in fact the disputed transfer was such a transfer on sale, for the parties to the sale intended (as recital (F) showed) that the transaction of sale should be completed by this instrument; moreover (per LORD JENKINS and LORD KEITH OF AVONHOLM), although the interest that P. sold was a reversionary beneficial interest, the disputed transfer must be regarded as being a transfer on sale that included this reversionary interest, and the fact that the transferors were the trustees (not P.) did not prevent the disputed transfer being a transfer on sale, since the trustees were transferring by the directions of O. and P.

Decision of the COURT OF APPEAL ([1958] 2 All E.R. 443) affirmed.

[As to stamp duty on conveyances or transfers on sale, see 28 HALSBURY'S STATUTES (2nd Edn.) 458, para. 973; and for cases on the subject, see 39 DIGEST 278-281, 621-651.]

For the Stamp Act, 1891, s. 54 and Sch. 1, see 21 HALSBURY'S STATUTES (2nd Edn.) 627, 652.

For the Law of Property Act, 1925, s. 53, see 20 HALSBURY'S STATUTES (2nd Edn.) 551.]

Cases referred to:

A.-G. v. Brown, (1849), 3 Exch. 662; 18 L.J.Ex. 336; 13 L.T.O.S. 121; 154 E.R. 1011; 39 Digest 296, 766.

Escoigne Properties, Ltd. v. Inland Revenue Comrs., [1958] 1 All E.R. 406; [1958] A.C. 549; [1958] 2 W.L.R. 336; 3rd Digest Supp.

Inland Revenue Comrs. v. Angus; Same v. Lewis, (1889), 23 Q.B.D. 579; 61 L.T. 832; 39 Digest 254, 378.

Appeal.

Appeal by Phyllis Brown Oughtred from an order of the Court of Appeal (LORD EVERSHED, M.R., MORRIS and ORMEROD, L.J.J.), dated May 15, 1958, and reported [1958] 2 All E.R. 443, reversing an order of UPJOHN, J., dated Dec. 3, 1957, and reported [1958] 1 All E.R. 252, on an appeal by Case Stated by the appellant in which she sought the determination by the court of the amount of stamp duty chargeable on an instrument of transfer of shares dated June 26, 1956, made by the trustees of a settlement to the appellant. The facts are set out in the opinion of LORD JENKINS, p. 630, letters B to I, post.

Geoffrey Cross, Q.C., and *P. E. Whitworth* for the appellant.

R. O. Wilberforce, Q.C., and *E. Blanshard Stamp* for the Crown.

Their Lordships took time for consideration.

Nov. 4. The following opinions were read.

LORD RADCLIFFE: My Lords, the facts of this case are very simple. The appellant, Mrs. Oughtred, and her son were respectively entitled to the life interest and absolute reversion in a settled fund consisting of shares in a limited company. They thus owned between them the whole equitable interest in those shares, which were vested in the appellant and two other persons as trustees of the settlement. On June 18, 1956, an oral agreement was made between the appellant and her son to the effect that, on the 26th of the same month, she would transfer to him certain other shares in the same company which were her own absolute property and, in exchange, he would make her the absolute beneficial owner of the settled shares by giving up to her his beneficial reversionary interest. On June 26 three documents were executed. It is obvious that they were all part of the same transaction, though I will mention them in the order which gives them logical coherence. First, the appellant transferred her own shares to her son. Secondly, the two of them joined in giving a release to the trustees of the settlement in respect of any

“act deed matter or thing done or omitted by the trustees or any of them in or about the execution of the trusts and provisions of the settlement”

and, the trust fund being (I quote from recital (F) of the deed of release) “now held by the trustees in trust for [the appellant] absolutely as the trustees hereby acknowledge”, the trustees undertook to transfer the settled shares to the appellant or as she should direct. Thirdly, the trustees executed a deed of transfer accordingly vesting the legal title to the shares in the appellant. It is this last-mentioned deed which is claimed by the Commissioners of Inland Revenue to be a conveyance on sale of the son's equitable reversionary interest within the meaning of s. 54 of the Stamp Act, 1891, and, as such, liable to ad valorem duty on the value of the shares transferred by the appellant in exchange for it. The Case Stated, on which this appeal arises, presents that claim as a question for decision by the court.

It is plain, of course, that, ostensibly, the transfer is not a conveyance of the equitable reversionary interest at all. It deals with the shares themselves, not with any beneficiary's particular interest in them. The commissioners, however, arrived at their opinion that the transfer was chargeable ad valorem by a process of reasoning which is set out in para. 12 of the Case. They took the view that, having regard to para. (c) of s. 53 (1) of the Law of Property Act, 1925 (a provision which requires that any “disposition” of an equitable interest subsisting

- A at the time of the disposition must be in writing), they must treat the recital that the shares held by the trustees were "now held" in trust for the appellant as incorrect; and they appear to have concluded, without more, that, as apart from the transfer now in question no instrument in writing stamped with ad valorem duty transferring the son's equitable reversionary interest had been produced to them, they ought to treat the transfer of shares itself as constituting the necessary instrument. This line of reasoning is, in my view, fallacious.
- B It contains two false assumptions. One is that, under English law, it must have been wrong to describe the settled shares as held by the trustees on June 26 in trust for the appellant absolutely unless the son's reversion had been assigned to her in writing so as to satisfy s. 53 (1) (c) of the Law of Property Act, 1925. The other is that somehow there must exist as a result of the transaction covered
- C by the recited facts an instrument of conveyance capable of being charged to duty ad valorem, since otherwise there would be no ad valorem duty payable. The second assumption is one which, I am bound to say, appears to me to be the foundation of the argument for the commissioners' claim, no matter in what form it is expressed.

- Yet the law with regard to liability to stamp duty is clear enough. The duty
- D is charged on instruments, if they exist and come within any of the categories prescribed by the Act. It is not charged on transactions. Thus property such as chattels which by law pass on delivery can be transferred from one owner to another without attracting duty. Again, though an agreement for sale may be chargeable ad valorem, since the Act has so required, an oral agreement for the sale of property involves no charge to duty because no instrument is brought
- E into existence to effect or to record it. The whole point of the present appeal seems to me to turn on the question whether it is open to a court of law to deduce from the documents of this case that the appellant's title to her son's equitable reversionary interest rested on anything more than the oral agreement which admittedly took place. My Lords, on this short point my opinion is that such a deduction is not open to a court of law. The materials that would support it
- F are simply not there. I think that the judgment of UPJOHN, J., in the High Court, which was in favour of the appellant, was correct and I agree with his reasons. I am afraid that I do not agree with the judgment of the Court of Appeal, which was in favour of the commissioners, or with the conclusion which, as I understand, commends itself to a majority of your Lordships.

- The reasoning of the whole matter, as I see it, is as follows. On June 18,
- G 1956, the son owned an equitable reversionary interest in the settled shares; by his oral agreement of that date he created in his mother an equitable interest in his reversion, since the subject-matter of the agreement was property of which specific performance would normally be decreed by the court. He thus became a trustee for her of that interest sub modo; having regard to sub-s. (2) of s. 53 of the Law of Property Act, 1925, sub-s. (1) of that section did not operate to
- H prevent that trusteeship arising by operation of law. On June 26 the appellant transferred to her son the shares which were the consideration for her acquisition of his equitable interest; on this transfer he became in a full sense and without more the trustee of his interest for her. She was the effective owner of all outstanding equitable interests. It was thus correct to recite in the deed of release to the trustees of the settlement, which was to wind up their trust, that
- I the trust fund was by then held on trust for her absolutely. There was, in fact, no equity to the shares that could be asserted against her, and it was open to her, if she so wished, to let the matter rest without calling for a written assignment from her son. Given that the trustees were apprised of the making of the oral agreement and of the appellant's satisfaction of the consideration to be given by her, the trustees had no more to do than to transfer their legal title to her or as she might direct. This and no more is what they did.

It follows that, in my view, this transfer cannot be treated as a conveyance

of the son's equitable reversion at all. The trustees had not got it; he never transferred or released it to them; how, then, could they convey it? With all respect to those who think otherwise, it is incorrect to say that the trustees' transfer was made either with his authority or at his direction. If the recital as to the appellant's rights was correct, as I think that it was, he had no remaining authority to give or direction to issue. A release is, after all, the normal instrument for winding-up a trust when all the equitable rights are vested and the legal estate is called for from the trustees who hold it. What the release gave the trustees from him was acquittance for the trust administration and accounts to date, and the fact that he gave it in consideration of the legal interest in the shares being vested in his mother adds nothing on this point. Nor does it, with respect, advance the matter to say, correctly, that, at the end of the day, the appellant was the absolute owner of the shares, legal and equitable. I think that she was; but that is description, not analysis. The question that is relevant for the purpose of this appeal is how she came to occupy that position; a position which, under English law, could be reached by more than one road.

Lastly, I ought, perhaps, to say that I do not myself see any analogy between the operations embraced by the oral agreement and documents and the common case of a sale of shares by an owner for whom they are held by a nominee or bare trustee. What is sold there is the shares themselves, not the owner's equitable interest. What is passed by the transfer executed by his nominee is the shares, according to the contract, without any incumbance on the title, equitable or legal. It is, I think, a misunderstanding of the law to speak of the nominee as transferring his beneficiary's previous equitable interest to the purchaser.

For the reasons which I have given, I am in favour of allowing the appeal.

LORD COHEN: My Lords, the question for your Lordships' decision is whether the Inland Revenue were entitled to claim *ad valorem* duty on a deed (to which I shall refer hereinafter as "the transfer") dated June 26, whereby four transferors (the trustees of the settlement hereinafter mentioned) were expressed to transfer one hundred thousand preference shares of 10s. each and one hundred thousand ordinary shares of 10s. each in a company called William Jackson & Son, Ltd. to the appellant in consideration of 10s. The commissioners upheld the claim of the Inland Revenue but, at the request of the present appellant, stated a Case for the determination of the High Court. This came before UPJOHN, J., on Dec. 3, 1957. He answered the question in favour of the present appellant, directed that the *ad valorem* duty which had been paid should be repaid, and fixed the duty at 10s. The commissioners appealed to the Court of Appeal, and, on May 15, 1958, the Court of Appeal, holding that the transfer attracted *ad valorem* duty, allowed the appeal and ordered the present appellant to pay £662 10s., i.e., the agreed amount of the *ad valorem* duty (£663) less the 10s. paid under the order of UPJOHN, J. It is from that order of the Court of Appeal that the appeal now before your Lordships is brought.

My Lords, the facts have already been sufficiently stated by the noble and learned Lord on the Woolsack. I agree with him that to give logical coherence to what was done your Lordships should treat the three documents executed on June 26 as having been executed in the following order:—(i) the transfer by the appellant to her son Peter of the shares which were the consideration for the oral agreement by Peter to make her the absolute beneficial owner of the settled shares; (ii) the deed of release; (iii) the transfer. Before UPJOHN, J., the Crown argued that, having regard to s. 53 (1) (c) of the Law of Property Act, 1925, no equitable interest passed to the present appellant under the contract and, therefore, Peter's beneficial interest in the settled shares must have passed under the transfer. The material portions of s. 53 are as follows:

"(1) Subject to the provisions hereinafter contained with respect to the creation of interests in land by parol—... (c) a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing

- A signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will.

"(2) This section does not affect the creation or operation of resulting, implied or constructive trusts."

- B UPJOHN, J., rejected the Crown's argument. He held that sub-s. (2) afforded a complete answer to it saying (1):

"This was an oral agreement for value, and, accordingly, on the making thereof Peter the vendor became a constructive trustee of his equitable reversionary interest in the trust funds for the appellant. No writing to achieve that result was necessary, for an agreement of sale and purchase of an equitable interest in personalty (other than chattels real) may be made orally, and s. 53 has no application to a trust arising by construction of law."

- C The Court of Appeal did not accept UPJOHN, J.'s conclusion as to the effect of sub-s. (2), but did not find it necessary to express a concluded opinion as to the effect of s. 53.

- D Before your Lordships, counsel for the Crown was prepared to agree that, on the making of the oral agreement, Peter became a constructive trustee of his equitable reversionary interest in the settled funds for the appellant, but he submitted that, none the less, s. 53 (1) (c) applied and, accordingly, Peter could not assign that equitable interest to the appellant except by a disposition in writing. My Lords, with that I agree, but it does not follow that the transfer was a conveyance of that equitable interest on which ad valorem stamp duty was payable under the Stamp Act, 1891. It might well be that there has been no document transferring the equitable interest. The appellant may have been content to rely on getting in the legal interest by the transfer and on the fact that it would be impossible for Peter to put forward successfully a claim to an equitable interest in the settled shares once the consideration shares had been transferred to him or his nominees by the appellant. In the Court of Appeal, counsel for the Crown argued that ad valorem duty was payable on the transfer since, immediately before the execution of the transfer, Peter's equitable reversionary interest remained in him and, since the transfer vested in the appellant full legal and beneficial title to the settled shares, the transfer must have operated both to assign to the appellant Peter's reversionary interest and also the legal estate. The Court of Appeal did not accept this argument as they could see no answer to the objection that Peter was not a conveying party and his equitable reversionary interest was never vested in the transferors. Counsel argued alternatively that the transfer, read in the light of the contemporary transfer of the consideration shares to Peter's nominees, and of the deed of release, was, in truth, nothing other than the completion and the contemplated method of completion of the oral contract, and so was a "conveyance or transfer on sale of property" within the meaning of s. 54 of, and Sch. 1 to, the Stamp Act, 1891.
- H This alternative argument the Court of Appeal accepted, saying (2):

"The distinction between the two alternative presentations of the Crown's case may be a fine one, but it is real. It is of the essence of the former alternative that the transfer operated to convey two separate and distinct 'properties', viz., the legal estate and the son's reversionary equitable interest, the Crown claiming duty in respect of each 'conveyance'. Though the vendor under the contract need not be a conveying party, the latter must, as we conceive, be in a position to convey the property alleged to pass. The second alternative treats the three documents of June 26 (being the date fixed by the contract for completion) as contemporaneous, and deduces—particularly from the terms of the release—that the trustees were thus enabled and entitled to transfer to the [appellant] (as the transfer on the face of

(1) [1958] 1 All E.R. at p. 255; [1958] Ch. at p. 390.

(2) [1958] 2 All E.R. at p. 448; [1958] Ch. at p. 690.

it purports to do) the shares themselves with all rights and benefits attached thereto." A

My Lords, the distinction is too fine for me. The Stamp Act, 1891, imposes stamp duty on documents, not transactions. The transfer does not attract ad valorem duty unless, to use the language of s. 54 of the Act, it is an

"instrument . . . whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser . . ." B

The words "upon the sale thereof" must, in relation to this case, mean "on the sale of Peter's equitable interest". It is, as the Court of Appeal recognise, impossible to say that the transfer had the effect of transferring the equitable interest, since the transferors never had that interest to transfer, nor, in my opinion, can it be said that, by the transfer, Peter's equitable interest was vested in the appellant. The appellant, as a result of what was done on June 26, was, as the release recognised, absolutely entitled to the settled shares, but that was not because the equitable interest was transferred to or vested in her by the transfer but because Peter, having become a constructive trustee for her of his equitable interest, could not, after his nominees had received the consideration shares, as they did on June 26, 1956, dispute the appellant's title to the settled shares. C D

I, too, would allow the appeal.

LORD KEITH OF AVONHOLM: My Lords, I have had the advantage of reading the opinion which will be delivered by my noble and learned friend, LORD JENKINS. I agree with it and have nothing to add. E

LORD DENNING: My Lords, stripped of all trimmings, the case is simply this: The trustees of a settlement held the legal title in two hundred thousand shares in trust for the appellant, Mrs. Oughtred, for life and after her death for her son Peter. The appellant also owned 72,700 shares which were her very own. On June 18, 1956, Peter and his mother agreed by word of mouth that they would, on June 26, 1956, effect an exchange: He would make over to her his reversionary interest in the two hundred thousand shares, and she, in exchange, would make over to him the entire interest in the 72,700 shares. On June 26, 1956, the exchange was implemented in this way: (i) By a simple transfer the appellant transferred her 72,700 shares direct to Peter, or rather to nominees for Peter. It was said to be "in consideration of 10s." (ii) Peter did not transfer his reversionary interest in the two hundred thousand shares direct to his mother, but he authorised the trustees of the settlement to transfer the two hundred thousand shares to her *to the intent that her life interest should be enlarged into absolute ownership of them*. The authority so given by Peter was implicit in the recitals of a deed of release executed by himself and his mother which was said to be "in consideration of the premises and of the transfer to be made as aforesaid." (iii) By a simple transfer, the trustees transferred the two hundred thousand shares to the appellant. It was said to be "in consideration of 10s.". There is no doubt that the transfer was intended to, and did, vest in the appellant the absolute ownership of the two hundred thousand shares both in law and in equity. No interest was left in Peter or anyone else. His reversionary interest was squeezed out. The trustees would not have dreamed of executing this transfer unless Peter had authorised them to do it. F G H I

Was this transfer "a conveyance or transfer on sale, of any property" such as to attract stamp duty on the value of the consideration? I have no doubt it was. Peter had agreed to sell his reversionary interest in the two hundred thousand shares to his mother for a stated consideration (the 72,700 shares). He did not convey this reversionary interest direct to her, nor did he convey it to the trustees of the settlement. But he authorised the trustees to convey it to her—not in the shape of a reversionary interest as such—but by way of enlarging

- A her life interest into absolute ownership. It is clear to me that, by the transfer so made by his authority, she acquired his reversionary interest as effectively as if he had conveyed it direct to her. And that is quite enough to attract stamp duty. In my opinion, every conveyance or transfer by which an agreement for sale is implemented is liable to stamp duty on the value of the consideration. It is not necessary for the instrument of implementation to be between the same
- B parties as the agreement for sale, nor for it to relate to the self-same property as the agreement for sale. Suffice it that the instrument is the means by which the parties choose to implement the bargain they have made. It is then a "conveyance or transfer on sale" of any property—which I take to mean a conveyance or transfer consequent on the sale of the property and in implementation of it. Such is, I think, clearly borne out by *A.-G. v. Brown* (3) and by the
- C illustrations given in the course of the argument. Thus, when an equitable owner of shares (registered in the name of a nominee) agrees to sell them to a purchaser, and it is implemented by a transfer by the nominee to the purchaser, the transfer is a conveyance on sale of any property—although, of course, the parties to the agreement are different from the parties to the transfer. And when two people are equitable co-owners of shares—and one of them agrees to
- D sell his interest to the other—and it is implemented by a transfer of the shares by the trustees (with the authority of the one) to the other, the transfer is a conveyance on sale of any property—although, of course, the property which is transferred is different from the property in the agreement.

- I do not think it necessary to embark on a disquisition on constructive trusts; because I take the view that, even if the oral agreement of June 18, 1956, was
- E effective to transfer Peter's reversionary interest to his mother, nevertheless, when that oral agreement was subsequently implemented by the transfer, then the transfer became liable to stamp duty. But I may say that I do not think^T the oral agreement was effective to transfer Peter's reversionary interest to his mother. I should have thought that the wording of s. 53 (1) (c) of the Law of Property Act, 1925, clearly made a writing necessary to effect a transfer; and
- F s. 53 (2) does not do away with that necessity.]

For these reasons, which are in substance the same as those given by the Master of the Rolls (LORD EVERSHERD), I would dismiss this appeal.

- LORD JENKINS: My Lords, the question in this case is whether a transfer under seal dated June 26, 1956, whereby the trustees of the settlement hereinafter
- G mentioned transferred to the appellant, Mrs. Phyllis Brown Oughtred, one hundred thousand ordinary and one hundred thousand preference shares of 10s. each in a company called William Jackson & Son, Ltd., attracted ad valorem stamp duty as a conveyance or transfer on sale within the meaning of the head of charge "conveyance or transfer on sale of any property . . ." in Sch. 1 to the Stamp Act, 1891, or was liable only to the fixed duty of 10s. as a "conveyance
- H or transfer of any kind not hereinbefore described". The matter came before UPJOHN, J., on an appeal by way of Case Stated under s. 13 of the Act of 1891 at the request of the appellant by the Commissioners of Inland Revenue, who had assessed the stamp duty chargeable on the transfer in question at £663 10s. made up of £663 ad valorem transfer on sale duty together with the fixed duty of 10s.
- I UPJOHN, J., by an order dated Dec. 3, 1957, allowed the appeal, stated the opinion of the court to be that the transfer in question was not chargeable with ad valorem duty, declared that it was chargeable with the fixed duty of 10s. only, and ordered the £663 ad valorem duty paid on the transfer to be repaid. The commissioners appealed to the Court of Appeal, and by an order of that court (the Master of the Rolls (LORD EVERSHERD) and MORRIS and ORMEROD, L.JJ.) dated May 15, 1958, the appeal was allowed, the transfer in question was held to be chargeable with the ad valorem duty of £663 but not with the fixed

duty of 10s., and the present appellant was ordered to repay to the commissioners the sum of £662 10s., being the amount of the ad valorem duty held to be payable, less the fixed duty of 10s. held not to be payable. From that order the appellant now appeals to your Lordships' House. A

The facts leading up to the execution of the disputed transfer are fully set out in the Stated Case and I need not repeat them at length. Immediately before the making of the oral agreement to which I am about to refer, the shares later transferred by the disputed transfer (which I will call "the settled shares") were under and by virtue of a settlement dated Jan. 1, 1924, a deed of appointment dated June 18, 1956, and made by the appellant, and a deed of release also made by the appellant and dated June 18, 1956, and in the events which had happened, held by the trustees of the settlement in trust for the appellant for life with remainder to her only child Peter Bentham Oughtred (whom I will call "Peter"), absolutely. By an oral agreement made on June 18, 1956, between the appellant and Peter, it was agreed that Peter would, on June 26, 1956, exchange his interest under the settlement and the above-mentioned deed of appointment and deed of release for 28,510 preference shares and 44,190 ordinary shares in William Jackson & Son, Ltd. then owned by the appellant (which I will call "the free shares") to the intent that the life interest of the appellant in the trust fund (which consisted wholly of the settled shares) should be enlarged into absolute ownership thereof. The oral agreement was followed by the execution of three documents, all dated June 26, 1956, viz.:—(i) a deed of release (which I will call "the release") made between the appellant of the first part, Peter of the second part, and the trustees of the settlement of the third part, which appears in fact to have been executed only by the appellant and Peter. (ii) A transfer by the appellant of the free shares to nominees for Peter, expressed to be made in consideration of 10s. (iii) The disputed transfer, likewise expressed to be made in consideration of 10s. The release, after recital of the facts to which I have already referred down to and including the oral agreement, the terms of which are fully stated in recital (F), continued in the same recital as follows: B C D E F

"(F) . . . The trust fund which now consists of [the settled shares] is accordingly now held by the trustees in trust for [the appellant] absolutely as the trustees hereby acknowledge and it is intended that the same shall forthwith be transferred to [the appellant] or as she shall direct."

After a further recital (G) to the effect that the appellant and Peter being satisfied with all matters and things relating to the execution of the trusts of the settlement had agreed to make the release thereafter contained, the release by its operative part was expressed to witness that "in consideration of the premises and of the transfer to be made as aforesaid" the appellant and Peter—to put it shortly—gave the trustees a general release in respect of their trusteeship of the settlement. The transfer of the free shares and the disputed transfer were common form share transfers the terms of which call for no special comment. As to the order in which the three documents of June 26, 1956, were executed, it seems clear from the terms of recital (F) and from the phrase "and of the transfer to be made as aforesaid" in the operative part of the release, that this document must have been executed before the disputed transfer, but there is no means of telling whether the execution of the transfer of the free shares preceded or followed the execution of the release or, in the latter case, whether it preceded or followed the execution of the disputed transfer. In my view, nothing turns on this, inasmuch as the three documents were interdependent parts of the same transaction, all executed on the same day. I am, however, prepared to assume in the appellant's favour that the transfer of the free shares to Peter preceded the transfer of the settled shares to the appellant, so that, when the transfer of the settled shares was executed, the appellant had already performed her part of the bargain. G H I

- A Ad valorem duty was not claimed on the release or on the transfer of the free shares, but only on the disputed transfer.

The provisions of the Stamp Act, 1891, directly relevant to the claim are these: s. 1 (which contains the charge of stamp duties) provides that the stamp duties "upon the several instruments specified in Sch. 1 to this Act shall be the several duties in the said schedule specified . . ." Section 54 provides as follows:

- B "For the purposes of this Act the expression 'conveyance on sale' includes every instrument . . . whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser, or any other person on his behalf or by his direction."

- C Schedule 1 imposes under the head of charge "Conveyance or transfer on sale of any property" (except as therein mentioned) ad valorem duty on "the amount or value of the consideration for the sale"; and under the head of charge "Conveyance or transfer of any kind not hereinbefore described" a fixed duty of 10s. Reference should also be made to s. 53 of the Law of Property Act, 1925, which (so far as material for the present purpose) provides as follows:

- D "(1) Subject to the provisions hereinafter contained with respect to the creation of interests in land by parol— . . . (c) a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will.

- E "(2) This section does not affect the creation or operation of resulting, implied or constructive trusts."

- F The question, then, is whether, on the true construction of s. 54 of the Act of 1891, and having regard to the terms and effect of the oral agreement and the nature of the interests with respect to which that agreement was made, the disputed transfer was an instrument whereby property in the shape of the settled shares or any estate or interest in that property was transferred "upon the sale thereof" to a purchaser in the person of the appellant. To revert to the terms of the oral agreement, it was made on June 18, 1956, and provided that, on a fixed future date, viz., June 26, 1956, Peter should exchange his interest under the settlement (i.e., his absolute interest in the settled shares subject to the appellant's life interest therein) for the free shares belonging to the appellant to the intent that the life interest of the appellant in the trust fund (i.e., in the settled shares) should be enlarged into absolute ownership thereof. The effect of the agreement according to the expressed intention of the parties thus was that, on June 26, the appellant should become absolutely and beneficially entitled in possession to the settled shares discharged from the trusts of the settlement, subject to her obligation to make over to Peter the free shares which formed the consideration for the exchange, or in other words the consideration for the sale to her by Peter of his reversionary interest in the settled shares. By way of corollary to the oral agreement, recital (F) of the release, after stating its terms, went on to acknowledge that the trust fund, consisting of the settled shares, was accordingly held by the trustees in trust for the appellant absolutely, and that it was intended that the same should forthwith be transferred to the appellant or as she should direct. It is not open to doubt that the oral agreement as above described amounted to an agreement for the sale by Peter, for a purchase consideration consisting of the free shares, of his reversionary interest in the settled shares to the appellant. It is also plain that the parties intended that the sale should have the effect of enlarging the appellant's life interest in the settled shares into absolute ownership thereof and should, accordingly, be completed on June 26 by an immediate out and out transfer of the settled shares by the trustees to the appellant for her own absolute use and benefit, against the satisfaction by her of the consideration due to Peter in the shape of the free shares. The expressed intention of the parties that the appellant's life interest should be enlarged into

absolute ownership appears to me to be indistinguishable in its effect from an intention that the appellant's life interest should merge in the reversionary interest, so as to convert that interest into an immediate absolute interest in possession, discharged from the life interest. A

Such being the nature of the transaction in connexion with which the disputed transfer was executed, the appellant's case is put in this way. It is said, and said truly, that stamp duty is imposed on instruments, not transactions, and that a transaction of sale carried out without bringing into existence an instrument which has the effect of transferring to or vesting in the purchaser the property sold attracts no duty: see per LORD ESHER, M.R., in *Inland Revenue Comrs. v. Angus* (4), where he said: B

"The first thing to be noticed is, that the thing which is made liable to the duty is an 'instrument'. If a contract of purchase and sale, or a conveyance by way of purchase and sale, can be, or is, carried out without an instrument, the case is not within the section, and no tax is imposed. It is not the transaction of purchase and sale which is struck at; it is the instrument whereby the purchase and sale are effected which is struck at. And if anyone can carry through a purchase and sale without an instrument, then the legislature have not reached that transaction. The next thing is that it is not every instrument which may be brought into being in the course of a transaction of purchase and sale which is struck at. It is the instrument 'whereby any property upon the sale thereof is legally or equitably transferred'. The taxation is confined to the instrument whereby the property is transferred. The transfer must be made by the instrument. If a transfer requires something more than an instrument to carry it through, then the transaction is not struck at, and the instrument is not struck at because the property is not transferred by it." C D E

It is said further that, in the present case, the disputed transfer transferred nothing beyond a bare legal estate, because, in accordance with the well-settled principle applicable to contracts of sale between contract and completion, the appellant became under the oral agreement beneficially entitled in equity to the settled shares, subject to the due satisfaction by her of the purchase consideration, and, accordingly, the entire beneficial interest in the settled shares had already passed to her at the time of the execution of the disputed transfer, and there was nothing left on which the disputed transfer could operate except the bare legal estate. F G

The Commissioners of Inland Revenue seek to meet this argument by reference to s. 53 (1) (c) of the Law of Property Act, 1925. They contend that, as the agreement of June 18, 1956, was an oral agreement, it could not, in view of s. 53 (1) (c), effect a disposition of a subsisting equitable interest or trust, and, accordingly, that Peter's subsisting equitable interest under the trusts of the settlement, in the shape of his reversionary interest, remained vested in him until the execution of the disputed transfer, which, in these circumstances, operated as a transfer on sale to the appellant of Peter's reversionary interest and additionally as a transfer not on sale to the appellant of the legal interest in the settled shares. It was by this process of reasoning that the commissioners arrived at the opinion expressed in the Case Stated that the disputed transfer attracted both the ad valorem duty exigible on a transfer on sale of the reversionary interest and also the fixed duty of 10s. This argument is attacked on the appellant's side by reference to sub-s. (2) of s. 53 of the Act of 1925, which excludes the creation or operation of resulting, implied or constructive trusts from the provisions of sub-s. (1). It is said that, inasmuch as the oral agreement was an agreement of sale and purchase, it gave rise, on the principle to which I have already adverted, to a constructive trust of the reversionary interest in favour of the appellant H I

A subject to performance by her of her obligation to transfer to Peter the free shares forming the consideration for the sale. It is said that this trust, being constructive, was untouched by s. 53 (1) (c) in view of the exemption afforded by s. 53 (2), and that the appellant's primary argument still holds good.

I find it unnecessary to decide whether s. 53 (2) has the effect of excluding the present transaction from the operation of s. 53 (1) (c), for, assuming in the appellant's favour that the oral contract did have the effect in equity of raising a constructive trust of the settled shares for her untouched by s. 53 (1) (c), I am unable to accept the conclusion that the disputed transfer was prevented from being a transfer of the shares to the appellant on sale because the entire beneficial interest in the settled shares was already vested in the appellant under the constructive trust, and there was, accordingly, nothing left for the disputed transfer to pass to the appellant except the bare legal estate. The constructive trust in favour of a purchaser which arises on the conclusion of a contract for sale is founded on the purchaser's right to enforce the contract in proceedings for specific performance. In other words, he is treated in equity as entitled by virtue of the contract to the property which the vendor is bound under the contract to convey to him. This interest under the contract is, no doubt, a proprietary interest of a sort, which arises, so to speak, in anticipation of the execution of the transfer for which the purchaser is entitled to call. But its existence has never (so far as I know) been held to prevent a subsequent transfer, in performance of the contract, of the property contracted to be sold from constituting for stamp duty purposes a transfer on sale of the property in question. Take the simple case of a contract for the sale of land. In such a case, a constructive trust in favour of the purchaser arises on the conclusion of the contract for sale, but (so far as I know) it has never been held on this account that a conveyance subsequently executed in performance of the contract is not stampable ad valorem as a transfer on sale. Similarly, in a case like the present one, but uncomplicated by the existence of successive interests, a transfer to a purchaser of the investments comprised in a trust fund could not, in my judgment, be prevented from constituting a transfer on sale for the purposes of stamp duty by reason of the fact that the actual transfer had been preceded by an oral agreement for sale.

In truth, the title secured by a purchaser by means of an actual transfer is different in kind from, and may well be far superior to, the special form of proprietary interest which equity confers on a purchaser in anticipation of such transfer. This difference is of particular importance in the case of property such as shares in a limited company. Under the contract, the purchaser is, no doubt, entitled in equity as between himself and the vendor to the beneficial interest in the shares, and (subject to due payment of the purchase consideration) to call for a transfer of them from the vendor as trustee for him. But it is only on the execution of the actual transfer that he becomes entitled to be registered as a member, to attend and vote at meetings, to effect transfers on the register, or to receive dividends otherwise than through the vendor as his trustee.

The parties to a transaction of sale and purchase may, no doubt, choose to let the matter rest in contract. But if the subject-matter of a sale is such that the full title to it can only be transferred by an instrument, then any instrument they execute by way of transfer of the property sold ranks for stamp duty purposes as a conveyance on sale, notwithstanding the constructive trust in favour of the purchaser which arose on the conclusion of the contract. On this part of the case, reference may be made to *Inland Revenue Comrs. v. Angus* (5), in which the converse question whether an agreement for sale of property in the shape of goodwill amounted to a conveyance of the property for stamp duty purposes under s. 70 of the Stamp Act, 1870, was discussed by the Court of Appeal and answered in the negative; and to the observations of LORD SOMERVELL OF HARROW in *Escoigne Properties, Ltd. v. Inland Revenue Comrs.* (6).

(5) (1889), 23 Q.B.D. 579.

(6) [1958] 1 All E.R. 406 at p. 412; [1958] A.C. 549 at p. 563.

In the present case, recital (F) of the release plainly shows the intention of the parties to the oral contract to have been that the transaction should be completed by the disputed transfer, and this seems to me hardly possible to reconcile with the view that nothing passed under it. A

A further argument raised on the appellant's side is to the effect that, in any case, the disputed transfer was not a transfer of the property sold, but was a transfer of the settled shares, whereas the property sold was Peter's reversionary interest. It is said that the disputed transfer was, accordingly, outside the definition in s. 54 of the Act of 1891 because it was not an instrument whereby property or any estate or interest therein was transferred on a sale thereof. I cannot accept this argument, in considering which I adhere to the assumption made above as to the exclusion of s. 53 (1) (c) of the Act of 1925. It appears to me that, in transferring the settled shares to the appellant, the disputed transfer was transferring to her the property then representing the reversionary interest, which, under the oral contract, had been converted into an immediate interest in possession by virtue of the expressed intention that the sale to the appellant of the reversionary interest should have the effect of enlarging her life interest into absolute ownership, which, as I have said above, appears to me to be indistinguishable from an intention that the appellant's life interest should merge in the absolute reversionary interest. It is obvious that the sale of an absolute interest in remainder such as this includes the absolute interest in possession in the property comprised in it when it falls into possession. Here, as it seems to me, the reversion was brought into possession in the hands of the appellant by the merger of her life interest, which was necessary if she was to be put in a position to call for an immediate transfer of the settled shares, as it was intended she should be; and, accordingly, the settled shares as transferred to her actually represented the reversionary interest which she had bought and which had been converted into an immediate interest in possession by the terms of the oral agreement. B C D E

One may take by way of illustration the simple case of an agreement for the sale of a reversionary interest in a trust fund subject to a life interest. Suppose in such a case that the life-tenant dies while the matter rests in contract, and that, after the life-tenant's death, the trustees of the settlement, by the direction of the vendor and purchaser, transfer to the purchaser by appropriate instruments the investments then representing the trust fund. In such a case it would, I should have thought, be impossible to maintain that such instruments did not constitute transfers whereby the investments were transferred to the purchaser on a sale thereof, on the ground that what he purchased was the reversionary interest whereas the property conveyed to him consisted of the investments. This, it appears to me, would also have been the position here if the appellant had died between June 18 and 26, 1956, and her personal representatives had called for a transfer of the settled shares to implement the oral agreement. In that event it would, in my view, have been impossible to contend that the transfer of the settled shares was not a transfer of property on a sale thereof within the meaning of s. 54. The property sold would have been the reversionary interest, and the property transferred would have consisted of the property comprised in the reversionary interest on its falling into possession. I do not see why there should be any difference in result between the imaginary case of the reversionary interest falling into possession by the death of the life-tenant and the actual case now before your Lordships, in which the reversionary interest was brought into immediate possession by merger of the life interest. It can at all events safely be said that the life interest and the reversionary interest either continued in existence as separate items of property or they did not. I think the terms of the oral agreement were consistent only with the merger of the life interest and the consequent acceleration of the reversionary interest sold, so as to bring it, and the shares which it comprised, into immediate possession. But if I am wrong in this, and the life and reversionary interest are to be considered F G H I

- A as having remained in existence as separate items of property, then it appears to me that the disputed transfer, made by the direction of both beneficiaries (as shown by the release), and apt as it was to transfer the entire beneficial ownership of the shares at law to the appellant, must be taken to have included two estates or interests in the settled shares, viz., (a) the appellant's life interest and (b) Peter's absolute interest in remainder expectant on the appellant's life interest. If that was the position, then, as it seems to me, the disputed transfer must have operated to transfer to the appellant an estate or interest in property (viz., in the settled shares) consisting of Peter's interest in the shares in remainder expectant on the death of the appellant, which interest had undeniably been sold to the appellant by Peter.

- I should next refer to the point taken on the appellant's side that the disputed transfer was made not by the vendor, namely, Peter, but by the trustees. In my view, there is no substance in this. Where property sold is outstanding in some person other than the vendor, being a trustee for or nominee of the vendor so as to be bound to transfer the property according to the vendor's direction, then, in my view, a transfer by such person at the direction of the vendor is for the present purpose equivalent to a transfer by the vendor himself. See, for example, *A.-G. v. Brown* (7), and consider the common case of sub-sales of land in which the vendor conveys by the direction of the original purchaser to the sub-purchaser. It is plain enough from the release in the present case that the disputed transfer was made in effect by the direction of both beneficiaries. I cannot accept UPJOHN, J.'s view that the disputed transfer was not stampable *ad valorem* because it was a transfer not on sale but on the winding-up of the trust. This seems to me to beg the question. The fact that the disputed transfer was made on the winding-up of the trust does not, in my view, prevent it from being also a transfer on sale. Let a case be supposed in which trustees hold a net fund in trust for some person who before the fund is distributed orally agrees to sell his interest to a purchaser, and, on the conclusion of this agreement, the original beneficiary and purchaser from him direct the trustees to transfer the investments representing the fund to the purchaser against a proper release, and the trustees execute the appropriate transfers accordingly. In such a case, it appears to me that the resulting transfers would plainly be transfers on sale although they also effected the winding-up of the trust.

For the reasons I have endeavoured to state, I am of opinion that this appeal fails and should be dismissed.

Appeal dismissed.

Solicitors: *Moeran, Oughtred & Co.*, agents for *Robinson, Sheffield & Till*, Beverley, Yorkshire (for the appellant); *Solicitor of Inland Revenue*.

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

LONDON COUNTY COUNCIL v. HENRY BOOT & SONS, LTD. A

[HOUSE OF LORDS (Viscount Simonds, Lord Radcliffe, Lord Cohen, Lord Keith of Avonholm and Lord Denning), October 7, 8, November 4, 1959.]

Building Contract—Wages—Rise and fall clause—“Wage”—“Rates of wages”—Weekly sums credited to each employee each week, payable as lump sum holiday money. B

By cl. 23A of a building contract, it was provided: “If during the currency of this contract:—(A) the rates of wages payable for any labour employed in the execution of the works shall in conformity with agreements between associations of employers and trade unions . . . be increased above or decreased below the corresponding rates in force at the date of the contractor’s tender . . . and the increase or decrease shall result in an increase or decrease of cost to the contractor”, then an allowance equivalent to the net increase or decrease should form an addition to or a deduction from the amount otherwise payable to the contractor. Under an annual holidays scheme (operated in conformity with agreements between associations of employers and trade unions) each workman was credited by the contractor, his employer, with a weekly sum, which credit was effected by stamping a card obtained for the workman with stamps purchased by the contractor from a management company. Under a public holidays scheme (similarly operated) similar credits were effected. The amount credited to a workman by means of the stamps would be paid to him by whomsoever was his employer at the time when he took his holiday and the management company would reimburse that employer. During the currency of the contract the credits were increased. The contractor claimed that the cost of this increase was payable as an addition to the contract price by virtue of cl. 23A. C

Held: the amounts paid by the contractor in respect of holiday credits were neither “wages” nor “rates of wages” within cl. 23A, for they were not paid by the contractor to the workman nor related to work done; therefore, the contractor was not entitled to add to the contract price the net cost of the increase in holiday credits. D

Decision of the COURT OF APPEAL (sub nom. *Henry Boot & Sons, Ltd. v. London County Council*) ([1959] 1 All E.R. 77) reversed. E

[As to the construction of phrases used in building contracts, see 3 HALSBURY’S LAWS (3rd Edn.) 428, para. 816; and for cases on the subject, see 7 DIGEST 340, 341, 38-47.] F

Appeal.

Appeal by London County Council from an order of the Court of Appeal (LORD SOMERVELL, MORRIS and PEARCE, L.JJ.), dated Nov. 18, 1958, and reported sub nom., *Henry Boot & Sons, Ltd. v. London County Council*, [1959] 1 All E.R. 77, reversing an order of PILCHER, J., dated Dec. 17, 1957. PILCHER, J., on a Special Case, dismissed the claim of the respondents, Henry Boot & Sons, Ltd., building contractors, against the appellants, their employers, under a building contract for the sum of £1,112 2s. 9d., being the amount of the increase during the currency of the contract in the amount of holiday money credited by the contractors to their employees due to an increase in the rates of such holiday money. The facts appear in the opinion of VISCOUNT SIMONDS. G

Sir Milner Holland, Q.C., and *M. R. Hoare* for the appellants. H

R. D. Stewart-Brown, Q.C., and *D. H. Gardam* for the respondents. I

Their Lordships took time for consideration.

Nov. 4. The following opinions were read.

VISCOUNT SIMONDS: My Lords, in the action out of which this appeal arises, the respondents, who carry on the business of building contractors, claimed from the appellants, the London County Council, sums amounting to

A £1,112 2s. 9d. They alleged that these sums were due to them under three building contracts, each of which contained a clause, commonly known as "an up and down clause", which I must set out in full. It was numbered cl. 23A and was in these terms:

B "If during the currency of this contract:—(A) the rates of wages payable for any labour employed in the execution of the works shall in conformity with agreements between associations of employers and trade unions, or with the decisions of a competent authority, be increased above or decreased below the corresponding rates in force at the date of the contractor's tender . . . and the increase or decrease shall result in an increase or decrease of cost to the contractor in carrying out the works, then an allowance equivalent to the net increase or decrease of cost (after deduction of all cash and other discount, and without any addition for overhead charges, profit or otherwise) as certified by the architect shall, subject to the provisions hereinafter contained, form an addition to or deduction from the amount otherwise payable under this contract and be paid to or allowed by the contractor accordingly as the case may require."

D The single question for your Lordships' decision is whether this clause is apt to cover certain payments which the respondents were constrained to make for the benefit of their workmen under agreements now to be described. They were agreements concerning what may be compendiously called "holiday pay", and I take this description of them from the Special Case which was agreed by the parties:

E "By an agreement in writing dated Oct. 28, 1942, and made between the said national federations (1) and two other parties representing the civil engineering industry it was agreed that the parties thereto would co-operate and use their best endeavours to procure all employers and operatives to co-operate in putting into operation and operating and carrying into effect a scheme (hereinafter called the 'annual holidays scheme') for providing holidays with pay in the building and civil engineering contracting industries.

F "10. The annual holidays scheme was subsequently to the coming into effect of the said agreement revised by the parties thereto so that at Dec. 17, 1951, the scheme as then in force provided inter alia—

G "(i) that each operative covered by the annual holidays scheme should, from the calendar week beginning on Monday, Apr. 2, 1951, be credited by the employer first employing him in that calendar week, and by the employer first employing him in each subsequent calendar week, with the sum of 2s. 3d. (two shillings and three pence) except in the case of persons (male or female) under the age of eighteen years, when the sum should be 1s. 9d. (one shilling and nine pence);

H "(ii) that each employer operating the annual holidays scheme should each year obtain from Building and Civil Engineering Holidays Scheme Management, Ltd. (a company limited by guarantee), which is hereinafter called 'the management company', a numbered holiday card in respect of each operative in his employment.

I "(iii) that the making of holiday credits as provided for in the said agreement should be done by the employer affixing stamps purchased by him from the management company in the spaces provided therefor in the operative's holiday cards;

"(iv) that each operative covered by the annual holidays scheme should be entitled to an annual holiday of six consecutive working days which should so far as possible be granted at the recognised summer holiday period and

(1) I.e., the National Federation of Building Trades Employers and the National Federation of Building Trades Operatives.

that a sum equivalent to the total amount of holiday credits made to the operative for the relevant accounting period less the appropriate administrative charge of the management company for that period should be paid to the operative by the employer in whose employment he was at the date of the annual holiday. The relevant accounting period for any annual holiday was the year ending on the preceding Apr. 1;

"(v) that reimbursement should be made by the management company to any employer of all annual holiday credits properly paid by him.

"11. By a further agreement in writing dated June 25, 1947, and made between the said national federations and the said other parties it was agreed that the parties thereto should operate a further scheme (hereinafter called 'the public holidays scheme') under which the operatives engaged in the building and civil engineering contracting industries would secure payment in respect of such public holidays as are generally or locally recognised as such in those industries.

"12. Subsequently to the coming into effect of the said further agreement the public holidays scheme was revised by the parties thereto so that at Dec. 17, 1951, the scheme as then in force provided (inter alia)—

"(i) that each operative covered by the public holidays scheme should from the calendar week beginning on Monday, Apr. 2, 1951, be credited by the employer first employing him in that calendar week and by the employer first employing him in each subsequent calendar week during the ensuing year with the sum of 2s. 3d. (two shillings and three pence) except in the case of operatives under the age of eighteen years when the sum should be 1s. 9d. (one shilling and nine pence);

"(ii) that each employer operating the public holidays scheme should obtain from the management company a numbered public holidays book containing public holidays cards in respect of each operative in his employment;

"(iii) that the making of public holiday credits should be effected by the employer affixing stamps purchased by him from the management company in the spaces provided therefor in the public holidays cards in the said books;

"(iv) that a sum equivalent to the value of the stamps on the operative's public holidays card referable to the public holiday in question (less the management company's administrative charge) up to and including the calendar week preceding the holiday should be paid to the operative by his employer on the pay day in respect of the week in which the holiday occurred;

"(v) that reimbursement should be made by the management company to any employer of all public holidays credits properly paid by him.

"13. The said national federations are parties to the National Joint Council for the Building Industry. The Working Rule Agreement for Building Trade Operatives in the London District as approved by the London Regional Joint Committee of the said National Joint Council on behalf of the council in force on Dec. 17, 1951, provided inter alia as follows:—

"By r. 1 (Wages) that the hourly rate of wages payable to operatives working on sites within the London District should be as therein stated and that annual holiday credits and public holiday credits should be due weekly to operatives from each employer on the conditions set out in the agreements hereinbefore mentioned, but that the amounts of such credits should not be variable under the Working Rule Agreement.

"14. The [respondents] are members of the National Federation of Building Trades Employers and of the London Master Builders Association which federation and association are and were at all material times represented on the said London Regional Joint Committee. The [respondents] operated both the annual holiday and public holiday schemes in respect of operatives employed by them upon each of the said contracts.

A "15. After Dec. 17, 1951, the weekly credits payable under the said schemes were by agreement of the parties to the relevant agreements increased as follows:—

"(i) Annual holiday scheme—

B	"Date		Operatives	Operatives
			over 18	under 18
			s. d.	s. d.
	" from Apr. 7, 1952		2 3	1 9
			to	to
			2 9	2 3
	" from Apr. 6, 1953, when the			
	annual holiday period for the			
C	following year was increased to		2 9	2 3
	two weeks		to	to
			5 6	4 6

"(ii) Public holidays scheme—

D	"Date		Operatives	Operatives
			over 18	under 18
			s. d.	s. d.
	" from Apr. 14, 1952		2 3	1 9
			to	to
			2 9	2 3"

E Here, then, is the question: Are these payments, which I will hereafter call "holiday credits", rates of wages within cl. 23A of the contracts? If they are, then the appellants are liable to the respondents. The Court of Appeal, reversing the decision of PILCHER, J., has held that they are, but to me the conclusion of the learned judge is preferable, though I do not at all points adopt his reasoning. In the consideration of this question it is no doubt proper to have regard not only to cl. 23A but to other clauses also of the contracts and to the relevant specifications which are incorporated in them and also to the so-called Working Rule Agreement by which the parties were bound. But I will say at once that I do not find anything in them to displace what I regard as the clear *primâ facie* meaning and scope of the relevant words. Rather do they confirm that meaning.

F My Lords, there is, I suppose, no doubt that what the workman gets from the operation of the holidays agreements is a benefit to him. It might, perhaps, be loosely called part of his remuneration. But to me it seems an essential element in a "wage" that it should be paid to the workman for work done by him, and it is just this element which is lacking in the holiday credit. It is neither paid by the employer to him nor related to the work which he does for the employer. I would say emphatically that it would not occur to an employer, being asked what wages he paid his workmen, or to a workman, being asked what wages he was paid, to refer in his answer to the holiday credits. They might, indeed, say that, in addition to his wage, he got the benefit of the holiday credits. But that would no more be a wage than would the benefit of a payment by the employer to a pension, superannuation, or sick fund. Further, the payment, to come within cl. 23A, must not only be properly described as a wage; it must satisfy the compound expression "rates of wage". There may, of course, be many different rates of wages payable to workmen employed on a building contract; there may be more than one rate payable to a single workman, e.g., normal time and overtime. It is, therefore, appropriate that the plural "rates of wages" should be used. But from this it does not follow that whatever is paid to or for the benefit of workmen in addition to what I will call his ordinary wage is also a wage, and, though I am conscious that it is little more than a repetition of the same argument, I would find it even more difficult to describe contributions of varying amounts to a management company in accordance with a holiday scheme as different rates of wages.

I do not then accept the view of the learned judge that the relevant words in cl. 23A provide an ambiguity which is to be resolved by a reference to other clauses of the contracts or of documents that must be read with them. But I do not dissent from the view that such a reference will confirm the meaning at which I have arrived. For instance, I find in cl. 27 (G) of the contract a strong indication that the rates of wages referred to in cl. 27 (A) connote wages of which it can be predicated that the actual amount is shown in wages books and pay sheets as being paid to the workmen. There is the same indication in cl. 28. On cl. 59 of the Specification on which much reliance was placed, I prefer the view of the learned judge to that of the Court of Appeal (2). It seems to me reasonably clear that, in that clause, "rates of wages" does not include holiday credits and I should, therefore, be predisposed to give the same meaning to the words where they occur in the body of the contract. I doubt with respect whether any help can be got from a consideration of the so-called Working Rule Agreement. It is not an artistically drawn document, and any inference which might be drawn from it as to the meaning of "rates of wages" can easily be matched by an inference in the contrary sense.

The appellants sought, if their primary argument on construction failed, to adduce evidence to the effect that the respondents were well aware of the meaning which they (the appellants) put on cl. 23A and knowingly entered into the agreement. It is unnecessary in the event to deal with this argument, but I think fit to say that I am wholly satisfied with the way in which LORD SOMERVELL disposed of it (3).

I move, therefore, that the appeal be allowed and the order of the Court of Appeal discharged except so far as it dealt with costs and that the order of PILCHER, J., be restored. There will be no costs of the appeal in this House.

LORD RADCLIFFE: My Lords, I agree, and do not think it necessary to add anything.

LORD COHEN: My Lords, I also agree.

LORD KEITH OF AVONHOLM: My Lords, I agree.

LORD DENNING: My Lords, workmen in the building industry change their employment very frequently. One man may be employed by several different employers in the course of a year. In order to give them holidays with pay, a scheme has been devised by which each man has a holiday card. Each employer buys holiday stamps from the management company which cost 2s. 9d. each (afterwards increased to 5s. 6d. each). Each employer sticks a stamp every week on the card of every man working for him in that week. The card covers the period from Apr. 5 in one year to Apr. 5 in the next year. Thereafter the man keeps his card, with the stamps affixed, until the time when he wants to take his holiday, say August or September. Then he goes to his then employer who pays him the money's worth of the stamps affixed on the card. And that employer, in due course, is reimbursed by the management company. So each employer only pays the cost of the stamps, not the cost of the holiday. Your Lordships are concerned here with the increase in the cost of the holiday stamps from 2s. 9d. each to 5s. 6d. each. You are not concerned with the amount which the man draws for his holiday pay. The question is whether the increase in cost of the holiday stamps is an increase in the "rates of wages" within the rise-and-fall clause in the building contract; for if it is, then the employer is entitled to add this increased cost on to the sum payable to him under the contract by the appellants.

The case turns on the meaning of the phrase in the rise-and-fall clause: "the rates of wages payable for any labour employed in the execution of the works." Some things are clear enough. This phrase includes the standard rate of 3s. an hour (or whatever the figure may be) payable for work done by the men. If that

(2) See [1959] 1 All E.R. at p. 79, letter C.

(3) [1959] 1 All E.R. at p. 79, letter H.

- A is increased, the builder can get the increased cost from the appellants. So, also, it includes the rates payable to apprentices, youths and women for their work. And it includes the rates payable for overtime. But it does not include such payments as tool allowances, travelling allowances or the employer's contribution to an insurance fund or a superannuation fund. The reason is because those are not payments "for labour". They are, it is true, payments to or for the
- B benefit of a workman—and maybe they are payments made under the contract of service—but they are not payments for work done by him. The phrase "labour employed" in the clause does not, to my mind, mean "labourers employed". It means "labour done by workmen" employed in the execution of the works. So interpreted, it is clear to my mind that the phrase does not include the cost of these holiday stamps. They are not payable for work done.
- C That is shown by taking a case where a man works for one employer on the first day or two of a week and then for another employer on the last two or three days of the same week. The first employer has to buy the holiday stamp and stick it on his card. The second employer pays nothing. The truth is that the stamps are bought by the employer for the benefit of a workman—just like an employer's contribution to a superannuation fund—but they are not payments made for
- D labour done by him in the execution of the works and do not come within the rise-and-fall clause. The builder cannot, therefore, pass on the increase to the appellants.

This interpretation of the phrase is borne out by the other places in the agreement where it is used, such as cl. 27 (G) of the contract and cl. 59 of the Specification.

- E I may add, perhaps, a word on the correspondence which took place before the contract was executed. The appellants there made it clear that they did not regard holiday credits as coming within the rise-and-fall clause; but the Builders Association (4) took a different view. Neither side inserted any words in the contract so as to clear up the difference between them. They left the rise-and-fall clause as it was. It was suggested that, on this account, there was no consensus
- F ad idem; your Lordships rejected this suggestion without wishing to hear further argument on it. There was, to all outward appearances, agreement by the parties on the one thing that really mattered—on the terms that should bind them. In case of difference as to the meaning of those terms, it was for the court to determine it. It does not matter what the parties, in their inmost states of mind, thought the terms meant. They may each have meant different things. But still
- G the contract is binding according to its terms—as interpreted by the court.

In my opinion, on the true interpretation of cl. 23A, holiday credits do not come within it. I would, therefore, allow the appeal.

Appeal allowed.

Solicitors: *Solicitor, London County Council* (for the appellants); *Masons* (for the respondents).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

(4) I.e., the London Master Builders Association.

SILVESTER *v.* OSTROWSKA.

[QUEEN'S BENCH DIVISION (His Honour Percy Lamb, Q.C., Official Referee),
October 12, 13, 1959.]

Landlord and Tenant—Repair—Breach of covenant—Notice to remedy breach served on tenant—Notice also alleging breach of non-existent covenant not to sub-let—Validity of notice—Law of Property Act, 1925 (15 & 16 Geo. 5 c. 20), s. 146 (1)—Leasehold Property (Repairs) Act, 1938 (1 & 2 Geo. 6 c. 34), s. 1 (2), as amended by the Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2 c. 56), s. 51 (2) (b).

A lease of premises for a term of thirty-one years (less three days) from Dec. 25, 1931, contained the usual repairing covenant on the part of the lessee, and a proviso that no breach of covenant (except the covenants to pay rent and to insure) should occasion forfeiture unless judgment for the breach had been obtained against the lessee and the damages and costs awarded against the lessee had not been paid within three months of the date of the judgment. The lease did not contain a covenant against sub-letting. By a notice dated Nov. 6, 1956, and purporting to be a notice served on the tenant under s. 146 (1)* of the Law of Property Act, 1925, and s. 1 (2)† of the Leasehold Property (Repairs) Act, 1938, as amended by s. 51 (2) (b) of the Landlord and Tenant Act, 1954, the landlord alleged that there had been breaches of the covenants contained in the lease, namely, (a) the breaches particulars of which were set out in the schedule of dilapidations annexed to the notice, and (b) the sub-letting of the premises into three dwellings and a shop. The notice required the breaches to be remedied and the payment of compensation within a specified time. The schedule of dilapidations contained no reference to any breach of any covenant not to sub-let. The tenant did not serve a counter-notice under s. 1 of the Act of 1938. In an action by the landlord for damages for breach of covenant, the tenant claimed that, as the notice of Nov. 6, 1956, referred to a covenant against sub-letting when the lease contained no such covenant, it was not a valid notice.

Held: the reference to a non-existing covenant did not destroy the efficacy of the notice of Nov. 6, 1956, which was a valid notice under s. 146 (1) of the Act of 1925 and s. 1 (2) of the Act of 1938, as amended.

Dictum of LORD BUCKMASTER, L.C., in *Fox v. Jolly* ([1916] 1 A.C. at p. 12) applied.

[As to a notice under the Law of Property Act, 1925, s. 146 (1), see 23 HALSBURY'S LAWS (3rd Edn.) 588, para. 1271; and for cases on the subject, see 31 DIGEST (Repl.) 538-541, 6620-6638.

For the Law of Property Act, 1925, s. 146 (1), see 20 HALSBURY'S STATUTES (2nd Edn.) 739.

For the Leasehold Property (Repairs) Act, 1938, s. 1 (1) and (2), see 13 HALSBURY'S STATUTES (2nd Edn.) 914; and for the Landlord and Tenant Act, 1954, s. 51 (2) (a) and (b), containing amendments to s. 1 (1) and (2) of the Act of 1938, see 34 HALSBURY'S STATUTES (2nd Edn.) 430.]

Cases referred to:

Fletcher v. Nokes, [1897] 1 Ch. 271; 66 L.J.Ch. 177; 76 L.T. 107; 61 J.P. 232; 31 Digest (Repl.) 539, 6629.

Fox v. Jolly, [1916] 1 A.C. 1; 84 L.J.K.B. 1927; 113 L.T. 1025; 31 Digest (Repl.) 540, 6633.

Guillemard v. Silverthorne, (1908), 99 L.T. 584; 31 Digest (Repl.) 540, 6636.

* The relevant terms of s. 146 (1) of the Act of 1925 are printed at p. 645, letter G, post.

† The relevant terms of s. 1 (2) of the Act of 1938, as amended by s. 51 (2) (b) of the Act of 1954, are printed at p. 645, letter I, post.

- A *Horsey Estate, Ltd. v. Steiger*, [1899] 2 Q.B. 79; 68 L.J.Q.B. 743; 80 L.T. 857; 31 Digest (Repl.) 541, 6639.
- Lock v. Pearce*, [1893] 2 Ch. 271; 62 L.J.Ch. 582; 68 L.T. 569; 31 Digest (Repl.) 539, 6626.
- Pannell v. City of London Brewery Co.*, [1900] 1 Ch. 496; 69 L.J.Ch. 244; 82 L.T. 53; 31 Digest (Repl.) 540, 6634.
- B *Penton v. Barnett*, [1898] 1 Q.B. 276; 67 L.J.Q.B. 11; 77 L.T. 645; 31 Digest (Repl.) 537, 6618.
- Serle, Re, Gregory v. Serle*, [1898] 1 Ch. 652; 67 L.J.Ch. 344; 78 L.T. 384; 31 Digest (Repl.) 539, 6630.

Action.

- C The plaintiff, as the successor in title to the lessor named in a lease dated Feb. 8, 1932, of premises known as No. 272, Fulham Road, London, claimed damages against the defendant, the successor in title to the lessee, for breach of a repairing covenant contained in the lease. Particulars of the dilapidations alleged to be existing in August, 1956, and the work necessary to remedy them were served on the defendant on Nov. 6, 1956, together with a notice purporting to be under the Law of Property Act, 1925, s. 146, and the Leasehold Property
- D (Repairs) Act, 1938, as amended. In the notice, the breaches complained of were stated to be not merely those comprised in the particulars specified in the schedule of dilapidations annexed to the notice, but also the sub-letting of the premises into three dwellings and one shop. The lease did not in fact contain a covenant against sub-letting. By her defence, the lessee denied that she had failed to repair the premises as alleged, and, by para. 4, did not admit the validity
- E of the notice under s. 146 of the Act of 1925 or under the Act of 1938. By consent of the parties this issue was decided as a preliminary issue, and the report is confined to the judgment on this point.

Peter Alchin for the plaintiff, the landlord.

George Dobry for the defendant, the tenant.

- F HIS HONOUR PERCY LAMB, Q.C. (OFFICIAL REFEREE): This is an action for damages for breach of covenant contained in a somewhat unusually drafted lease, dated Feb. 8, 1932, and made between Robert Wilson Black and Mark Frederick North. The plaintiff is admittedly the successor in title to Robert Black and the defendant is admittedly the successor in title to Mark North. When the case was called on for hearing, I was told that the important
- G expert witness for the plaintiff had been taken ill since the case had been put into Monday's list and an adjournment was asked for, but I noticed that para. 4 of the defence alleges that the necessary precursor to such an action, namely, the service of a valid notice under s. 146 of the Law of Property Act, 1925, as amended and enlarged by s. 1 (2) of the Leasehold Property (Repairs) Act, 1938 (1), was not admitted, and, accordingly, by consent of counsel for both sides it was
- H agreed that this issue should be determined before dealing with the application for adjournment.

- This plea was founded on the form of the document, received by the defendant on Nov. 6, 1956, which the plaintiff said was a valid notice, and which the defendant contended was invalid. Counsel have agreed that no oral evidence can be relevant to assist me to resolve that part of this case. As I have said, the
- I lease is somewhat unusual by reason of its form. The lease states these particulars which are of interest:

"All that piece of ground situate on the north side of Fulham Road in the parish of Saint Mary Abbots Kensington in the County of London fronting towards the south on the Fulham Road aforesaid and containing on the north side [and it sets out the measurements] together with the messuage

erections and buildings now standing upon the said piece of ground and which said message is the third house westwards from Redcliffe Gardens (formerly Walnut Tree Walk) including the corner house and the said premises being formerly known as No. 3 Finborough Terrace but now as No. 272 Fulham Road aforesaid . . .”

reserving certain rights in regard to sewers and drains on and under the demised premises—

“ . . . To hold under the lessee for the term of thirty-one years to be computed from Dec. 25, 1931 (except the last three days thereof) . . . yielding and paying [a rent of £65 a year] . . . Provided always that if the yearly rent hereby reserved or any part thereof shall be unpaid for the space of twenty-one days after the same shall become due and payable or if the lessee shall not perform and keep all and every the covenants provisos and conditions herein contained on the part of the lessee to be performed and kept then and in any of the said cases it shall be lawful for the person or persons for the time being entitled to the reversion of the said demised premises immediately expectant upon the said term hereby granted into and upon the said demised premises or any part thereof in the name of the whole to re-enter and the same to re-possess and enjoy as in his or her or their former estate . . .”

So far the lease is in common form. Then there is this proviso: “ Provided always . . . that [no] breach . . .”—the word “ no ” is accepted by learned counsel on both sides as being right, whereas the word “ in ” is typewritten in the original:

“ Provided always nevertheless that no breach of any of the covenants herein contained (except the covenant for payment of the rent and of the covenants for insurance against damage by fire) shall occasion any forfeiture of this lease or of the term hereby granted or give any right of re-entry unless or until judgment shall have been obtained in an action for such breach of covenant and the damages and costs to be recovered in such action shall remain unpaid for the space of three calendar months after such judgment shall have been obtained.”

Then there are covenants relating to repair, which are in the normal form, covenants to insure, covenants against the use of the premises for trades which would not be suitable in this area such as slaughterman, horse boiler, catgut spinner and the like, compendiously described as “ offensive trades”, a covenant that the elevation of the said message should not be altered without the consent in writing of the said lessor, and a covenant that the lessee

“ . . . will from time to time during the said term within six calendar months of the date and execution of each and every assignment transfer charge or other disposition of the premises hereby demised for the whole term then to come give notice in writing of such assignment showing the date thereof and the premises comprised therein and the name and address of the person or persons to whom such assignment shall be made to the lessor . . .”

The next document of importance is the notice which was served by the plaintiff, who alleged breaches of covenant and, again, this is a document which requires careful consideration. It is headed: “ Notice under the Law of Property Act, 1925, s. 146, and the Leasehold Property (Repairs) Act, 1938, as amended ”. It is addressed to the defendant, at the address appearing in the lease, and

“ . . . to all other persons interested. We, the undersigned, as solicitors for and on behalf of [the plaintiff] your landlord of the above premises give you notice as follows:

A "1. There have been breaches of the covenants mentioned in the lease dated Feb. 8, 1932, made between Robert Wilson Black of the one part and Mark Frederick North of the other part.

B "2. The breaches complained of are (a) Those comprised in the particulars which in the schedule of dilapidations hereto annexed are specified as required to be remedied and made good and the said premises are defective because what is required by the schedule to be done has not been done. (b) The sub-letting of the premises into three dwellings and one shop."

Paragraph 3 recites that the reversion is vested in the plaintiff, and requires remedy of the breaches and repairs. Paragraph 4 says:

C "If the said breaches shall be remedied and the repairs completed as aforesaid within three months from the date hereof the [plaintiff] will accept as such compensation the sum of £75 for expenses already incurred by her together with the amount of any further expenses to be incurred by her or on her behalf in respect of the breaches aforesaid."

Paragraph 5 says:

D "Unless within three months from the date hereof or a reasonable time thereafter you remedy the said breaches to the satisfaction of Messrs. Knight & Co. . . [the plaintiff's] surveyors, and make reasonable compensation in money, proceedings will be taken for damages or other compensation in respect of the said breaches. And if such damages, compensation and costs as shall be awarded to the [plaintiff] in such proceedings shall remain unpaid for a space of three calendar months after the date of judgment therein proceedings will be taken for forfeiture of the said lease and for recovery of possession of the said premises."

E Paragraph 6 gives the defendant notice that, by virtue of the Leasehold Property (Repairs) Act, 1938, she is entitled to serve a counter-notice. No counter-notice was, in fact, served in accordance with the requirements of that Act, and the matter now comes before me. Counsel for the defendant submits that the notice of Nov. 6, 1956, does not comply with the requirements of the statute which require consideration.

Section 146 (1) of the Law of Property Act, 1925, provides:

G "A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice—(a) specifying the particular breach complained of; and (b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and (c) in any case, requiring the lessee to make compensation in money for the breach . . ."

H Section 1 (1) of the Leasehold Property (Repairs) Act, 1938, as amended (2) by s. 51 (2) (a) of the Landlord and Tenant Act, 1954, explains the operation of that section in this way:

I "Where a lessor serves on a lessee under s. 146 (1) of the Law of Property Act, 1925, a notice that relates to a breach of a covenant or agreement to keep or put in repair during the currency of the lease all or any of the property comprised in the lease, and at the date of the service of the notice three years or more of the term of the lease remain unexpired, the lessee may within twenty-eight days from that date serve on the lessor a counter-notice to the effect that he claims the benefit of this Act."

(2) By s. 51 (2) (a) of the Act of 1954, the words "all or any of the property comprised in the lease" were substituted for the words "a house of a rateable value of £100 or less", and the word "three" was substituted for the word "five".

Then s. 1 (2) of the Act of 1938, as amended (3) by s. 51 (2) (b) of the Act of 1954, A
says:

"A right to damages for a breach of such a covenant as aforesaid shall not be enforceable by action commenced at any time at which three years or more of the term of the lease remain unexpired unless the lessor has served on the lessee not less than one month before the commencement of the action such a notice as is specified in s. 146 (1) of the Law of Property Act, 1925 . . ."

The rest of that subsection is immaterial. Therefore, not only under the Act of 1925 must there be such a notice where there is a claim for forfeiture, but under the Act of 1938 there must be a similar notice where there is a claim for damages for breach of the covenant to repair.

Counsel for the defendant submits that the notice which must, by statute, precede this action must be clear and certain and must enable the defendant to appreciate readily what is required of her. He submits that the inclusion in that notice of a reference to a covenant against sub-letting, when there is no such covenant in the lease, is fatal to the efficacy of the notice and he cites in support of that submission the decision of RIDLEY, J., in *Guillemard v. Silverthorne* (4). Counsel for the plaintiff submits that the inclusion of a reference to a non-existing covenant, particularly when the schedule of dilapidations is silent as to that covenant—and I hold as a fact that the schedule is silent on that matter and contains nothing that can possibly be attributable thereto—does not affect the efficacy of the notice, and he cites *Pannell v. City of London Brewery Co.* (5) and *Fox v. Jolly* (6) in support of his submission. Having regard to the peculiar form of this lease and to the fact that this is not a claim for forfeiture but a claim for damages for breach of covenant to repair, I am at liberty to approach this matter *res integra*; neither counsel has been able to discover any authority dealing with such a claim or giving any decision as to the form of notice required before such a claim can be brought.

I must approach this problem on the clear understanding that this action makes no inroads into the rights of the defendant in her property. Suppose she is found in breach of the repairing covenant, no forfeiture can follow unless she fails to pay the damages and costs awarded within three months after judgment is given. The court will always examine a notice affecting the rights of property with great care and will always require strict observance of the statutory requirements relating to such notice, as has been said over and over again in cases relating to compulsory acquisition of land and planning restrictions on the use of land, but the notice of Nov. 6, 1956, does no such thing. Apart from authority, I should have no hesitation in holding that this notice is a valid notice and that the reference to a non-existing covenant in no way reduces or destroys its efficacy, but, out of respect to the able and careful arguments of counsel, I feel it proper to refer to the authorities which they cite. The first is *Guillemard v. Silverthorne* (4), where the headnote is as follows:

"A notice under s. 14 of the Conveyancing and Law of Property Act, 1881, which set out the general covenant to repair contained in a lease, and then set out two further special painting covenants which the lease did not contain at all, comprised a schedule of work required to be done generally, some at least of which was not properly referable to the general covenant: Held, that the notice was invalid."

I was referred to the submissions on behalf of the parties in that case, particularly

(3) By s. 51 (2) (b) of the Act of 1954, the word "three" was substituted for the word "five".

(4) (1908), 99 L.T. 584. The notice in this case (and in the other cases cited) was under s. 14 (1) of the Conveyancing Act, 1881. That subsection, which is repealed, was similar to s. 146 (1) of the Law of Property Act, 1925.

(5) [1900] 1 Ch. 496.

(6) [1916] 1 A.C. 1.

A that of Mr. Foà, the well-known expert on the law of landlord and tenant, who was counsel for the defendant. Submitting that the notice was bad, he said (7):

B “Although the first part of the notice setting out the general covenant to repair is in order, the second and third parts specify obligations which the defendant is not liable for at all; and the schedule of dilapidations and repairs annexed to the notice lumps the dilapidations all together, so that it is impossible for the defendant to know what the work is which he ought to perform. Moreover, some of the work required in the schedule, such as varnishing and other decorative work, is not attributable to the general covenant to repair, and can only be referred to those parts which were wrongly comprised in the notice. The notice therefore does not comply with the requirement laid down by the Court of Appeal in *Horsey Estate, Ltd. v. Steiger* (8).”

RIDLEY, J., after setting out the facts, said (9):

D “The statement as to the existence of the two last-mentioned covenants in the lease was due to some mistake. Some other lease had apparently been looked at, for the only covenant specially referring to painting in the present lease was the one to which I have already referred—namely, to paint the outside wood and iron work every fourth year of the term. The notice contained a schedule of work required to be done which included matters—such as varnishing, etc.—apparently not referable to the general covenant alone. In these circumstances it was objected on the part of the defendant that the notice did not satisfy the requirements of the Conveyancing Act, 1881. The plaintiff’s counsel, in answer to that objection, relied on the decisions in the cases of *Lock v. Pearce* (10) and *Pannell v. City of London Brewery Co.* (11), but I think that those cases do not govern the present case. In both of them the notice, so far as setting out the covenants was concerned, did agree with the terms of the lease. In the former, the notice merely contained a claim—in respect of surveyor’s fees and solicitor’s charges—which was not justified in law; and the Court of Appeal held that that circumstance in itself did not render the notice invalid. In the latter case the notice relied inter alia on breaches of a covenant to paint, which had not in fact been committed; and there again it was held by BUCKLEY, J., that the notice was not thereby necessarily rendered altogether ineffective. The notice in both cases was good in some respects; and it was decided that the part which was valid might be separated from the part which was invalid, and that the latter might be rejected as surplusage. But here the notice does not agree with the terms of the lease; and I think that the tenant has a right to insist that the Act is not complied with unless it does. The work required to be done under this notice is not necessarily the same as the work which would have been required if the covenants in the lease had been properly set out, and the tenant, in my opinion, is entitled to say that the notice is invalid.”

I In my judgment that case is clearly distinguishable because (i) it was an action for forfeiture, while this is not, and (ii) the schedule of repairs included matters not referable to the general covenant to repair, but referable to the particular covenant which, although alleged, did not in fact appear in the lease. This seems to me, as far as I know, to be the only authority dealing with a notice containing references to non-existing covenants.

Pannell v. City of London Brewery Co. (11) deals with different matters, but I find it most helpful because BUCKLEY, J., surveyed the matter historically and

(7) (1908), 99 L.T. at p. 585.

(9) (1908), 99 L.T. at p. 586.

(8) [1899] 2 Q.B. 79.

(10) [1893] 2 Ch. 271.

(11) [1900] 1 Ch. 496.

his decision was expressly approved by the House of Lords in *Fox v. Jolly* (12). A
In his judgment BUCKLEY, J., referred to the facts and said (13):

"I find that the plaintiff has failed to prove that there was any breach of the covenant to paint once in every four years. On the contrary, I find that the defendants have proved that the premises have been properly painted during the last four years. One of the matters included in the notice given on Jan. 31, 1899, was this: 'Rub down, repair, and paint, with two coats, all external wood, iron and other work'. I find as a fact that the lessor was wrong in requiring the lessee to do that, because there had been no breach of that covenant. Then Mr. Astbury, for the defendant, argued that the notice, having been bad in one particular, was bad altogether.

"The argument on this part of the case amounts to this—that if a lessor gives his lessee notice of, say, three breaches, as to two of which he is right and as to the third of which he is wrong, any proceedings which he may take upon that notice must be defeated because the notice is bad as a whole. The first observation on that is, that if that were the law it would be very inconvenient, as the result would be that every lessor must, for his own protection in case of several breaches of covenant, serve a separate notice with regard to each breach."

After discussing that point, BUCKLEY, J., went on to say (14):

"Again, this occurs to me—that before the Act of 1881, (15), under the old law, when a lessor was bringing his action of ejectment for breach of covenant, the first thing the defendant was entitled to was to have particulars of the breaches alleged. And if the lessor gave particulars of three alleged breaches, and if two were breaches and the third was not, what would have been the result? At the trial of the action the defendant would succeed as regards number three; but the lessor, succeeding as to numbers one and two, would of course be entitled to his judgment for ejectment. One would suppose that the statute passed in that state of things operated in favour of the tenant to this extent—that the tenant is now entitled not only to particulars of breaches in an action brought, but also to particulars of breaches long before action brought. The Act of 1881 gives him this benefit—that if within a reasonable time he remedies the breaches which are the subject of the notice, then he defeats the lessor's right to re-enter. But suppose the notice contains particulars of an alleged breach which is not a breach, why should that be more than matter of defence? Why should it go to defeat the notice as a whole? There does not seem to be any obvious reason why that should be so, and therefore *prima facie* I should have thought that if the notice required by the statute was good as to part, and sustained as to that part, and was bad as to the rest, the lessor would be entitled to succeed in his action. That being what one would suppose to be reasonable, let us see what the Act says."

BUCKLEY, J., then reads s. 14 (1) of the Conveyancing Act, 1881, and continued (16):

"If a lessor gives a notice specifying two breaches, and specifying a third thing which is not a breach, he has given notice specifying the breach complained of. He has done that and more. He has not only done that which the statute says he must do, but he has done something in addition. He is, therefore, within the words of the Act; and, for the reasons I have given, it seems to me that a notice which contains too much is within the reasoning of the Act."

I have also obtained great assistance from *Fox v. Jolly* (12). The headnote is as follows:

(12) [1916] 1 A.C. at p. 15.

(13) [1900] 1 Ch. at p. 498.

(14) [1900] 1 Ch. at p. 499.

(15) The Conveyancing Act, 1881.

(16) [1900] 1 Ch. at p. 500.

A "A notice was served under s. 14 of the Conveyancing and Law of
Property Act, 1881, by the lessor of six small houses, stating that the
repairing covenants as therein set out had been broken and that the particular
breaches complained of were the committing or allowing the dilapidations
mentioned in the schedule annexed to the notice. The schedule indicated
B under general headings repairs which were required to be done in all the
houses, and in a few instances only specified repairs to be done in particular
houses. In some instances it required the lessee to 'examine and repair'
specified parts of the houses. The schedule concluded with the words
'And note that the completion of the items mentioned in this schedule
does not excuse the execution of other repairs if found necessary':—
C *Held*, that the notice sufficiently specified the particular breaches com-
plained of, and that it was not vitiated by the addition of the general
clause at the end."

I need not burden my judgment with the facts and the history of the trial, but
LORD BUCKMASTER, L.C., in his speech, said (17):

D "My Lords, in this case it is not necessary to consider the rights of a
landlord to re-enter on premises for non-payment of rent, although some
reference was made to the subject in the arguments addressed to your
Lordships. Such rights are unaffected by the provisions of the Convey-
ancing Act of 1881, and it is only with the terms of that statute that this
appeal is concerned.

E "The question that is raised is very simple, involving the consideration
of only a few facts and but one section of an Act of Parliament; it is,
however, of undoubted importance to landlords and tenants, and conse-
quently it may be desirable to state their relative position in some detail.
Before the passing of the Conveyancing Act of 1881, a right of re-entry
reserved in a lease conditional upon breach of a covenant to repair could be
enforced by the landlord at common law without the tenant having oppor-
F tunity to meet the complaint, and often without his knowing that the breach
had in fact occurred. It is true that the courts of equity attempted to mitigate
the harshness of this procedure, and in several reported cases restrained
the landlords from exercising their rights where the breach was one which,
by accident or surprise, the tenant had been unable to rectify. There was,
however, no general rule relating to such relief on which reliance could be
G placed. In these circumstances the Conveyancing Act of 1881 was passed,
and it was to extend and render certain the rights of tenants in such cases
that s. 14 of that statute was framed."

LORD BUCKMASTER, L.C., then read s. 14 (1) of the Act of 1881 and continued (18):

H "The effect of this subsection is plain. The right of re-entry which the
lessor enjoys on the breach of a covenant is not capable of being exercised
against the lessee until the conditions in that subsection have been satisfied.
If such condition were not satisfied and entry were attempted at common
law, such entry would be a trespass; if proceedings were instituted to
obtain possession they would be instantly demurrable. That is the meaning
of the phrase, 'shall not be enforceable by action or otherwise'. Now the
conditions precedent which the lessor must perform are these. He must
I serve a notice, and that notice must specify the breach of covenant which is
the subject of complaint. That is, he must point out the covenant which he
says is broken, and he must specify the breach of which he complains. He
must also call upon the lessee to remedy the breach, and if he requires
compensation in money he must ask for it. After this has been done a
reasonable time must elapse in which the lessee has the opportunity of
complying with the requirements of the notice. It is only when this has been

done, when the time has expired, and the work is incomplete, that the landlord can proceed to the assertion of his rights.

"All this is common and familiar ground, and I do not know that it is in any way disputed by the appellants in this case, whose real complaint is that in the particular circumstances in which they stand no sufficient notice specifying the breach of contract was served upon them within the meaning of the section. This leads me to examine the facts that have given rise to the present dispute."

After stating the facts, LORD BUCKMASTER went on to say (19):

"This notice has unquestionably complied with the first condition referred to in s. 14 of the Act. It has plainly set out the covenants which it is alleged are broken, and the schedule contains what is alleged by the respondent to be a sufficient specification of the breach. The work mentioned in this schedule was not done within a reasonable time, and the present proceedings were accordingly instituted by the respondent against the people who were in actual occupation of the premises, claiming that he was entitled to enforce his right of re-entry."

After a reference to the pleadings and to the history of the trial, LORD BUCKMASTER continued (20):

"Thus the only question for consideration here is whether para. 3 of the defence [which says that the notice is invalid] was substantiated, and this depends solely upon the adequacy of the schedule to the notice . . .

"Now the schedule is attacked on several grounds. It is said that it does not tell the tenant what it is he ought to do in order to remedy the breach of which the complaint is made. I am not prepared to accede to that view of the schedule. But even if it did not, I can find nowhere in the section any words which cast upon the landlord the obligation of telling the tenant what it is that he must do. All that the landlord is bound to do is to state particulars of the breaches of covenants of which he complains and call upon the lessee to remedy them. The means by which the breach is to be remedied is a matter for the lessee and not for the lessor. In many cases specification of the breach will of itself suggest the only possible remedy. For example, complaint that a covenant to paint or to paper has been broken can only be met by painting and papering. But it does not follow that this is always so. A particular covenant to keep the roof watertight, if broken, would be sufficiently defined by a reference to the covenant, a statement that the roof had not been kept watertight, and that the tenant was required to remedy the omission; the means by which this could be accomplished would be for the tenant to determine.

"It was further urged that the schedule called upon the tenant to make examination on his own account of certain parts of the premises, and that this was a request to survey rather than a request to repair. It is true that in two cases, that of the roof and the drains, the schedule contains the following directions: 'Examine, repair, and reinstate all broken or loose tiles to main and w.c. roofs'. 'Examine and repair and put in good sanitary condition all sinks, cisterns, waterclosets, supply and waste pipes, ball valves and taps . . .'"

LORD BUCKMASTER continued (21):

"I do not think the description in the schedule is too general in its nature, nor am I able to see that the addition of the general phrase at the foot can possibly destroy the efficacy of the schedule as a whole. No form whatever is provided by the statute as the form in which the notice is to

A be given. It might be associated with useless and irrelevant matter, and it would none the less be a notice under the section if it was clear from its terms that it was so intended and if in fact it contained in plain language the information the section requires."

B LORD BUCKMASTER then referred to two authorities, *Lock v. Pearce* (22) and *Fletcher v. Nokes* (23) and continued (24):

C "Even, however, if this were accepted, it should be remembered that the particulars which would be required in an action that merely claimed possession for breach of a covenant to repair would not necessarily be as detailed and minute as the particulars that would be wanted where a claim was being made for damages for breach of the covenant, and it is rather in comparison with this latter class of particulars that the appellant seeks to have the notice tested."

D Then the Lord Chancellor referred to *Penton v. Barnett* (25), *Horsey Estate, Ltd. v. Steiger* (26) and *Re Serle, Gregory v. Serle* (27), which we have looked at in this discussion, and continued (28):

E "The last case is that of *Pannell v. City of London Brewery Co.* (29), where it was decided that a notice which specified two breaches and something else which was not a breach was none the less good since the breach complained of had been specified together with the addition of something which was immaterial.

F "I regard this view as the correct interpretation of the section. The notice must state with sufficient particularity the breach of which the landlord complains, and that breach the tenant must satisfy within a reasonable time. If he does satisfy it, it would not be open to the landlord to allege that there was another breach of another covenant, which had been referred to in the notice, but had not been sufficiently specified, which had not been remedied."

Then LORD BUCKMASTER concluded (30):

G "In the present case I think the notice sufficiently specified the landlord's complaints. It gave the tenant adequate notice of what he was required to do, and it provided full and sufficient information upon which he could determine what course of action he should adopt. For these reasons I think this appeal should fail."

H The result is that I find that the schedule attached to the notice of Nov. 6, 1956, gives ample particulars of the breach of the covenant to repair. It contained no reference at all to the breach of the alleged covenant against sub-letting, and there was nothing in it which could possibly be construed by the defendant to refer to the alleged covenant of sub-letting. I respectfully adopt and follow the obiter dictum in LORD BUCKMASTER's speech where he said (31):

I "No form whatever is provided by the statute as the form in which the notice is to be given. It might be associated with useless and irrelevant matter, and it would none the less be a notice under the section . . ."

I find that the notice of Nov. 6, 1956, is a valid notice and the contention that

(22) [1893] 2 Ch. 271.	(23) [1897] 1 Ch. 271.	(24) [1916] 1 A.C. at p. 14.
(25) [1898] 1 Q.B. 276.	(26) [1899] 2 Q.B. 79.	(27) [1898] 1 Ch. 652.
(28) [1916] 1 A.C. at p. 15.	(29) [1900] 1 Ch. 496.	(30) [1916] 1 A.C. at p. 15.
	(31) [1916] 1 A.C. at p. 12.	

has been put forward by the defendant fails. The result is that this action will now have to be heard; we shall have to ascertain if there are any breaches of covenant, and we shall have to ascertain, if there are, what the damages are to be. We shall have to fix a date for the hearing, because the plaintiff's witness is not yet available.

Judgment for the plaintiff on the preliminary issue.

Solicitors: *Wedlake, Letts & Birds* (for the plaintiff); *S. Z. Kmiecik & Co.* (for the defendant).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

KENSINGTON BOROUGH COUNCIL v. WALTERS.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Cassels and Edmund Davies, JJ.), October 30, 1959.]

Highway—London—Damage to street refuge by motor car—No negligence on part of driver of car—Liability to local authority for cost of repairs—London Government Act, 1939 (2 & 3 Geo. 6 c. 40), s. 181 (3).

London—Damage to property vested in local authority—Accidental damage—Recovery of cost of repairs—London Government Act, 1939 (2 & 3 Geo. 6 c. 40), s. 181 (3).

By s. 181 (3) of the London Government Act, 1939: "If any person accidentally or carelessly damages any property vested in a local authority, the authority may recover from him summarily as a civil debt the expenses incurred by it in making good the damage."

While the respondent was driving a motor car on a highway in London, he was involved in a collision with another car owing to the negligence of the driver of the other car, and, as a result, the respondent's car hit and damaged a street refuge. There was no negligence on the part of the respondent.

Held: under s. 181 (3) of the Act of 1939, the local authority were entitled to recover from the respondent the cost of repairing the refuge, even though he was not to blame for the accident, because the object of the subsection was to provide a speedy remedy for the recovery of the cost of damage done to property of a local authority without considering who was to blame for the damage, and the person liable for the cost, under the subsection, was the person who actually did the accidental or careless act which caused the damage.

Appeal allowed.

[As to the consequences of damaging property vested in a metropolitan borough council, see 25 HALSBURY'S LAWS (3rd Edn.) 84, para. 162.]

For the London Government Act, 1939, s. 181 (3), see 15 HALSBURY'S STATUTES (2nd Edn.) 1157.]

Case referred to:

Harding v. Barker, (1888), 53 J.P. 308; 26 Digest 394, 1209.

Case Stated.

This was a Case Stated by justices for the County of London in respect of their adjudication as a magistrates' court sitting at the Town Hall, Kensington, on Mar. 17, 1959.

On Feb. 10, 1959, a complaint was preferred by the appellants against the respondent that he, having on June 19, 1958, damaged a street refuge (No. F.9) in the Cromwell Road, London, when driving a motor car, and having failed to

- A pay the sum of £25 0s. 1d. (expenses incurred by the appellants in repairing the refuge) after demand by the appellants, owed that sum to them in accordance with s. 181 (3) of the London Government Act, 1939. The justices found the following facts. The street refuge was part of the property vested in the appellants, as a local authority, for the purpose of the Act of 1939. On June 19, 1958, the respondent was driving his car west along the Cromwell Road when
- B he was involved in a collision with another car turning into the Cromwell Road on the respondent's left-hand side. Immediately before the collision the refuge was in good order. Just after the collision the respondent's car came into contact with the refuge with such force that the concrete base to its guard-post was completely destroyed. Within a short time after the collision, the respondent, speaking to a police constable, described what had happened in these words:
- C "I was coming west along Cromwell Road. I swerved to avoid another car, hit the island and turned over." While the respondent was taking avoiding action, the other car hit the side of the respondent's car with such force that it drove his car into the refuge, and, but for the collision, his car would not have come into contact with the refuge. The person responsible for the collision was the driver of the other car concerned and not the respondent. The refuge was
- D repaired by the appellants at a cost of £25 0s. 1d. On Sept. 26, 1958, the appellants demanded payment of that sum from the respondent, but he had failed to pay it.

It was contended by the appellants that the respondent was liable to pay the sum of £25 0s. 1d. in any event by virtue of s. 181 (3) of the London Government Act, 1939, whether or not his driving involved any degree of negligence. The

E respondent contended that the person really at fault was the driver of the other car; that he, the respondent, was not responsible for his car coming into contact with the refuge; that the damage to the refuge was caused by the respondent's car being driven on to it by the other car concerned; and that he was accordingly not liable to pay the sum. The justices were of the opinion that the contentions of the respondent were correct and accordingly dismissed

F the complaint.

Paul Wrightson for the appellants.
The respondent appeared in person.

- LORD PARKER, C.J.:** On June 19, 1958, the respondent was driving a motor car westwards along the Cromwell Road when he was involved in a
- G collision with another car which had turned into the Cromwell Road on his left-hand side. He swerved, but, notwithstanding that, he was hit by the other car, and the other car forced his car on to this refuge. The justices find as a fact that, but for this collision, the respondent's car would not have come into contact with the refuge. The argument which the justices accepted was this:

- H "It was contended by the respondent that the person really at fault was the driver of the other car; that he, the respondent, was not responsible for his car coming into contact with the refuge; that the damage to the refuge was caused by the respondent's car being driven on to it by the other car concerned, and that he was accordingly not liable to pay the said sum."

- I In my judgment, this case depends entirely on the correct interpretation to be placed on the section in question. It is s. 181 of the London Government Act, 1939. By sub-s. (1), which I need not read, it is provided that a person who has charge of any property vested in a local authority, and who fails to deliver up such property, shall be guilty of an offence and be liable to be fined and also be liable to pay the value of the property. Then sub-s. (2) provides:

"If any person wilfully damages any property vested in a local authority, he shall in respect of each offence be liable on summary conviction to a fine

not exceeding 40s. and to pay to the authority the expenses incurred by it in making good the damage." A

Thirdly, by sub-s. (3) it is provided:

"If any person accidentally or carelessly damages any property vested in a local authority, the authority may recover from him summarily as a civil debt the expenses incurred by it in making good the damage." B

It is to be observed, before leaving sub-s. (3), that the damage referred to there does not create any offence at all; the subsection merely says that the expenses of making good that damage may be recovered summarily as a civil debt.

Counsel for the appellants referred us to a number of cases (1). I think it is unnecessary to refer to them in detail. The words "accidentally or carelessly damages" do not appear in the London Government Act, 1939, for the first time. They were to all intents and purposes the same in the Metropolis Management Act, 1855, and in the Gas Works Clauses Act, 1847; the only difference was that the word "carelessly" came before the word "accidentally" in those two statutes (2). It is clear from the authorities that the words corresponding to those in sub-s. (2) and sub-s. (3) have been treated as providing, first, in regard to the words of sub-s. (2), for wilful or negligent damage, for which there is a penalty as well as a right to recover the expenses, and, secondly, in regard to the words of sub-s. (3), for something which is not wilful and not negligent, namely, something done accidentally or carelessly, in which case there is no penalty. In one of the cases it was said (3) that "carelessly" was something akin to "accidentally". D

The real point in this case is whether sub-s. (3) is aimed at, if I may put it that way, the person who is responsible for the damage and who as a matter of causation has caused it, or whether it is aimed at the person whose hand or vehicle has come in contact with the property and caused damage to that property thereby. In my judgment, the latter is the correct view. I think that this subsection is providing a speedy remedy for a local authority to recover expenses incurred in repairing damage without having to consider who is blameworthy in that respect. They are entitled under this subsection to recover from the person whose hand or vehicle has actually come in contact with and damaged their property. I get some support for that view from the judgment of WILLS, J., in *Harding v. Barker* (4), a case which arose under s. 207 of the Metropolis Management Act, 1855. It was a case in which a driver had accidentally caused damage to a street lamp and the complaint was made against his employer. WILLS, J., said (5): E

"I am of the same opinion. I think s. 207 does not relate to anybody but the person who is actually doing the careless act. But here it was not even a careless act, for the justices found that it was a mere accident. Therefore, there is no satisfactory ground for holding that the master here would be liable." F

I think that s. 181 (3) of the Act of 1939 does not relate to anybody but the person who actually does the accidental or careless act, whether voluntarily or involuntarily, as in this case, where he was forced into the street refuge. If the owner of the car who had forced the respondent's car into the refuge had been summoned, I think that his answer would have been: "It was not my hand, not my car, that came into contact with the street refuge. It may have G

(1) *Harding v. Barker* (1888), 53 J.P. 308; *Burgess v. Morris* (1897), 77 L.T. 97; and *Ashton v. Eccles Corpn.* (1906), 71 J.P. 55.

(2) See s. 207 of the Metropolis Management Act, 1855, and s. 20 of the Gas Works Clauses Act, 1847; and for cases under these Acts, see 26 DIGEST 394, 395, 1209-1212.

(3) See per DARLING, J., in *Ashton v. Eccles Corpn.* (1906), 71 J.P. at p. 56.

(4) (1888), 53 J.P. 308.

(5) (1888), 53 J.P. at p. 309.

A been my negligence that caused it, but for that I cannot be summoned under the subsection although I could be proceeded against, at common law." I think that this appeal should be allowed and that the case should go back to the justices with an intimation that the complaint was proved.

B **CASSELS, J.:** I agree. I think that the respondent may well feel that he has a grievance in the matter, because he can quite reasonably and rightly say that he was in no way to blame, but this is not a case of blameworthiness at all. So far as the respondent was concerned, it was a pure accident for which no one can say anything against him, but, on the other hand, the words of s. 181 (3) of the London Government Act, 1939, are plain:

C "If any person accidentally or carelessly damages any property vested in a local authority, the authority may recover from him summarily as a civil debt the expenses incurred by it in making good the damage."

D This is just one of those cases in which it may well seem strange to the individual who is called on to put his hand into his pocket and pay for damage for which he was in no way responsible, merely because it happens to be his motor car which caused the actual damage. I was impressed somewhat by the illustrations which the respondent, quite properly, put before us. It does seem strange that, if a pedestrian walking along the High Street, Kensington, should be pushed through a window belonging to the local authority, the local authority, receiving him through the broken window, can put out their hands and say: "The damage is so much". None the less, that is the position in which the respondent here finds himself. I agree that the appeal should be allowed and the case remitted to the justices to make an order for the recovery of the debt.

E **EDMUND DAVIES, J.:** I also agree. One cannot but sympathise with the respondent for the position in which he finds himself, for £25 is no small sum to find, and, if I may say so, he has put forward his argument with eminent clarity and ability. But s. 181 (3) of the London Government Act, 1939, unlike s. 181 (2), without importing blame or penalty provides a simple remedy for the recovery of the cost of damage done to property vested in the local authority. It renders liable the person whose person or property actually, accidentally or carelessly, damages such property, leaving him to enforce any claim which he may have over against a third party. I accordingly agree that this appeal should be allowed.

Appeal allowed.

Solicitor: *Town clerk, Kensington* (for the appellants).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

CRESTA HOLDINGS, LTD. v. KARLIN AND OTHERS.

[COURT OF APPEAL (Hodson and Ormerod, L.J.J.), October 27, 28, 1959.]

Practice—Particulars—Pleading—“ Notice ” contrasted with “ knowledge ”—
Notice that cheque being dealt with without owner’s authority alleged against
bankers—Materiality of form and precise terms of notice, or of circumstances
from which notice was to be inferred—R.S.C., Ord. 19, r. 23, r. 22.

The plaintiffs sued twelve defendants alleging fraud against the first two defendants, whereby the plaintiffs had been defrauded of some £300,000. The eleventh defendants were bankers against whom the plaintiffs alleged in the statement of claim that, as a result of the fraud, the bankers received a cheque and the proceeds thereof and “ did not receive the same as purchasers for value without notice ”; viz., without notice that the property had been dealt with as previously alleged without the authority of the plaintiffs. On the application of the bankers particulars of this allegation concerning notice were ordered to be given after discovery. On appeal by the plaintiffs,

Held: (i) “ notice ” was not a synonym for “ knowledge ” and the allegation was not an allegation of a condition of mind within R.S.C., Ord. 19, r. 22*, which accordingly had no application.

(ii) the bankers were entitled to particulars after discovery showing how they were alleged to have received notice that the cheque or proceeds thereof had been dealt with without the plaintiffs’ authority, since the present case was one where “ the form or the precise terms of such notice, or the circumstances from which such notice [was] to be inferred ” were material within R.S.C., Ord. 19, r. 23†.

Appeal dismissed.

[As to particulars of allegations of notice, see 25 HALSBURY’S LAWS (2nd Edn.) 245, para. 407.]

Case referred to:

Burgess v. Beethoven Electric Equipment, Ltd., [1942] 2 All E.R. 658; [1943] K.B. 96; 112 L.J.K.B. 195; 168 L.T. 105; 2nd Digest Supp.

Interlocutory Appeal.

The plaintiffs appealed from an order of SALMON, J., in chambers dated July 27, 1959, that they should give to the eleventh defendants, the bankers, further and better particulars of an allegation made in the statement of claim. The facts are stated in the judgment of HODSON, L.J.

I. S. Warren for the plaintiffs.

Maurice Lyell, Q.C., J. M. Shaw and J. M. Rankin for the defendant bankers.

HODSON, L.J.: The action by the plaintiffs, Cresta Holdings, Ltd., is one against twelve defendants in respect of a large sum of money, some £300,000, of which the plaintiff company claims to have been defrauded. The allegation of fraud is made against the first two named defendants. The eleventh named defendant is Heller & Partners, Ltd., a firm of merchant bankers; and the claim, so far as it affects the merchant bankers, is set out in para. 12 of the amended statement of claim as follows:

“ As a result of the transactions aforesaid [that is to say, the fraudulent transactions] the cheque referred to in paras. 2, 5, 7 and 9 hereof and the proceeds thereof being the property of the plaintiffs traceable in equity were received by [the bankers]. [The bankers] did not receive the same as purchasers for value without notice that the plaintiffs’ said property was so dealt with as aforesaid without the authority of the plaintiffs.”

* The material terms of r. 22 are printed at p. 657, letter D, post.

† The material terms of r. 23 are printed at p. 657, letter G, post.

A The learned judge has ordered the plaintiffs to give particulars of para. 12 of the statement of claim, directing them to give particulars after discovery:

B “Of the allegation that [the bankers] received the plaintiffs’ said property with notice that it was dealt with without the authority of the plaintiffs stating whether it is alleged that the said notice to [the bankers] was express or was to be inferred; if express, whether oral or in writing; if oral, the date or dates when and by whom and to whom on behalf of [the bankers] it was given; if in writing, identifying the relevant documents; if inferred, the circumstances relied upon from which such notice is to be inferred.”

C The plaintiffs seek to resist the request, and they appeal against the order for particulars on the ground that, although they admit that they are making a positive allegation that the bankers had notice of the lack of authority of the plaintiffs, they are protected by the rules from any obligation to give any further particulars. Order 19, r. 22 of the Rules of the Supreme Court deals with allegations of knowledge in this way:

D “Wherever it is material to allege malice, fraudulent intention, knowledge, or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.”

That rule was not always strictly applied, but this court in *Burgess v. Beethoven Electric Equipment, Ltd.* (1) pointed out that the rule must be strictly followed. The Master of the Rolls (LORD GREENE) said (2):

E “Rule 22 seems to me to lay down as clearly as anything can be laid down that the pleading which alleges a condition of mind as a fact is a sufficient pleading and, therefore, is one in respect of which particulars cannot be ordered.”

F Counsel’s first argument on behalf of the plaintiffs is that this is really an allegation of knowledge, a condition of the mind, and that it is controlled by r. 22. That submission must be rejected, as it was rejected by the learned judge. I do not myself regard the word “notice” as a synonym for the word “knowledge”. Notice is a word which involves that knowledge may be imparted by notice, but “notice” and “knowledge” are not the same thing, although loosely one sometimes talks as if to act with notice and to act with knowledge were indeed the same. So that in order to consider the position here, one must

G consider R.S.C., Ord. 19, r. 23. That rule reads as follows:

“Wherever it is material to allege notice to any person of any fact, matter or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice, or the circumstances from which such notice is to be inferred, be material.”

H Counsel for the plaintiffs argues that, even if he is wrong in his first submission that this case is covered by r. 22, nevertheless in the circumstances of this case he has pleaded sufficiently by alleging notice, and that the last words of r. 23—“unless the form or the precise terms of such notice, or the circumstances from which such notice is to be inferred, be material”—do not apply to this case.

I It is necessary, therefore, to consider the legal position which bankers, such as the eleventh named defendant, occupy. They are bound by the Bills of Exchange Act, 1882, to honour cheques which have been drawn by their customers unless there is a countermand of payment, or the customer dies. Counsel on behalf of the bankers does not contend that the countermand of payment would necessarily be in the form of a direct countermand by the customer himself. The countermand may come about by other circumstances, such, for example, as fraud coming to the knowledge of the bankers in circumstances casting a duty

(1) [1942] 2 All E.R. 658; [1943] K.B. 96.

(2) [1942] 2 All E.R. at p. 660; [1943] K.B. at p. 100.

on them to make inquiry before carrying out the order of their principal, which on the face of it is in good form. A

The question then arises whether it is right, as the learned judge thought, to apply the proviso beginning with the word "unless", and to direct the plaintiffs to give the particulars asked for. As I have indicated previously, I do not accept the contention that the word "notice" in r. 23 can be construed, as it were, in the sense of knowledge; but the question still remains whether the form, or the precise terms of notice, or the circumstances from which notice is to be inferred, are material. B

I agree with the learned judge that it is only right, in the way in which this case is pleaded, to give the bankers an opportunity of knowing how it is said that they have had notice at all. The notice, if it is a notice which is couched in precise terms, must be material for the bankers to know about in order that they may understand what case they have to meet. Similarly, if it is said only that there are circumstances of suspicion here from which the bankers ought to have inferred a notice, it is clearly right that those circumstances should be set out and particularised. The plaintiffs, no doubt, are in a difficulty at the present time in framing such particulars. Their knowledge must, I suppose, be very limited; but by this order the opportunity is given to them to consider all the relevant documents which have been disclosed on discovery before tying themselves to particulars. C D

I think that the order of the learned judge was right, and that this appeal should be dismissed.

ORMEROD, L.J.: I agree. On the first point which was argued by counsel for the plaintiffs I have nothing to add to the remarks that have fallen from my Lord except to say that it appears to be clear that the learned pleader, in drawing the amended para. 12 of the statement of claim, had used the word "notice" deliberately, and, it would appear, in distinction to the word "knowledge" which appears in paras. 6 and 8 of the statement of claim. In the circumstances of the statement of claim as it is drawn, I see no reason why this should not be considered under R.S.C., Ord. 19, r. 23, and not under r. 22, as counsel for the plaintiffs submits should be the case. E F

In regard to the second part of counsel for the plaintiffs' argument that even though r. 23 be the proper rule for consideration in this matter, the second part of the rule should not apply—in my judgment the view which the learned judge took was the correct one. In his judgment he says this: G

"I think in this case, having regard to the fact that in effect it is said, or the pleading as framed leaves it open to the plaintiffs to say, that the bankers were parties to the alleged frauds of Mr. Karlin and Mr. Albert, it is only fair that the bankers should have a little more information regarding the case they have to meet."

What the learned judge is saying there is that fraud was alleged on the part of Mr. Karlin and Mr. Albert, and that the bankers had notice either of the fraud or of the transactions in such a way as to amount to a countermanding of their mandate. In such circumstances it is material that they should have the information for which they ask. I am bound to say that I agree with that view, and that the particulars should be delivered as ordered. H

I agree that the appeal should be dismissed. I

Appeal dismissed.

Solicitors: *Richards, Butler & Co.* (for the plaintiffs); *Franks, Charlesly & Co.* (for the defendant bankers).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

A HIGH COMMISSIONER FOR INDIA AND OTHERS v. GHOSH.

[COURT OF APPEAL (Jenkins, Morris and Ormerod, L.J.J.), March 17, 1959.]

Constitutional Law—Foreign sovereign state—Immunity from suit—Counterclaim—Extent of waiver of immunity by sovereign state suing in High Court—Action for money lent—Counterclaim for damages for slander—Whether counterclaim maintainable.

B A High Commissioner entitled to diplomatic immunity and the foreign sovereign state which he represented began an action in the High Court against the defendant, who was a doctor, by specially indorsed writ claiming primarily the return of money lent to him. The defendant delivered a defence and counterclaim, in which he counterclaimed damages for alleged slander by servants or agents of the plaintiffs in the way of his profession, alleging that by reason of the allegation of the plaintiffs that the defendant had not repaid the money lent the plaintiffs and their said servants or agents were desirous of excluding the defendant from a hostel and from attending patients resident there.

D **Held:** the plaintiffs were not to be regarded as having submitted, by the issue of their writ, to the jurisdiction of the court in relation to the counterclaim, because the counterclaim was not sufficiently connected with the claim for money lent as to make it necessary in the interests of justice that the counterclaim should be decided along with the defence to the plaintiffs' claim; therefore, the counterclaim must be struck out on the ground of the plaintiffs' diplomatic immunity or immunity as a foreign sovereign state.

E *South African Republic v. Compagnie Franco-Belge du Chemin de Fer du Nord* ([1898] 1 Ch. 190) followed.
Appeal dismissed.

[As to a counterclaim against a foreign sovereign, see 7 HALSBURY'S LAWS (3rd Edn.) 267, para. 570, and as to one against a foreign minister, see *ibid.*, 272, para. 576, text and note (b).]

F Cases referred to:

Mighell v. Sultan of Johore, [1894] 1 Q.B. 149; 63 L.J.Q.B. 593; 70 L.T. 64; 58 J.P. 244; 11 Digest (Repl.) 615, 435.

South African Republic v. Compagnie Franco-Belge du Chemin de Fer du Nord, [1898] 1 Ch. 190; 77 L.T. 555; 18 Digest (Repl.) 24, 178.

Interlocutory Appeal.

G The defendant appealed against an order of McNAIR, J., in chambers, affirming an order of the master in chambers, striking out the defendants' counterclaim against two of the plaintiffs, the High Commissioner for India and the Union of India. The facts are stated in the judgment of JENKINS, L.J.

The defendant appeared in person.

T. O. Kellock for the two plaintiffs.

H **JENKINS, L.J.:** In this case the High Commissioner for India, the Union of India and the Government of West Bengal sued Dr. Satya Ranjan Ghosh for money lent. The writ, which was originally issued on Apr. 13, 1956, was later amended, the statement of claim being set out in the indorsement on the writ. By the amended claim, so indorsed, the plaintiffs claimed as follows:

I “(1) On or about May 2, 1950, the first plaintiff advanced the sum of £75 10s. to the defendant as a repayable advance. The said sum has not been repaid. (2) In 1950 the first plaintiff on behalf of the second plaintiff advanced the sum of £120 to the defendant as a loan repayable on demand. The said sum was paid in instalments of £30 on the following dates [and then the dates are set out]. (3) The said sum of £120 was demanded by letter dated Nov. 7, 1955, but the said sum has not been paid. (4) Alternatively, the said sum was repayable to the Government of India together with interest thereon at the rate from time to time fixed for the purpose by the

President in equal monthly instalments to be fixed by the Government from the sixth month after arrival in India of the defendant or from the date of employment on return to India whichever is earlier and it was an implied term of the agreement that the defendant would return to India within a reasonable time. (5) The defendant is in breach of the said implied term by failing to return to India within a reasonable time. (6) On or about Nov. 14, 1950, the first plaintiff on behalf of the third plaintiff advanced the sum of £87 to the defendant on condition that he returned to West Bengal and served the third defendant for a period of five years. It was an implied term of the said advance that the defendant should return to West Bengal within a reasonable time. (7) In breach of the said implied term the defendant has failed to return to West Bengal within a reasonable time."

Then there is the claim by the first plaintiff, that is to say, the High Commissioner for India for £75 10s., the second plaintiff, that is the Union of India, claimed £120 under paras. 2 and 3, and, alternatively, damages under paras. 4 and 5.

A defence was delivered by the defendant on May 24, 1956. That document was not only a defence, but it also contained a counterclaim. By the defence the defendant contested his liability for the alleged loans on various grounds, and, of course, as he had been sued in this country by the High Commissioner for India, the Union of India and the Government of West Bengal, the defendant was well entitled to put in any defence properly open to him; there is no question of that whatever. He went on to make his counterclaim. Two individuals, Dr. D'Rozario and Nagappa, were joined as defendants to the counterclaim, which was against the High Commissioner for India and the Union of India and those two added individuals; the Government of West Bengal was not impleaded in the counterclaim. I return to that document:

"Counterclaim. (10) At all material times the plaintiff [that is the defendant, the plaintiff by counterclaim] carried on practice at 31 Howitt Road, N.W.3 in the County of London as a medical practitioner. (11) At all material times the defendants, Dr. D'Rozario and Nagappa were servants or agents of the first and second-named defendants, the High Commissioner for India and the Union of India. The said Dr. D'Rozario and the said Nagappa acting as such servants or agents were in control of or connected with an Indian Students' Hostel operated by or on behalf of the first and second-named defendants at 89-91 Guildford Street, London, W.C.1. (12) At all material times the plaintiff had patients who were residents in the said hostel. (13) By reason of the allegation of the first and second defendants that the plaintiff had not repaid the alleged loans, the subject-matter of the defendant's claim in the action and/or that the plaintiff had not returned to India, the defendants and each of them were desirous of excluding the plaintiff from the said hostel or from attending upon patients of the plaintiff resident in the said hostel. (14) In or about the month of April, 1956, the defendant Dr. D'Rozario acting as aforesaid at India House falsely and maliciously spoke and published of and concerning the plaintiff and of and concerning him in the way of his profession to one Ganesdutt Gaur the words following or similar words to the like effect: 'Dr. Ghosh (meaning the plaintiff) had come to the United Kingdom for the purpose of studying with the financial help of the Bengal Government. He has not completed his studies or returned the money to the Bengal Government. He is creating difficulties with regard to the running of the Indian Students' Hostel in Guildford Street and I am trying to prevent such an undesirable doctor from going to the Hostel.' (15) At or about the end of the year 1956 the defendant, Dr. D'Rozario, acting as aforesaid in the course of an interview for the selection of students to be permanently accommodated at the said hostel falsely and maliciously spoke and published of and concerning the plaintiff and of and concerning him in the way of his profession to one

- A R. Bhattacharya the words following or similar words to the like effect: 'Who is your doctor'. When informed that the plaintiff [that is the defendant, the plaintiff by counterclaim] was 'Could you not get a better doctor round Russell Square?' 'I don't understand why you registered with an undesirable person like Dr. Ghosh'. (16) In or about the month of September 1957 the defendant, Nagappa, acting as aforesaid falsely and maliciously
- B spoke and published of and concerning the plaintiff and of and concerning him in the way of his profession to one R. Sinha the words following or similar words to the like effect: 'Who is your doctor?' When informed that the plaintiff was the doctor in question, 'I cannot accommodate you in the hostel'. (17) By reason of the premises the plaintiff has been greatly injured in his character credit and reputation and in the way of his said
- C profession and has been brought into public scandal odium and contempt."

That counterclaim provoked an application on the part of the plaintiffs in the action to strike it out. The summons for that purpose, which was dated Oct. 6, 1958, stated that the application was on the part of the High Commissioner for India and the Union of India, who were the two plaintiffs against whom the counterclaim was brought, and they applied

- D "to strike out the counterclaim on the grounds that: (1) the first defendant to the counterclaim is immune from suit and legal process under the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952, and the second defendant to the counterclaim is a sovereign state. (2) Under Ord. 21, r. 15 the claim raised ought not to be disposed of by way
- E of counterclaim."

The view I have taken of the first ground makes it unnecessary to consider the second.

- When the summons came before the master on Nov. 20, 1958, he made an order striking out the counterclaim, and on appeal to the Queen's Bench judge in chambers, McNair, J., who heard the appeal, dismissed the appeal so that the master's order striking out the counterclaim stood. From that decision of the learned judge, the defendant, Dr. Ghosh, now appeals to this court.

- The law which we have to apply is, I apprehend, well settled. A person entitled to diplomatic immunity, as the High Commissioner for India indisputably is, or a foreign sovereign state, as for this purpose the Union of India admittedly
- G is, cannot be impleaded in the courts of this country in an action such as the plaintiff's counterclaim in respect of slander. It is unnecessary to refer to the law relating to diplomatic immunity and the immunity accorded to foreign sovereign states, because in this particular case it is quite manifest that the subject of the defendant's counterclaim could not have been maintained against the High Commissioner for India and the Union of India as an original action. But the
- H High Commissioner and the Union of India have chosen to come to the courts in this country and to submit to the jurisdiction of those courts for the purpose of establishing their claim in debt against the defendant. By that course of action it is undoubtedly true that they must be taken to have waived their immunity to a certain extent, and the extent of such waiver for the present purpose is this:—by bringing their action in this country and submitting to the
- I jurisdiction, the plaintiffs must be taken to have submitted to the jurisdiction not only for the purpose of having their claim adjudicated on, but also for the purpose of enabling the defendant, against whom they are prosecuting their claim, to defend himself adequately, and his adequate defence may include a claim or demand asserted by way of counterclaim. That does not, however, mean that the plaintiffs, having brought their action here, are thereby exposed to any sort of claim which the defendant may choose to raise against them by way of counterclaim, however far removed from the plaintiffs' cause of action the counterclaim may be.

I can conveniently refer to the law as stated in two passages in the *ANNUAL PRACTICE* (1959 Edn.). The first passage is to be found at p. 311 in the course of the note to R.S.C., Ord. 16, r. 1, and is this (1):

"A foreign sovereign suing here submits to the jurisdiction so far as to subject himself not only to process of discovery and so forth, but to any set-off or cross-claim which the defendant may set up by way of defence against claim, and which it is necessary for the court to entertain in order to do justice between the parties in regard to plaintiff's claim, but he does not lay himself open generally to counterclaims or cross-actions."

That is one passage. The other passage, which is at p. 508 in the notes to R.S.C., Ord. 21, r. 17, is this (2):

"A similar rule applies when a sovereign prince or state over whom our courts have no jurisdiction (*Mighell v. Sultan of Johore* (3)) submits to bring an action in this country. The defendant is allowed to plead any set-off or counterclaim against him which is an answer to his demand; but not to recover any judgment against him for the excess, or to raise any counterclaim which is 'outside of and independent of the subject-matter of' the claim."

Counsel for the plaintiffs referred us to *South African Republic v. Compagnie Franco-Belge du Chemin de Fer du Nord* (4) as providing sufficient authority to support the effect of the passages in the *ANNUAL PRACTICE* to which I have referred.

Accordingly, I am of opinion that this counterclaim cannot be maintained unless it is shown to be, as regards the relief it claims, sufficiently connected with or allied to the subject-matter of the claim as to make it necessary in the interests of justice that it should be dealt with along with the claim. The defendant has said all that could possibly be said in support of his contention, but I am at a loss to see how the subject-matter of the counterclaim, which is a claim for alleged slanders of the defendant by servants of the High Commissioner for India or the Union of India, has any material bearing at all on the subject-matter of the claim, which in its primary form is simply a claim for money lent.

Accordingly, on the principles to which I have referred, this does not seem to me to be a counterclaim to which the High Commissioner for India and the Union of India must be taken to have submitted by bringing their action in these courts. The counterclaim clearly could not be maintained by independent action, and it is equally clear in my opinion that it cannot be brought into the present litigation on the ground that it is necessary to adjudicate on the claims for slander in order to do justice on the claim in debt. As I have said, the view I have formed on the first ground, on which the striking out of the counterclaim was asked for, makes it unnecessary to deal with the second ground, which is the objection under R.S.C., Ord. 21, r. 15.

For the reasons I have endeavoured to state, I am of opinion that the learned master and the learned judge were perfectly right in the conclusion to which they came, and I would dismiss this appeal.

MORRIS, L.J.: I am in entire agreement with the judgment which my Lord has delivered.

ORMEROD, L.J.: I agree.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *T. L. Wilson & Co.* (for the two plaintiffs).

[Reported by *HENRY SUMMERFIELD, Esq., Barrister-at-Law.*]

(1) This passage occurs at p. 311 in the 1960 edition too.

(2) This passage occurs at p. 508 in the 1960 edition too.

(3) [1894] 1 Q.B. 149.

(4) [1898] 1 Ch. 190.

A ROYAL COLLEGE OF NURSING v. ST. MARYLEBONE CORPORATION.

[COURT OF APPEAL (MORRIS, ROMER AND WILLMER, L.J.J.), October 2, 5, 6, 7, 27, 1959.]

B *Rates—Limitation of rates chargeable—Royal College of Nursing—Organisation whose main objects are charitable—Organisation to promote the “advance of nursing as a profession”—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 & 5 Eliz. 2 c. 9), s. 8 (1) (a).*

Charity—Benefit to community—Nursing—Promotion of the “advance of nursing as a profession”—Incidental benefits to individuals—Objects of Royal College of Nursing—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 & 5 Eliz. 2 c. 9), s. 8 (1) (a).

C The preamble to the charter of the Royal College of Nursing reciting from the petition for its grant, stated that the petitioning company: “believes that the incorporation under Our Charter of the proposed corporation will be for the public advantage, and will tend to the advancement of the science and art of nursing, and further to improve the education of nurses in the said science and art”. The two objects found by quarter sessions to be the main objects of the college were there stated in para. (a) and para. (b) of art. II (B) of the charter, viz.: “(a) To promote the science and art of nursing and the better education and training of nurses and their efficiency in the profession of nursing; (b) To promote the advance of nursing as a profession in all or any of its branches”. The charter did not contain any statement clearly indicative of an intention to promote the interests of nurses as members of their profession. It was admitted that para. (a) was in law a charitable purpose. The college claimed the partial relief from rates conferred by s. 8 (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, as being an organisation falling within the terms of s. 8 (1) (a).

E **F** **Held:** the college was entitled to the relief claimed as an organisation whose main objects were charitable for the following reasons—
(i) whether its main objects fell within s. 8 (1) of the Act of 1955 was a question purely of construction unaffected by the college’s activities or their effects.

G Dictum of LORD KEITH OF AVONHOLM in *General Nursing Council for England and Wales v. St. Marylebone Corpn.* ([1959] 1 All E.R. at p. 333) applied.

H (ii) para. (b) expressed a charitable purpose since the words “the advance of nursing as a profession” meant that the purpose was the improving of the services which nurses gave and by this means to enhance the esteem in which the nursing profession was held, and thus the purpose expressed was for the advancement of nursing as distinct from advancing the interests of nurses; moreover object (a) did not cover the relief, by means of nursing, of human suffering in all its aspects so that it was not to be inferred from the presence of object (a) that object (b) was directed to advancing the interests of nurses, and any consequence of the advance of nursing as a profession that benefit to nurses would result was irrelevant.

I *Institution of Civil Engineers v. Inland Revenue Comrs.* ([1931] All E.R. Rep. 454), and dictum of GREER, L.J., in *Geologists’ Association v. Inland Revenue Comrs.* ((1928), 14 Tax Cas. at p. 283) applied.

Decision of the DIVISIONAL COURT ([1958] 1 All E.R. 129) affirmed.

[As to what objects are charitable in law, see 4 HALSBURY’S LAWS (3rd Edn.) 206, para. 486, and 209, para. 488; and for cases on the subject, see 8 DIGEST (Repl.) 312-331, 1-126.

For the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8 (1), see 35 HALSBURY’S STATUTES (2nd Edn.) 394.]

Cases referred to:

Art Union of London v. Savoy Overseers, [1894] 2 Q.B. 609; 63 L.J.M.C. 253; 71 L.T. 40; 59 J.P. 20; *revsd.* H.L. sub nom. *Savoy Overseers v. Art Union of London*, [1896] A.C. 296; 65 L.J.M.C. 161; 74 L.T. 497; 60 J.P. 660; 38 Digest 498, 525.

General Medical Council v. Inland Revenue Comrs., [1928] All E.R. Rep. 252; 97 L.J.K.B. 578; 139 L.T. 225; 13 Tax Cas. 819; 28 Digest (Repl.) 316, 1383.

General Nursing Council for England and Wales v. St. Marylebone Corpn., [1959] 1 All E.R. 325; [1959] 2 W.L.R. 308.

Geologists' Association v. Inland Revenue Comrs., (1928), 14 Tax Cas. 271; 28 Digest (Repl.) 317, 1392.

Institution of Civil Engineers v. Inland Revenue Comrs., [1931] All E.R. Rep. 454; [1932] 1 K.B. 149; 100 L.J.K.B. 705; 145 L.T. 553; 16 Tax Cas. 158; 28 Digest (Repl.) 317, 1394.

Royal College of Surgeons of England v. National Provincial Bank, Ltd., [1952] 1 All E.R. 984; [1952] A.C. 631; 8 Digest (Repl.) 327, 96.

Appeal.

The Royal College of Nursing appealed to the County of London Quarter Sessions against the refusal of St. Marylebone Corporation as the rating authority to allow the college the relief from rates prescribed by s. 8 (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, in respect of premises occupied by the college and known as hall, offices and premises, Royal College of Nursing, 1/1A, Henrietta Place, London, W.1. It was admitted that the college was not established or conducted for profit. Quarter sessions held that the main objects of the college were such as to attract the application of s. 8 (1) (a) of the Act of 1955 and allowed the appeal. The corporation appealed by way of Case Stated to the High Court. On Oct. 16, 1957, the Divisional Court remitted the case to quarter sessions for further facts to be found (see p. 665, letter I, post). On Dec. 13, 1957, the court (LORD GODDARD, C.J., DONOVAN and HAVERS, JJ.) dismissed the corporation's appeal ([1958] 1 All E.R. 129). The corporation appealed to the Court of Appeal.

J. P. Widgery, Q.C., and *E. Blanshard Stamp* for the corporation.

L. G. Scarman, Q.C., *E. H. Blain* and *M. Mann* for the college.

Cur. adv. vult.

Oct. 27. **MORRIS, L.J.:** I will ask ROMER, L.J., to read the judgment of the court.

ROMER, L.J.: The question at issue is whether the Royal College of Nursing (hereinafter referred to as "the college") is entitled to rating relief under s. 8 (1), (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, in respect of certain hereditaments occupied by the college, being 1 and 1A, Henrietta Place, London, W. In January, 1957, the corporation rejected the college's claim to relief, but an appeal from that rejection to quarter sessions was successful and the Divisional Court upheld the decision of quarter sessions.

So far as material, s. 8 (1) of the Act of 1955 provides as follows:

"This section applies to the following hereditaments, that is to say—(a) any hereditament occupied for the purposes of an organisation (whether corporate or unincorporate) which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare."

Then the sub-divisions of the section give a certain measure of relief from rates to those hereditaments.

The college, which is admittedly not conducted for profit, was incorporated by royal charter in 1928. The following provisions of the charter are or may be material. It begins with the recital:

A "Whereas 'the College of Nursing, Ltd.' hereinafter referred to as 'the said company', a company incorporated under the Companies Acts, 1908 and 1913, has presented to Us in Our Council a humble petition setting forth:—

B "That the said company was so incorporated for the purposes set forth and mentioned in its memorandum of association, and that it was thereby provided (inter alia) that the income and property of the company should be applied solely towards the promotion of those purposes:

"That the said company has during the last ten years created an organisation, acquired premises and property, and promoted reforms directed to the said purposes:

C "That the said company proposes to place at the disposal of, and to transfer to, and vest in, the proposed corporation, when incorporated under Our Charter, the said premises and other property and existing organisation:

"That the said company believes that the incorporation under Our Charter of the proposed corporation will be for the public advantage, and will tend to the advancement of the science and art of nursing, and further to improve the education of nurses in the said science and art:

D "And most humbly praying Us in Our Council to grant Our Charter of Incorporation to the president and other members for the time being of the proposed corporation under the name and style of 'The College of Nursing' and with such powers and privileges and in such manner in all respects as to Us in Our Council may seem fit."

E By the first article, the president and other members for the time being of the corporation were constituted and created one body corporate with the name "The College" and "The College of Nursing". By art. II it is provided:

"The purposes for which the college is established and incorporated are as follows: (A) To acquire and take over all the assets, property, possessions, effects, and liabilities of the said company. (B) To promote, by means of such assets and otherwise, the purposes hereinafter set out and in particular (a) To promote the science and art of nursing and the better education and training of nurses and their efficiency in the profession of nursing. (b) To promote the advance of nursing as a profession in all or any of its branches . . . (e) To institute and conduct examinations in all branches of women's work conducive to the efficient conduct of the nursing profession and to grant certificates and diplomas to those who pass prescribed examinations: Provided no certificate or diploma shall confer any right to the privilege of a nurse registered in pursuance of an Act of Parliament. (f) To provide establish and maintain for the purposes herein mentioned in London and elsewhere offices, examination halls, and lecture rooms, with all requisite equipment, and to institute and provide courses of lectures and demonstrations . . . (j) To do all such other lawful things as may from time to time be conducive to the attainment and furtherance of the above objects or any of them."

On the matter being heard by quarter sessions, their decision was as follows:

I "We were of the opinion that the main objects of the appellants were such as to attract the application of s. 8 of the Act."

This finding of quarter sessions being somewhat wanting in precision, the Divisional Court, on the appeal coming before it, remitted the Case for an answer to the following questions:

"(1) What is or are the main object or objects of the college? (2) In the case of such object or objects is it (a) charitable, (b) if not, is it otherwise concerned with the advancement of education, (c) is it otherwise concerned with the advancement of social welfare?"

Quarter sessions gave the following answer to these questions:

"We found that the main objects of the college were those set out in art. II (B) (a) and (b) of its charter. The objects in art. II (B) (a) were admitted to be charitable. We were further of opinion that the object in art. II (B) (b) was either charitable or otherwise concerned with the advancement of social welfare for we were satisfied on the evidence written and oral that the objects in art. II (B) (a) and (b) were mutually complementary in that both were directed to a single end, namely, the raising of the standard of nursing for the benefit of the community rather than the promotion of the professional interests of nurses as an end in itself."

It is to be observed in passing that quarter sessions did not specifically answer the question whether the main object or objects, if not charitable, was or were mainly concerned with the advancement of education, but it is, we think, implicit in the answers which they did give that they did not think that the question should be answered affirmatively. The supplementary answers given by quarter sessions are, perhaps, expressed a little ambiguously and counsel for the college suggested before us that their finding that the objects in art. II (B) (a) and (b) "were mutually complementary in that both were directed to a single end" was intended to qualify the earlier finding "that the main objects of the college were those set out in art. II (B) (a) and (b) of its charter."

Counsel for the college relied in this connexion on the observation of A. L. SMITH, L.J. (referred to in the judgment of the Divisional Court), in *Art Union of London v. Savoy Overseers* (1) that

"... if the other object be only a means to the one end ... then the society has a sole and exclusive object, and not another object subsidiary thereto."

Applying this, counsel submitted that, reading the answers of quarter sessions as a whole, they were intending to find that the college had only one main object, which they described as a single end. We agree, however, with the view of the Divisional Court that the effect of the answers of quarter sessions is that they were intending to find that the college, under its charter, had two main objects and not one. It seems to us that this is reasonably clear if the answers are read in conjunction with the arguments which had been addressed to quarter sessions by the respective parties, which are set out in para. 3 (a) and 4 (a) of the Case.

On the footing, then, that the college has two main objects, it is now established by authority that each of them must comply with the requirements of s. 8 (1) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, if the college is to qualify for the relief from rates which the section provides. It is also established that, once the main objects of a body such as the college have been determined, the question whether such objects do so comply is purely one of construction, unaffected by the actual activities in which the body engages. Nor is the court concerned with the results of such activities. LORD KEITH OF AVONHOLM said in *General Nursing Council for England and Wales v. St. Marylebone Corpn.* (2):

"... it is with the objects for which the council was immediately and directly constituted that we are, in my opinion, concerned, and not with the results of its activities at second or third hand."

The question cannot, however, be decided by taking the language in which a main object is expressed and by asking what that language means if construed by itself; the language has to be construed in its context and with reference to all other relevant provisions of the document.

(1) [1894] 2 Q.B. 609 at pp. 627, 628. (2) [1959] 1 All E.R. 325 at p. 333.

A The object expressed in art. II (B) (a) is admittedly charitable, and accordingly the first question to be considered is whether the purpose expressed in art. II (B) (b) of the charter

"To promote the advance of nursing as a profession in all or any of its branches",

B is, in its context and in the light of the charter as a whole, also a charitable object. The answer to this question depends, in our judgment, on whether the true view of the object is (in the words of DONOVAN, J., who delivered the judgment of the Divisional Court) (3) "the advancement of nursing or the advancement of the interests of nurses". If it is the former, then counsel for the appellant corporation rightly concedes that the object is undoubtedly charitable.

C If, however, the object is to advance the interests of the members of the nursing profession, it cannot be said to be charitable in the sense in which that word is known to our law (see *General Nursing Council for England and Wales v. St. Marylebone Corpn.* (4), and *General Medical Council v. Inland Revenue Comrs.* (5)).

D The question is a difficult one, but the Divisional Court decided it in favour of the college, and we have come to the conclusion on the whole that they were right in doing so. The difficulty arises from the presence in art. II (B) (b) of the words "as a profession". Had those words been absent and the expressed object been "to promote the advance of nursing in all or any of its branches", it would clearly have been charitable as promoting (in the words of LORD MORTON OF HENRYTON in *Royal College of Surgeons of England v. National Provincial Bank, Ltd.* (6)) "the relief of human suffering". Counsel for the corporation, however, naturally relies on the words "as a profession" as showing that the real object of the provision was to promote the interests of the nurses as distinct from the nursed. His argument in essence is that the object of para. (b) was either to provide a trade union protection for the nursing profession or to increase the status of the profession and its members. He contended that the interests of the sick were fully covered by art. II (B) (a) and that (b) is directed to promoting the interests of the nurses, which is not the subject of any other provision in the charter. Article II (B) (a), says counsel, having fully covered the promotion of nursing for the benefit of the community, one would expect (b) to be concerned with something else; and the only reasonable meaning to attribute to (b), and one which is indicated by the words "as a profession", is an intention to promote and safeguard the interests of those who administer the nursing.

G It cannot be disputed, we think, that there is considerable force in counsel's submission. Although it is true, as DONOVAN, J., pointed out, that tautology is by no means unusual in documents such as the college's charter, we agree with counsel for the corporation that, on ordinary principles of construction, one should try to attribute some significance of its own to each separate provision. It is at this point, however, that we diverge from counsel. In our opinion, the relief of human suffering through nursing is not covered in all its aspects by art. II (B) (a). For example, para. (a) does not cover, or at all events does not clearly cover, the advance of nursing in the sense of increasing the quality and range of services offered to the public or of enhancing the number and standard of those joining the profession. We respectfully adopt and are unable to improve on the language of DONOVAN, J., where he said (7):

I "What is meant by the advance of some particular calling as a profession? If, for example, one says that in the last fifty years there has been a striking advance in the profession of accountancy, what idea is conveyed? Presumably this, that the profession has greatly increased in stature, importance,

(3) [1958] 1 All E.R. at p. 136.

(4) [1959] 1 All E.R. 325.

(5) [1928] All E.R. Rep. 252; 13 Tax Cas. 819.

(6) [1952] 1 All E.R. 984 at p. 995; [1952] A.C. 631 at p. 654.

(7) [1958] 1 All E.R. at p. 136.

membership and general esteem, not simply that the fees have gone up, although that might be assumed as a consequence. How then is a profession to be 'advanced' in this sense? The answer is, by service. Demands for more pay and better conditions for those engaged, however loud and persistent, and even successful, will not 'advance' the profession in the sense that we have defined; but improvement in the quality and range of services rendered, and the spectacle of constant endeavour to do better, will certainly have that effect. If, then, one finds an organisation one of whose objects is to advance nursing as a profession, there is no great difficulty in interpreting this as meaning to improve the quality and range of the services which nurses give and so to enhance the stature and importance of the nursing profession and the esteem in which it is held. It may well be, of course, that in order to improve nursing services more entrants must be attracted into the profession, and that this in time will mean improvements in pay and conditions; but such improvements will be means, not ends."

We agree with those views of the Divisional Court as expressed by DONOVAN, J., and the rejection of the corporation's contention is, we think, supported by certain other considerations. First, it seems to us that the words "in all or any of its branches" which appear in art. II (B) (b) are by no means apt if the intention of the provision was to promote the interests of the profession in a trade union sense or to increase the status of its members and the esteem in which they are held. Secondly, the whole tenor of the charter appears to us to show that the object of the college was to promote the interests of the sick in all the ways that efficient and extensive nursing can achieve. In this connexion we would refer again to the fourth statement in the recital in the charter. Thirdly, there is nowhere in the charter any clear statement indicative of an intention to promote the interests of nurses as members of the nursing profession—a point to which LORD MORTON attached importance in the *Royal College of Surgeons* case (8).

It may well be, and it is indeed probable, that (to borrow the language of DONOVAN, J., in the passage above cited) the improvement in the quality and range of the services which nurses give will benefit the nurses and their profession in the ways which he indicated. It is clear, however, from such cases as *Institution of Civil Engineers v. Inland Revenue Comrs.* (9) and other cases that this resulting benefit to the nurses is irrelevant for the purpose now in question, provided that the main object as expressed in art. II (B) (b) is to promote the advance of nursing. We have no doubt that under this provision those who administer the affairs of the college can (as in fact they do) take care of the interests of the nursing profession and its members. But in the words of GREER, L.J., in *Geologists' Association v. Inland Revenue Comrs.* (10):

"If you come to the conclusion, as you may in many cases, that one of the ways in which the public objects of an association can be served is by giving special advantages to the members of the association, then the association does not cease to be an association with a charitable object because incidentally and in order to carry out the charitable object it is both necessary and desirable to confer special benefits upon the members."

As we have come to the conclusion that art. II (B) (b) had as its main object the advancement of nursing and not the advancement of the nursing profession in the ways suggested by counsel for the corporation, it follows that in our judgment the college is entitled to the relief from rates which it claims on the ground that its main objects are charitable. On this view it becomes unnecessary

(8) [1952] 1 All E.R. at p. 995; [1952] A.C. at p. 655.

(9) [1931] All E.R. Rep. 454; [1932] 1 K.B. 149.

(10) (1928), 14 Tax Cas. 271 at p. 283.

A to consider the alternative submission advanced by counsel for the college that the main objects are otherwise concerned with the advancement of education or social welfare, and we express no opinion on that question. In our judgment the appeal must be dismissed.

Appeal dismissed.

B Solicitors: *Sharpe, Pritchard & Co.* (for the corporation); *Charles Russell & Co.* (for the college).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

Re CAUNTER'S CHARGE. BISHOP v. SOUTHGATE CORPORATION.

[CHANCERY DIVISION (Danckwerts, J.), October 20, 1959.]

Housing—Small dwellings—Money advanced by local authority for purchase of small house—Sale by local authority—Second mortgage—Whether local authority must pay surplus on sale to second mortgagee—Small Dwellings Acquisition Act, 1899 (62 & 63 Vict. c. 44), s. 6 (2).

D A local authority made an advance of £1,800 under s. 1 of the Small Dwellings Acquisition Act, 1899, to C., to enable him to purchase a house. The first charge to the local authority to secure the loan and interest and a second charge to B. to secure a further loan of £450 were executed on the same day as the transfer to C. C. defaulted in his payments under the first charge. The local authority ordered a sale without vacant possession and caused the house to be put up for auction, when the highest bid did not reach the total amount secured by their charge, and the house was withdrawn from the auction. After proceedings had been taken by the local authority to obtain vacant possession, the house was sold for £2,200. The amount due to the local authority for principal, interest, costs and expenses was £1,905 3s. 5d. but they refused to pay the surplus of £294 16s. 7d. to B. on the ground that they had no power to do so as she was in no better position than C. and by s. 6 (2)* of the Act of 1899 the local authority might take possession of the house in manner provided by the Act, but was not to be liable to pay any sum to the proprietor.

G **Held:** on the true construction of the Small Dwellings Acquisition Act, 1899, B. was not deprived of the ordinary rights of a second mortgagee to repayment of the money secured by the second charge, and, accordingly, the local authority were liable to pay to B. the balance remaining of the proceeds of sale of the house after satisfying out of those proceeds the amount properly due to them for principal, interest, costs and expenses.

H [As to possession and sale by local authorities for breach of conditions of acquisition loans, see 19 HALSBURY'S LAWS (3rd Edn.) 596, 597, paras. 965, 968, p. 757, para. 1209.

For the Small Dwellings Acquisition Act, 1899, s. 1, s. 2, s. 3, s. 4, s. 5, s. 6, s. 10, see 11 HALSBURY'S STATUTES (2nd Edn.) 382-387, 389.]

Case referred to:

I *Brown's Mortgage, Re, Wallasey Corpn. v. A.-G.*, [1945] 1 All E.R. 397; [1945] Ch. 166; 114 L.J.Ch. 81; 172 L.T. 210; 109 J.P. 105; 2nd Digest Supp.

Adjourned Summons.

The plaintiff, Mrs. Bishop, applied by originating summons, dated Mar. 10, 1959, to which the Southgate Corporation (hereinafter called the "borough council") were defendants, for the determination of the question whether on the true construction of the Small Dwellings Acquisition Acts, 1899 to 1923,

* The advance was made under s. 1 of the Small Dwellings Acquisition Act, 1899, as amended by s. 44 of the Housing Act, 1949.

as amended, the borough council were liable to account to the plaintiff for any surplus of the proceeds of sale of certain premises, No. 55 Eaton Park Road, Palmer's Green, Middlesex, remaining after satisfaction of principal, interest, costs and expenses due to the borough council under the first charge dated Mar. 15, 1954, hereinafter mentioned. A

Prior to the sale next mentioned the plaintiff was registered proprietor with absolute title of No. 55, Eaton Park Road, which was a small house. In November, 1953, she arranged to sell it to Charles Richard Caunter for £2,250. Mr. Caunter borrowed £1,800 from the defendants and the plaintiff lent the remaining £450 on a second charge of the premises. The defendants advanced the £1,800 under powers conferred by the Small Dwellings Acquisition Acts, 1899 to 1923*, as amended. The transaction was completed on Mar. 15, 1954, by transfer of that date. On the same day Mr. Caunter charged the property to the borough council to secure their loan and interest, and executed a second charge in favour of the plaintiff to secure the £450 and interest. After the sale the plaintiff remained in possession of part of the house as tenant. Mr. Caunter made default under the charge to the borough council in the payment of the instalment due on Mar. 31, 1957, and subsequently made no further payment. He let the rest of the house and disappeared. In pursuance of s. 3 (3) of the Act of 1899 the borough council ordered the sale of the house without themselves taking possession thereof. They caused the house to be offered for sale by public auction on Feb. 14, 1958, with a reserve of £1,850. The highest bid made was £1,750, which was less than the amount owing to the borough council on the security of their charge, and the house was withdrawn from the auction. The borough council then took proceedings for possession and on July 25, 1958, an order for possession on Aug. 22, 1958, was made by a county court. The borough council offered the house to the plaintiff for sale at £1,900 on Aug. 1, 1958, and, that offer not being accepted, advertised the house for sale and sold it with vacant possession for £2,200. The total sum for principal, interest, costs and expenses amounted to £1,905 3s. 5d. leaving a balance of £294 16s. 7d. The plaintiff contended that this sum should be paid over to her towards the repayment of her second mortgage but the borough council contended that they had no power against the interests of the ratepayers to pay her this balance. B
C
D
E
F

G. B. H. Dillon for the plaintiff.

D. C. Potter for the defendants.

DANCKWERTS, J.: This is an application which involves the construction of the Small Dwellings Acquisition Act, 1899, which, as its title shows, was an Act passed to empower local authorities to advance money to any person to enable him to acquire a small house in which he intended to reside. In other words, it was an Act which enabled the proprietor to acquire a house on easy terms compared to those which he might have to pay if he had to go into the open market for a loan. [His LORDSHIP reviewed the facts and continued:] The Act has been amended by certain statutes, but the amendments do not affect the present point; their only material effect is to raise the total of the market value of a house on which the borough council may lend money from £400 to £5,000. Section 1 (1) provides: G
H

"A local authority for any area may, subject to the provisions of this Act, advance money to a resident in any house within the area for the purpose of enabling him to acquire the ownership of that house . . ."

I

Then there is a proviso that an advance shall not be made for the acquisition of the ownership of a house where, in the opinion of the local authority, the market value exceeds a figure which is now £5,000, and sub-s. (2) provides that the advance shall be repaid with interest over a period not exceeding thirty

* See p. 669, ante.

A years. Then provision can be made for payment by instalments, which was done in this case. Then s. 2 provides:

"Before making an advance under this Act in respect of a house a local authority shall be satisfied—(a) that the applicant for the advance is resident or intends to reside in the house, and is not already the proprietor within the meaning of this Act of a house to which the statutory conditions apply . . ."

B The whole purpose of the Act is, of course, to enable people to acquire houses in which they intend to reside.

Section 3 contains the conditions for an advance, one of which is that the proprietor of the house shall reside in the house, but I do not think that anything which is material today turns on that section. Section 4 provides:

C "(1) Where the ownership of a house has been acquired by means of an advance under this Act, the person who is the proprietor shall be personally liable for the repayment of any sum due in respect of the advance until he ceases to be proprietor, by reason of a transfer made in accordance with this Act.

D "(2) The provisions of this Act requiring the permission of the local authority to the transfer of the proprietor's interest in a house under this Act shall not apply to any charge on that interest made by the proprietor, so far as the charge does not affect any rights or powers of the local authority under this Act."

E That is the first time there is a reference to a charge and it is worth noting that it is a charge "on that interest"—that is the interest of the proprietor—and nothing else.

Section 5 provides for the recovery of possession and disposal of a house. Subsection (1) reads:

F "Where a local authority take possession of a house, all the estate, right, interest, and claim of the proprietor in or to the house shall, subject as in this section mentioned, vest in and become the property of the local authority, and that authority may either retain the house under their own management or sell or otherwise dispose of it as they think expedient."

Then sub-s. (2) provides:

G "Where a local authority take possession of a house they shall, save as hereinafter mentioned, pay to the proprietor either—(a) such sum as may be agreed upon; or (b) a sum equal to the value of the interest in the house at the disposal of the local authority, after deducting therefrom the amount of the advance then remaining unpaid . . ."

In the case of taking a house under that section they have power to pay something to the proprietor.

H Section 6 provides for the case where the present position obtains. Subsection (1) reads:

I "Where a local authority order the sale of a house without taking possession, they shall cause it to be put up for sale by auction, and out of the proceeds of sale retain any sum due to them on account of the interest or principal of the advance, and all costs, charges, and expenses properly incurred by them in or about the sale of the house, and pay over the balance (if any) to the proprietor."

That subsection obviously can have no application to the present case because the authority ordered the sale of the house without taking possession and they did not effect a sale and consequently there was no question of any payment of a balance to the proprietor because there was no sale. Subsection (2) provides:

"If the local authority are unable at the auction to sell the house for such a sum as will allow of the payment out of the proceeds of sale of the interest

and principal of the advance then due to the authority, and the costs, charges, and expenses aforesaid, they may take possession of the house in manner provided by this Act, but shall not be liable to pay any sum to the proprietor."

I can well understand the good sense of that subsection because if the local authority are unable to sell after they take possession they have not any proceeds of sale, and there cannot be any question then of any surplus being paid to the proprietor, so it would be unfair to impose on the local authority any liability to pay a sum to the proprietor which they have not got. But it has been held under that subsection in *Re Brown's Mortgage, Wallasey Corpn. v. A.-G.* (1) that if, owing to the increase in value of the property, a council subsequently effect a sale which will provide a surplus over all the money that they lent and their interest and costs, they still cannot pay the proprietor anything out of the surplus which has accrued. I do not know that it follows from that subsection that such a result should occur by which the proprietor is deprived of all further interest in the property or the proceeds of sale, but, at any rate, that was the result reached by COHEN, J., in *Re Brown's Mortgage* (1).

Sections 7, 8 and 9 have not any application to the point which I have to decide, but s. 10 may have some materiality. Section 10 (1) provides:

"A person shall not be deemed for the purposes of this Act to be resident in a house unless he is both the occupier of and resident in that house",

whatever that may mean. Then sub-s. (2) reads:

"For the purposes of this Act 'ownership' shall be such interest or combination of interests in a house as, together with the interest of the purchaser of the ownership, will constitute either a fee simple in possession or a leasehold interest in possession of at least sixty years unexpired at the date of the purchase."

Subsection (3) provides:

"Where the ownership of a house is acquired by means of an advance under this Act, the purchaser of the ownership, or, in the case of any devolution or transfer, the person in whom the interest of the purchaser is for the time being vested, shall be the proprietor of the house for the purposes of this Act."

It is claimed on behalf of the borough council that they are not entitled (because of the interest of the ratepayers, for which they are trustees), to pay any part of the surplus, which is in their hands, to the plaintiff, with the result that she will lose the benefit of her charge and cease to have any right to recover from the proceeds of the property any part of the money which in fact she lent to Mr. Caunter. That seems a very hard and unjust result as she was not in default in any way. The argument, which is perfectly clear and which is put forward on behalf of the borough council, is as follows. COHEN, J., held, as a result of s. 6, that where the local authority has sold after taking possession, the proprietor lost any right to share in any surplus proceeds of sale. In the same way, it is said, a person who has advanced money by way of a second mortgage on the security of the property has no better title than that of the person who owns the equity of redemption in the first mortgage and, as a borrower, has raised money on the security of a mortgage made in favour of the local authority. A lender who advances money on a second mortgage in such circumstances must face the prospect that there may be the misfortune of the proprietor being expropriated as a result of the provisions contained in the Small Dwellings Acquisition Act, 1899. That is a very unfair result which one would not credit the legislature with intending, unless it was a necessary result of the provisions of the Act. It seems very remarkable that the proprietor should be entirely expropriated

A as was held in *Re Brown's Mortgage* (2), without either the formality of a foreclosure action or anything of that sort and without, therefore, the traditional protection afforded by the court of equity to a borrower who finds himself in difficulty with regard to repayment of the loan. It seems to me still more hard to expropriate a lender who has not failed to obtain foreclosure or anything of the sort but merely has been deprived of repayment in the same way as the

B first mortgagee has been deprived of repayment. I do not think it follows from the provisions of the Act that such a result would occur. It seems to me quite plain from s. 3 and s. 4 that a person having a charge may be a different person from the proprietor. I cannot see anything in the Act of 1899 which requires the chargee to be deprived of a chargee's rights to repayment by reason of the default of the proprietor, who owes the money. Consequently, it seems to

C me in this case that the chargee's rights remain, unless disposed of by due process of law, as, for instance, by the act of foreclosure. In the present case, therefore, the borough council are accountable to the plaintiff for any balance of the money which remains in their hands from the sale of the property after the satisfaction of their own claims and payment of the amount of the principal, interest and costs of the charge.

Declaration accordingly.

Solicitors: *H. W. Pegden* (for the plaintiff); *Town clerk*, Southgate (for the defendants).

[Reported by E. COCKBURN MILLAR, Barrister-at-Law.]

PRACTICE NOTE.

Re ALLEN'S SETTLEMENT.

ALLEN v. ALLEN AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), October 29, 1959.]

F *Trust and Trustee—Variation of trusts by the court—Investment—Evidence of stockbroker or expert.*
Charity—Scheme—Investment—Extension of powers of investment—Evidence of stockbroker or expert.

[For the Variation of Trusts Act, 1958, s. 1, see 38 HALSBURY'S STATUTES (2nd Edn.) 1130.]

G Adjourned Summons.

This was an originating summons under the Variation of Trusts Act, 1958, heard in open court on Oct. 29, 1959. By the summons the applicants were asking for an extension of powers of investment to give power to invest in ordinary shares. In the course of the hearing HIS LORDSHIP gave the following

H directions concerning practice in such cases.

I **VAISEY, J.**, said (3) that in future cases of this kind it would be unnecessary to file evidence by a stockbroker or other expert containing general matters of economic and financial history or argument in general terms as to the wisdom of extending powers of investment. HIS LORDSHIP indicated that the same practice should be followed in applications made by charities for the purpose of obtaining wider investment powers.

HIS LORDSHIP further indicated that this direction was not intended to preclude the filing of expert evidence relating to matters peculiar to the particular application which an applicant was advised should be brought to the attention of the court.

(2) [1945] 1 All E.R. 397; [1945] Ch. 166.

(3) This Practice Note was issued by the direction of VAISEY, J.

WILSON v. WREXHAM CORPORATION.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Ashworth and Hinchcliffe, JJ.),
October 12, 22, 1959.]

Highway—Street—Private street works—Resolution of local authority—Abandonment—Resolution that apportionment be based on degree of benefit—Subsequent resolution that apportionment be based on frontage—Whether prior resolution amended or abandoned—Scope of power of amendment—Validity of later resolution—Jurisdiction of justices to quash resolution for invalidity—Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 6 (1), s. 8 (1), (2), s. 11.

On Nov. 29, 1956, a local authority resolved, pursuant to s. 6 (1) of the Private Street Works Act, 1892*, to execute certain private street works in a street, and that the provisional cost should be borne by the frontagers on the basis of frontage and not of degree of benefit, but no steps were taken to implement this resolution. On Sept. 5, 1957, the local authority passed another resolution to change the basis of apportionment of the cost of the work from frontage to degree of benefit. After the necessary plans and other documents had been prepared and published and the necessary notices served, however, the authority, on Nov. 28, 1957, resolved to change the basis back to frontage basis. The necessary plans and other documents were prepared again on a frontage basis, approved by resolution and published, and the necessary notices served. A frontager whose apportioned costs were thereby increased objected, and contended, among other contentions, on appeal against a decision of justices rejecting his objections, that the resolution of Nov. 28, 1957, was an amendment of the scheme resolved on on Sept. 5, 1957, and was not within the power of amendment given by s. 11 of the Act. He relied on the provisions of s. 8 (1)† that the justices "may quash in whole or in part . . . the resolution" and of s. 8 (2) that "no objection which could be made under this Act shall be otherwise made or allowed in any court proceeding or manner whatsoever"‡, as conferring jurisdiction on the justices to quash the resolution of Nov. 28, 1957.

Held: the appeal failed because—

(i) section 8 of the Private Street Works Act, 1892, did not enable the justices to decide the substance of the contention on behalf of the appellant (which was that the resolution of Nov. 28, 1957, was a nullity) as no such ground of objection was created by s. 7; accordingly the justices had no jurisdiction to decide such an objection, but the proper remedy for it would be by application for a prerogative order.

(ii) further, there had been an abandonment of the scheme and resolution of Sept. 5, 1957, as distinct from an amendment thereof, when the resolution of Nov. 28, 1957, was passed, and the latter resolution was valid.

SEMBLE: it was not possible under s. 11 of the Private Street Works Act, 1892, to change the basis of apportionment (see p. 677, letter G, post).

[**Editorial Note.** As from Jan. 1, 1960, this Act is repealed and replaced by the Highways Act, 1959, s. 173 (1) of which expressly re-enacts "the code of 1892" as contained in ss. 174-188 of the Act of 1959.]

As to the incapacity of an inferior court to gain jurisdiction by determining questions on the answer to which its jurisdiction depends, see 11 HALSBURY'S LAWS (3rd Edn.) 59, para. 116.

* The effect of s. 6 (1), which is repealed as from Jan. 1, 1960, by the Highways Act, 1959, s. 174 (1) of which repeats its provisions, is set out at p. 675, letter H, post.

† Section 8 (1) corresponds to s. 178 (2) of the Act of 1959.

‡ This provision is repeated in slightly different language by s. 186 of the Act of 1959.

A As to the hearing of objections to proposed private street works, see 19 HALSBURY'S LAWS (3rd Edn.) 445, para. 705; and for cases on the subject, see 26 DIGEST 544, 545, 2426-2433.

For the Private Street Works Act, 1892, s. 6 (1), s. 8, s. 11, see 11 HALSBURY'S STATUTES (2nd Edn.) 184, 187, 190.]

Case Stated.

B A frontager appealed by Case Stated from the decision of justices for the County of Denbigh, disallowing his objection to certain proposals made by the respondent local authority under the Private Street Works Act, 1892. The facts are stated in the judgment of LORD PARKER, C.J.

R. G. Woolley for the appellant frontager.

C *H. Parrish* for the respondent local authority.

After argument on Oct. 12, 1959, the case was adjourned for the production of the notices given by the local authority to the appellant, and again came on for hearing and was further argued, the notices having been produced, on Oct. 22.

D **LORD PARKER, C.J.:** This is an appeal by the appellant frontager by way of Case Stated by justices for the County of Denbigh to whom an application was made by the Mayor, Aldermen and Burgesses of the Borough of Wrexham to hear and determine certain objections made by the appellant to the respondent local authority's proposal to carry out private street works under the provisions of the Private Street Works Act, 1892, (1). The estimated expenses of such works amounted to £1,631 15s. in all and £318 2s. 7d. was the provisional apportionment in respect of the appellant's property. It was a difficult matter. The **E** justices went into it in considerable detail, and in the end they not only came to the conclusion that the proposed works were reasonable and the provisional apportionment was correct, but also they were of opinion that the objections which the appellant sought to make before them were objections which were not included in his grounds of objection, and for that reason also the objections **F** failed.

The appellant until February, 1958, was the owner of a bungalow having a frontage of one hundred and four feet six inches to Windermere Road, which was not then a highway repairable by the inhabitants at large. Although he ceased to be the owner in February, 1958, he remained under the contract of sale liable to pay all road charges which might become payable in the future, hence his **G** interest in the matter.

The matter arises under the Private Street Works Act, 1892, and, before continuing to state what in fact the local authority did, I refer shortly to a few sections of the Act. By s. 6 (1), taking it quite shortly, it is provided (2) that the urban authority may from time to time resolve in respect of a street which is not sewered, levelled, paved, metalled, flagged or channelled, etc., that work of that nature shall be done, and that the expenses incurred in executing the works shall be apportioned on the premises fronting, adjoining, or abutting on such street. That is what I may call a "domestic resolution" of the urban authority which is not published. Pausing there, it is provided by s. 10 that in that resolution the method of apportionment shall be on a frontage basis (3) unless the urban authority otherwise resolve, but that the urban authority may if they **H** think it just resolve that the apportionment shall be made having regard to the greater or less degree of benefit to be derived by any premises from such works (4). **I** Having passed such a resolution, the surveyor in the ordinary way is then instructed to prepare a specification, estimate and provisional apportionment

(1) See p. 674, letter I, ante, as regards the prospective repeal of this Act.

(2) This provision is repeated in s. 174 (1) of the Highways Act, 1959.

(3) This provision is repeated in s. 176 (1) of the Highways Act, 1959.

(4) Apportionment on a benefit basis is re-enacted in s. 176 (2) of the Highways Act, 1959.

in accordance with the basis already resolved. Then, when those have been prepared the urban authority may pass a resolution approving the specification, estimate and apportionment of the surveyor (5), and if that is done that resolution, which I will call the "published resolution", has to be published together with his specification, plans, sections, estimate and the like, and copies are to be served on the owners (6). Then each owner of property abutting the street in question has one month in which to make certain objections, and by s. 7 it is provided that the objections can be made on any of six different grounds (7). After the month has expired the local authority if there are objections may apply (8) to a court of summary jurisdiction to hear those objections. The court of summary jurisdiction has then authority to

"quash in whole or in part or may amend the resolution, plans, sections, estimates, and provisional apportionments, or any of them, on the application either of any objector or of the urban authority." (9).

Finally, by s. 11 there is power in the urban authority to amend the specifications, plans, sections, estimates and provisional apportionments (10).

The appellant had a frontage which was more than the frontage of any other of the owners of dwellings along the street, and a frontage basis would clearly require him to pay considerably more when the total cost was apportioned than if the basis was on the degree of benefit. What happened was this: on Nov. 29, 1956, the respondent local authority resolved under s. 6 (1) of the Act of 1892 (11) to do certain work to this road. They resolved in that resolution, which was what I have called a domestic resolution, that the provisional cost should be borne on the basis of frontage and not of degree of benefit. However, no steps whatever were taken as the result of that domestic resolution. The surveyor was not asked to prepare any plans; there was no approval, therefore, of his plans, and there were no notices. It was and remained purely a domestic resolution. On Sept. 5, 1957, however, the local authority passed a second resolution, again what I have called a "domestic resolution", under which they resolved to change the basis of apportionment from frontage to degree of benefit, and they instructed their surveyor to prepare the necessary documents on that basis. He did so, and they confirmed and approved by resolution what he had done. In other words, on this occasion, unlike the first, they went through the statutory procedure and, having confirmed what the surveyor had done, they then pursuant to s. 6 (3) made the necessary publications and served the necessary notices. In fact no formal objections (12) under s. 7 were ever made as the result of that resolution either within a month or at all and, so far as this appellant is concerned, there was of course no inducement to him to make any objection because under this resolution his apportionment was on a degree of benefit basis which was more favourable to him than a frontage basis.

On Nov. 28, 1957, however, the committee of the local authority passed yet another domestic resolution, under which they changed back from the degree of benefit basis to the frontage basis. The surveyor was again asked to prepare plans on that basis. His documents were approved by resolution, and that resolution was published and again the necessary notices were given. Having regard to the change of basis the appellant's apportionment rose from a sum of £191 18s. 8d. to some £318. He did object, and in his objections, which were stated by his solicitors, he objected on the following grounds:

(5) Private Street Works Act, 1892, s. 6 (2); see s. 174 (2) of the Highways Act, 1959.

(6) Private Street Works Act, 1892, s. 6 (3); see s. 174 (3) of the Highways Act, 1959.

(7) See, for the replacing enactment, s. 177 (1) of the Highways Act, 1959.

(8) Private Street Works Act, 1892, s. 8; see s. 178 (1) of the Highways Act, 1959.

(9) Private Street Works Act, 1892, s. 8 (1); see s. 178 (2) of the Highways Act, 1959.

(10) This provision is replaced by s. 179 of the Highways Act, 1959.

(11) Corresponding to s. 174 (1) of the Highways Act, 1959.

(12) As regards objections, see now s. 177 of the Highways Act, 1959.

A “(a) that the proposed works were insufficient and unreasonable and that the estimated expenses were excessive; (b) that the provisional apportionment was incorrect in respect of the degree of benefit to be derived by the appellants.”

B Pausing there, it is quite clear that he had in fact no case under his first objection. It is also clear, I think, that the second objection was completely misconceived because in fact the new apportionment was not on the degree of benefit basis at all but on a frontage basis. On the last occasion when this matter came before the court, the court were unable to see how it was that that objection, the second objection, had come to be made. It was not clear what his knowledge was at the time. It now becomes clear that the local authority had in sending him notice of the resolution specifically drawn his attention to the fact that a change had been made from degree of benefit basis to frontage basis. He therefore knew of it, and how he came to make that second objection I do not quite know. It is only fair, however, to say that at that stage nobody fully appreciated the position.

C As I have said, the justices decided this matter on the ground that nowhere among those objections I have read was any objection made to this change from degree of benefit basis to frontage basis. The court have been rather concerned with that because as I have said the position then was by no means clear. But for the letter from the local authority to which I have referred there was nothing to indicate to the appellants what the basis was on which the apportionment was made. Also it appears that he was ignorant at that time of something which he learned later, namely, that the reason for the change from degree of benefit basis to frontage basis was representations made by other frontagers informally and not by way of objection to the resolution of Sept. 5, 1957.

D In those circumstances, Mr. Woolley, who has argued this case very well for the appellants, has submitted a number of arguments to the effect that there was no power in the local authority to pass the resolution as to which the objection was made and the objection determined by the justices. The main argument is really this, that there was here no abandonment of the original scheme but that the original scheme was perpetuated but with a minor amendment, namely, this change from degree of benefit basis to frontage basis, and that there is no power under the Act to amend in that respect. He has referred us to s. 11 and (13), although it is not strictly necessary for the decision, I am inclined to agree with his argument that under s. 11 it is not possible to change the basis of apportionment. Indeed it would be odd if there was power because there is no ground on which a frontager could object unless, as I understand it, the total cost of all the work in the street had gone up. In other words, as between himself and his neighbours he would have no right of objection whatsoever. Accordingly, counsel for the appellants maintains that there was no power to pass this resolution.

H His other argument really led to the same result, namely, that the local authority had no jurisdiction to pass the resolution. If, however, there was no power to pass that resolution, it was a complete nullity. The publication of it was a nullity. The objections made were a complete nullity. The hearing before the justices was a complete nullity. Accordingly, it would be quite impossible for him to raise that point before the justices. Indeed, if one visualised a third objection having been made to the effect that the resolution in question was ultra vires, there being no jurisdiction to make it, it would have been the duty of the justices to say: ‘We cannot deal with that.’ Indeed, if it is a good point the only way in which the appellants could get it dealt with would be, as soon as he knew the full facts, to come to this court and apply, if the justices

(13) Section 11 of the Private Street Works Act, 1892, corresponds to s. 179 of the Highways Act, 1959.

would not adjourn the matter, for prohibition to them. If, as most likely, A they would have adjourned the matter, he could have applied to this court for an order of certiorari to quash the resolution in question as being a complete nullity.

It is right to say that s. 8, which I have read, in sub-s. (1) does say (14):

"The court [that is the summary jurisdiction court] may quash in whole B or in part or may amend the resolution, plans, sections, estimates, and provisional apportionments . . ."

I do not think myself that any reliance can be put on those words to give a court of summary jurisdiction power to determine a matter which is otherwise completely outside their jurisdiction. Full effect can be given to those words by enabling them to quash on the merits for good ground shown when there is C full jurisdiction in the matter. Accordingly I am content to decide this case on the basis that even if the appellant had made this objection before the justices, it was not a matter with which they could deal, and the only way in which he could have the matter dealt with would be by coming to this court.

It is only right, however, to go on to say that having heard the argument on both sides I am clear in my own mind that any application to this court would have failed. I am now satisfied that there was no attempt to invoke the powers D of s. 11 of the Act of 1892, the amending powers, at all. If there had been, there would have been no jurisdiction. I am satisfied without going into the facts in detail to say that the first published resolution (15) was fully rescinded and abandoned. I think that when the resolution in question (16) was made there was a total abandonment of the original resolution with fresh instructions E to the surveyor to prepare plans and estimates on the new basis and, accordingly, that that was something which was clearly within the jurisdiction of the local authority. They were not invoking the powers of s. 11, which would not have covered them on the facts of this case. However, the first ground is sufficient for the decision, and on that ground I would dismiss this appeal.

ASHWORTH, J.: I agree, and it is only out of deference to the argument F of counsel for the appellant that I add a word or two. In my judgment, the appeal can be disposed of and should be disposed of on the first of the grounds mentioned by my Lord. It seems to me that directly the argument is analysed the appellant is contending that the resolution which was before the justices was a nullity, yet he was seeking before those justices to raise a contention to that effect and thus invite them to determine their own jurisdiction in this matter. G They could only have jurisdiction if the resolution was effective and *intra vires*, and his contention that it was *ultra vires* was a matter which should have been pursued in this court by means of one of the prerogative remedies.

It is true that counsel for the appellant did raise a further point which I should like to mention. Under s. 8 (2) of the Private Street Works Act, 1892, it is provided (17): H

"No objection which could be made under this Act shall be otherwise made or allowed in any court proceeding or manner whatsoever."

As I understood counsel for the appellant, he was saying that that limited the appellant's rights here and indirectly enabled him to raise the contention as to jurisdiction which I have already indicated was not maintainable. As it seems I to me, that is an unsound argument because it pre-supposes an objection which could be made under this Act, and the objections which can be made under the Act are catalogued under s. 7 and do not include an objection which goes to the *vires* or otherwise of the second resolution.

(14) This provision is repeated in s. 178 (2) of the Highways Act, 1959.

(15) *Viz.*, the resolution of Sept. 5, 1957. (16) *Viz.*, the resolution of Nov. 28, 1957.

(17) This provision is repeated in slightly different language by s. 186 of the Highways Act, 1959.

- A On the second branch of his argument, namely, whether this resolution was in fact *intra vires* owing to the abandonment of the second one, I have nothing to add to what has fallen from my Lord. I agree that the appeal fails.

HINCHCLIFFE, J.: I agree, and there is nothing that I can usefully add.

Appeal dismissed.

- B Solicitors: *T. D. Jones & Co.*, agents for *James, James & Hatch*, Wrexham (for the appellant frontager); *Sharpe, Pritchard & Co.*, agents for *Town clerk*, Wrexham (for the respondent local authority).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

C

Re LONSDALE'S WILL TRUSTS.

LOWTHER AND OTHERS v. LOWTHER AND OTHERS.

- D [COURT OF APPEAL (Lord Evershed, M.R., Sellers and Harman, L.J.J.), October 6, 7, 8, 9, 21, 1959.]

Estate Duty—Incidence—Property not passing to executor as such—Recovery of duty from person entitled to sum charged on property—Jointure—Appointment of jointure to be paid without any deduction—Whether a disposition containing a provision to the contrary within Finance Act, 1894 (57 & 58 Vict. c. 30), s. 14 (1).

E

Power of Appointment—Exercise—Excessive exercise—Power to appoint £1,500—Appointment of £1,000 free of duty—Whether appointment in excess of power.

F

By his will made in 1871, a testator who died in 1872 gave power to the life tenant of his estate by deed or will "to appoint to any woman whom he may marry . . . for her life or for any less period a yearly rent charge . . . by way of jointure . . . not exceeding in the whole . . . the yearly sum of £1,500 to be charged upon all or any of the said . . . hereditaments hereinbefore devised in strict settlement . . ." By a settlement dated Oct. 6, 1923, the life tenant in exercise of the said power appointed to his wife in case she should survive him during the residue of her life "the yearly rent charge of £1,000 by way of jointure to be charged upon all the . . . hereditaments and premises now subject to the subsisting limitations of the said will . . . to be paid without any deduction (except for succession duty if any) . . ." In 1953 the life tenant died and estate duty became leviable on the settled property. Under s. 14 (1) of the Finance Act, 1894, a proper rateable part of the estate duty might be recovered by the person who had paid the duty from the person "entitled to any sum charged on such property . . . under a disposition not containing any express provision to the contrary". On the questions whether the proper rateable part of the estate duty leviable on the death of the life tenant was recoverable from the jointress, and, if not, whether the jointure was valid,

G

H

I

Held: (i) the direction in the settlement of 1923 that the rent charge was to be paid "without any deduction (except for succession duty if any)" was an "express provision to the contrary" within s. 14 (1) of the Finance Act, 1894, and the settlement was a disposition under which the jointure was charged within s. 14 (1), notwithstanding that the jointure was created by the joint effect of the testator's will and of the exercise of the power of appointment by the settlement; consequently s. 14 (1) was excluded and jointress was not liable to bear any part of the estate duty (see p. 690, letters E and H, and p. 691, letter A, post).

Re Fitzhardinge ((1899), 80 L.T. 376) applied. A

Re Smith-Bosanquet ([1940] 3 All E.R. 519) explained and approved; *Re Keele Estates* (No. 2) ([1952] 2 All E.R. 164) explained and distinguished.

(ii) the disposition, so operating, was within the power of jointuring conferred by the testator's will (see p. 690, letter F, post).

Appeal dismissed.

[As to apportionment of duty, see 15 HALSBURY'S LAWS (3rd Edn.) 136-138, paras. 281-283; and for cases on the subject, see 21 DIGEST 38-40, 244-254.] B

Cases referred to:

Fitzhardinge (Lord), *Re, Fitzhardinge* (Lord) v. *Jenkinson*, (1899), 80 L.T. 376; 21 Digest 41, 262.

Keele Estates (No. 2), *Re, Aveling* v. *Sneyd*, [1952] 2 All E.R. 164; [1952] Ch. 603; 3rd Digest Supp. C

Parker-Jervis, Re, Salt v. *Locker*, [1898] 2 Ch. 643; 67 L.J.Ch. 682; 79 L.T. 403; 21 Digest 41, 261.

Sebright, Re, Public Trustee v. *Sebright*, [1944] 2 All E.R. 547; [1944] Ch. 287; 113 L.J.Ch. 260; 171 L.T. 82; 2nd Digest Supp.

Smith-Bosanquet, Re, Smith v. *Smith-Bosanquet*, [1940] 3 All E.R. 519; [1940] Ch. 954; 109 L.J.Ch. 440; 164 L.T. 267; 2nd Digest Supp. D

Appeal.

This was an appeal by the third and fourth defendants from part of an order of VAISEY, J., dated Jan. 16, 1959. The plaintiffs, the trustees of the wills of the second, third and sixth Earls of Lonsdale by their originating summons dated Aug. 1, 1958, asked for the determination, among others, of the following questions: (i) whether an amount equal to the proper rateable part of the estate duty payable on the death of the sixth Earl of Lonsdale on (a) the property subject to the trust of the will of the second Earl on which the yearly rent charge of £1,000 appointed to the defendant Sybil Beatrix Countess of Lonsdale by an indenture dated Oct. 6, 1923 (herein called "the settlement of 1923"), was charged and (b) the property subject to the trust of the will of the third Earl on which the yearly rent charge of £3,000 appointed to the said defendant was charged was recoverable by the trustees of the wills respectively from the said defendant; (ii) if in either case the answer to question (i) was that such amount was not recoverable, whether the appointment in such case was (a) excessive and wholly or partially void or (b) wholly valid. VAISEY, J., held that no part of the death duty was recoverable and that the appointments were valid. The first defendant was a portioner under the joint effect of the will of the third Earl of Lonsdale and of the settlement of 1923; the second defendant was the jointress, the Dowager Countess of Lonsdale; and the third and fourth defendants (hereinafter referred to as "the inheritors") were respectively entitled to rents, profits and income on which the jointures were charged and to an interest in tail male on the property on which the portion was charged. E

John Pennycuik, Q.C., and *R. Cozens-Hardy Horne* for the third and fourth defendants, who were respectively interested in the income and capital of the settled estates. F

J. L. Arnold, Q.C., for the plaintiffs, the trustees. G

Peter Foster, Q.C., and *M. J. Fox* for the first and second defendants who were entitled to a portion and jointure rent charges respectively. H

Cur. adv. vult.

Oct. 21. The following judgments were read.

LORD EVERSHERD, M.R.: The question before the court in this case may be stated thus: Where a life tenant has power under a settlement to appoint a jointure of £X in favour of a surviving wife, can he validly so appoint free of duty, with the result that the jointress takes the appointed sum without any liability for having deducted therefrom anything in respect of the interest on I

A so much of the estate duty exigible at the appointor's death as is properly attributable to the jointure? The principle that in the case of settled property death duty is chargeable rateably on all interests in the settled fund, whether of a capital or income nature, is enshrined in the terms of the Finance Act, 1894; but that principle is subject to a qualification to be found in the last words of s. 14 (1) of that Act. The subsection reads as follows:

B "In the case of property which does not pass to the executor as such, an amount equal to the proper rateable part of the estate duty may be recovered by the person, who being authorised or required to pay the estate duty in respect of any property has paid such duty, from the person entitled to any sum charged on such property (whether as capital or as an annuity or otherwise,) under a disposition not containing any express provision to the contrary."

C In my judgment, the real question in this appeal in the end of all will, as I hope to show, be found to be whether the terms of the appointment here in question were an invocation of the dispensation contained in the last words of the subsection which I have read.

D The relevant facts relating to the Lowther estates are elaborate, but for the purposes of this appeal it is, I think, not necessary to go at great length into those facts; and I turn at once to the deed of appointment whereby Lancelot Edward, the sixth Earl of Lonsdale, on the occasion of his second marriage exercised certain powers which he had under the wills of the second and third Earls. The deed which I have mentioned, a settlement on the second marriage, is dated Oct. 6, 1923. The sixth Earl has since died in 1953, and the jointress E is the Dowager Countess of Lonsdale, who, as Sybil Beatrix Feetham, was a party to the settlement of 1923.

The relevant clauses of the deed are as follows:

F "1. In pursuance of the said agreement and in consideration of the said intended marriage the said Lancelot Edward Lowther in exercise of the power for this purpose conferred on him by the said will of the said William Earl of Lonsdale [the second Earl of Lonsdale] and of every other power enabling him and as settlor hereby irrevocably appoints to the said Sybil Beatrix Feetham in case the said marriage should be solemnized and she should survive the said Lancelot Edward Lowther during the residue of her life G the yearly rent charge of £1,000 by way of jointure to be charged upon all the manors hereditaments and premises now subject to the subsisting limitations of the said will of the said Earl of Lonsdale and to commence from the death of the said Lancelot Edward Lowther and to be considered as accruing from day to day but to be paid without any deduction (except for succession duty if any) by equal quarterly payments the first payment H thereof to be made [as there provided]."

I Clause 2 similarly invoked the power of jointuring contained in the will of the third Earl of Lonsdale. Its relevant language is the same, and it will therefore suffice if I say that by that clause Lancelot Edward Lowther appointed a yearly rent charge of £1,000 to be increased to £3,000 if (as happened) Lancelot Edward Lowther succeeded to the Earldom of Lonsdale. Again, we find the essential formula for our purposes

"to be considered as accruing from day to day but to be paid without any deduction (except for succession duty if any)."

The result, therefore, is, so far, that by the settlement of 1923 the late sixth Earl of Lonsdale appointed a jointure of £1,000 free of duty by virtue of the power under the second Earl's will and a jointure, in the events that happened, of £3,000 in favour of his widow free of duty under the powers contained in the will of the third Earl.

It will be right for me to refer to the exact words of the relevant terms of the wills of the second and third Earls. The second Earl made his will in 1871, which is one of the documents cited in the heading of the proceedings, and he died in 1872, in fact unmarried. The relevant language in the will was this. He gave power to a life tenant of the estate by any deed or deeds or by will or codicil

“to appoint to any woman whom he may marry or have married for her life or for any less period a yearly rent charge or rent charges by way of jointure and in bar or without being in bar of dower and free bench not exceeding in the whole for any one such woman the yearly sum of £1,500 to be charged upon all or any of the said manors and hereditaments hereinbefore devised in strict settlement as aforesaid and to be paid at such time and in such manner as to the person for the time being exercising this present power shall seem meet.”

The third Earl made his will in 1876, the year in which he died; and he gave a similar power, in almost identical terms:

“by any deed or deeds with or without power of revocation and new appointment or by will or codicil to appoint to any woman whom he may marry or have married for her life or for any less period a yearly rent charge or rent charges by way of jointure and in bar or without being in bar of dower any one such woman the yearly sum of £5,000 to be charged upon all or any of the said manors and hereditaments hereinbefore devised in strict settlement as aforesaid and to be paid at such times and in such manner as to the person for the time being exercising this present power shall seem meet and to appoint to such woman usual powers and remedies for rent charge and rent charges by distress and entry upon and detention of the possession and perception of the rents and profits of the premises charged therewith and also to appoint the premises so to be charged to any person or persons for any term of years with or without impeachment of waste upon such trusts for better securing the payment of the same rent charge or rent charges respectively as to the person for the time being exercising this present power shall seem meet.”

It will be observed that the sum named in the settlement of 1923 was £1,000 in the case of the power under the will of the second Earl, a figure (as such) less than the figure of £1,500 stated in that Earl's will. Similarly the figure of the jointure mentioned in exercise of the power under the third Earl's will was £3,000 under the 1923 deed, less by £2,000 than the figure of £5,000 mentioned in the third Earl's will. The significance of that fact is only, for present purposes, this. It has been conceded by counsel for the inheritors [i.e., the appellants, the third and fourth defendants to the originating summons], that, if the provision that the jointures should be free of duty is excessive, as he contends, it is so only to the extent that the total benefit received by the jointress is excessive. If I may illustrate it by reference to the second Earl's will, counsel for the inheritors concedes that the power is valid by exercise to the extent that the sum named, £1,000 plus the freedom from liability to pay interest on duty, does not exceed £1,500. The exact arithmetical result was a matter of some debate, but I need not go into it.

It was suggested during the course of the argument that counsel's concession was or might be to some extent inconsistent with or even destructive of certain of his arguments; and I should add that before the judge below a problem had arisen, not dissimilar in general kind from that now before the court, relating to portions. The portions appointed were as regards the sums named so much below the actual maxima named in the wills as to give, so to speak, plenty of leeroom as regards the one that was given free of duty; so that counsel's

A admission there, if given its full effect, did not, on any view, make the appointment excessive. I for myself do not think that any concession made by counsel for the inheritors in any way adversely affected his argument or that those concessions need be further discussed, because they do not seem to me to contribute to the conclusion of the matter; and I therefore say no more about them. I repeat that the question, put quite shortly, is, as stated by reference to the first appointment, whether, having regard to the terms of the second Earl's will, which said nothing about freedom of any duty (as was, indeed, not surprising, since the will was dated twenty-three years before the Finance Act, 1894) it was competent for the Earl to make the appointment in the terms which he did so as to give the jointress £1,000 clear and to relieve her, at the expense of the inheritance, of any obligation to pay or provide any sum for interest on a proportionate amount of the estate duty, exigible on the appointor's death. We have been informed that the estate duty in this case was at the rate of fifty per cent., so that the benefit which the jointress receives if her claim is correct and the corresponding detriment to the inheritance is, as a matter of figures, likely to be appreciable.

D Much importance during the course of the argument has turned on the effect of the decision in this court in *Re Keele Estates* (No. 2), *Aveling v. Sneyd* (1). Though counsel for the jointress has said that the present case is wholly outside anything decided in *Re Keele Estates* (1), the argument of counsel for the inheritors was largely based on that case, and, more particularly, on the inferences which he says should be drawn from the decision. I, therefore, turn at once to that case, which I must recite a little fully. There was another question involved before ROXBURGH, J., and this court, viz., whether persons entitled to portions or jointures had to bear any share of the estate duty which was exigible, not on the death which immediately preceded the case, but on an earlier life tenant's death. That question had been answered in the negative by ROXBURGH, J. (2), whose view on it was affirmed by this court, and that question is irrelevant for present purposes. I therefore will read only so much of the headnote as relates to the point which does bear on this case. It concerned an appointment by one Major Henry Sneyd, a life tenant of the estates under the devises of Walter Sneyd who had died in 1888. Walter had created a certain term in trustees; and the headnote, so far as relevant, proceeds now thus (3):

G "Subject to that term [created by Walter] Walter devised the settled estates to the use of Major Henry Sneyd for life, with remainder to the appellant, Major Henry Sneyd's sons in tail. He empowered a tenant for life of the settled estates, either before or after he became entitled in possession, to charge the same 'with the payment of any sum or sums not exceeding in the different events hereinafter specified the different sums hereinafter mentioned as and for the portions of his or her child or children—that is to say . . . in the case of four or more children the sum of £25,000' . . . Major Henry Sneyd by deed poll, executed in 1931, appointed that the settled estates should be held upon trust that after his death the trustees should 'raise the sum of £15,000 clear of all death duties (or such less sum as shall be the maximum principal sum chargeable by the appointor under the power now being exercised) with interest thereon at the rate of four per cent. in trust for each of the daughters as shall be objects of the power . . .'"

I The headnote then deals with the first question (i.e., of the death duty payable on an earlier death, the death of Colonel Sneyd) and it continues:

"A second question raised was whether, on the death of Major Henry Sneyd, the sum appointed by the deed of 1931 for portions ought to be charged

(1) [1952] 2 All E.R. 164; [1952] Ch. 603.

(3) [1952] Ch. 603.

(2) [1952] 1 All E.R. 44.

with a rateable part of the estate duty payable on his death, and, if the portions were so chargeable, whether the gross aggregate amount was £15,000 or £25,000 or some other and what sum. ROXBURGH, J., held that the gross aggregate sum which could be raised was £25,000 and the portions must bear their own duty to the extent that the sum raised must not exceed that sum."

There was an appeal on that point by the daughters, the portioners, and, as on the other question, this court affirmed the view of ROXBURGH, J., holding

"That on the true construction of the appointment of 1931, the first appointment of £15,000 clear of all death duties was an excessive appointment, and the sum raisable thereunder was the sum of £25,000 subject to its proportion of estate duty."

This part of the case is dealt with in a second judgment (4). I need not read the report of the argument, because in the leading judgment, which I delivered, I referred to what counsel said on behalf of the portioners. I say (4):

"It has been argued that the power in Walter's will fairly can be and should be construed as permitting the appointor to charge a sum exceeding £25,000 by whatever is the necessary sum to produce the result that, when the sum charged has made whatever contribution towards estate duty it ought to make, there will be a figure left of £25,000 (net) for the enjoyment of the portioners. I agree with ROXBURGH, J., that such a result cannot be fairly attributed to the sense of the language used, and I agree with him also that some support for that view is to be derived from the formula: 'to charge the estates with payments of sums as and for portions'."

Then, omitting one paragraph, I proceed to deal with the language of the document of appointment, the deed of 1931. I say (5):

"I think that the proper approach in these cases must always be to look first at the document and to see what it means . . . The relevant words are found in cl. 4 of the deed, and are: 'The trustees shall [at the date specified] raise the sum of £15,000 clear of death duties (or such less sum as shall be the maximum principal sum chargeable by the appointor under the power now being exercised) . . .' As a matter of plain terms, it seems to me that this appointor is saying: 'I desire to charge the settled estates with either (i) a figure of £15,000 clear of death duties (meaning thereby a figure of such magnitude that there will remain £15,000 clear when all charges or contributions in respect of death duties are provided for) or (ii) if that is greater than the amount which the will of Walter tells me that I can charge, then the maximum sum that the will authorises.'"

"I am unable to accept counsel's proposition that this deed of appointment can be regarded as being a disposition containing an express provision to the contrary within the meaning of s. 14 (1) [of the Finance Act, 1894], so as to take the case altogether out of that subsection and relieve the sums charged for portions of any liability to contribute and so also as to enable him to say that all that was charged was £15,000."

In the course of the argument a good deal of reliance had been placed on a decision of BENNETT, J., in 1940, in *Re Smith-Bosanquet, Smith v. Smith-Bosanquet* (6). As I shall have to deal somewhat fully with that decision hereafter, I will not now read the passage in my judgment in *Re Keele Estates* (7) which deals with *Re Smith-Bosanquet* (6). Suffice it at the moment to say that I expressed the view, though it was obiter, that the *Re Smith-Bosanquet* (6) decision was based on the

(4) [1952] 2 All E.R. at p. 173; [1952] Ch. at p. 622.

(5) [1952] 2 All E.R. at p. 173; [1952] Ch. at p. 623.

(6) [1940] 3 All E.R. 519; [1940] Ch. 954.

(7) [1952] 2 All E.R. 164; [1952] Ch. 603.

A ground that, according to the terms there used, it was or amounted to the appointment of a jointure out of a figure called the net residuary estate which would have (supposedly) paid all the duty. On that view, I expressed no dissent from the validity of the *Re Smith-Bosanquet* (8) decision. Indeed, it may be said that I went further and said that on that ground the decision was justified. Further discussion, as will appear, has led me on this occasion to

B feel at any rate a doubt whether what I said in *Re Keele Estates* (9) was a sufficient or proper analysis of BENNETT, J.'s decision in *Re Smith-Bosanquet* (8), but, as I have said, I shall have to come back to that at a later stage.

In my judgment the decision in *Re Keele Estates* (9) is based on two conclusions, viz., (i) that on the construction of the deed of appointment in that case, i.e., the deed of 1931, the appointor, by the words he there used, appointed

C or purported to appoint in favour of the portioners a gross amount equivalent to the sum which, after the deduction of the amount of estate duty properly attributable to and repayable by the portioners, left a net sum of £15,000, and, in the alternative, a less sum; and that if and so far as the first or gross sum exceeded £25,000 it was not effective; and (ii) that the appointor by the deed of 1931 and the language which he used in it did not purport to invoke the

D dispensing provision in the last two lines of s. 14 (1) of the Finance Act, 1894.

The argument of counsel for the inheritors, however, goes considerably further. He says that the decision of this court in *Re Keele Estates* (9) necessarily involves this further proposition, viz., that all appointments of portions "free of duty" or "clear of duty" or any similar formula must now be taken to be or to amount

E to appointments of gross sums so calculated that, after the appropriate amount of duty has been paid, the named net figure remains; that such appointments do not invoke the dispensing provisions of s. 14 (1) of the Act of 1894; and that they are invalid in so far as the calculated gross figure exceeds the sum stated in the deed conferring the power. Any other view, says counsel, would involve, in the case of portioners, unjustifiably fine distinctions. Counsel further contended that as a matter of logic, of good sense and of principle the same rule of

F construction should apply to an appointment of a jointure, i.e., that the appointment of the jointure of £X free or clear of duty means the appointment of a gross annual sum so calculated as to leave £X per annum net after deduction from the gross sum notionally appointed of the appropriate interest charge for duty, and that such an appointment is not, and must not be taken to be, an invocation of the dispensing power under s. 14 (1) of the Finance Act, 1894.

G Counsel finally added that this court only expressed approval of *Re Smith-Bosanquet* (8) on grounds which I have briefly indicated and which do not conflict with the above propositions, and that we should in any case now hold the decision of *Re Smith-Bosanquet* (8) to have been erroneous.

The decision in *Re Keele Estates* (9) has been subjected to much analysis in the argument; but I conclude that the decision did involve only the two

H propositions which I have stated above, viz., first, that, as a matter of construction of the relevant deed of appointment, the appointor purported to appoint in favour of the portioners a gross sum equivalent to that amount which, after deduction of estate duty, left the figure named, and, second, that the terms of that appointment did not purport to invoke the last words of s. 14 (1) of the Act of 1894. I also conclude that, even if counsel for the inheritors is right

I in his argument so far as appointments of portions are concerned (as to which I express no opinion) the inference which he draws as regards appointments of jointures does not follow and is not inherent in the decision.

This last conclusion is, I think, supported by two considerations. First, if arithmetically the appointment of a capital sum of £X by way of portions free of duty should or can be taken as meaning an appointment of such a sum as

(8) [1940] 3 All E.R. 519; [1940] Ch. 954.

(9) [1952] 2 All E.R. 164; [1952] Ch. 603.

leaves £X after payment of the appropriate capital amount of duty, a similar calculation should not, and perhaps cannot, properly be made as regards a jointure. In the case of portions one is, after all, making a calculation of a capital sum once and for all; but the decision in *Re Parker-Jervis, Salt v. Locker* (10), which has always been accepted and followed, shows that this method of calculation is inapplicable, or is at least not readily or necessarily appropriate, to a jointure; for, if the proportion of the duty expressed as a capital sum attributable to the jointure is arrived at by a process of capitalisation on the basis of the then average of the income of the estate as a whole, the amount of the interest charge actually made against the jointress depends on, or may depend on, different considerations, viz., the actual interest payable in respect of the duty; and that may vary. For example, until the actual payment of the duty, it would be the rate of interest payable to the Estate Duty Office and thereafter, if the duty is raised by mortgage, it will presumably be the rate of the mortgage interest. (See the examples given in HANSON'S DEATH DUTIES (10th Edn.), p. 492, and GREEN'S DEATH DUTIES (4th Edn.), p. 485.) Other variations may occur, to which I need not refer, but I should state that in the present case, though many assumed figures were mentioned during the course of the argument, there is no evidence, as I understand it, before the court of any of the relevant figures, either those of the average rate of income of the estate as a whole at any particular period or of the rate of interest payable in respect of the estate duty on any charge which may have been incurred in respect thereof.

The second ground which, I think, supports my earlier conclusion that the reasoning of the decision in *Re Keele Estates* (11) in any case does not carry with it a similar proposition with regard to jointures rests on *Re Smith-Bosanquet* (12). I have stated the grounds on which, as it then appeared to this court, we said in *Re Keele Estates* (11) that the decision could be justified; but I am far from clear on further reflection whether the ground there stated was the correct or at any rate the only ground on which BENNETT, J., based himself. It was a case, like the present, of an appointment of a jointure free of duty, and, as I read the case after the assistance that we have had in the present argument, I think now that it is impossible to escape the conclusion that part at any rate of BENNETT, J.'s decision (to put it no higher) was based on the view that the appointor had invoked, and effectively invoked, the dispensing power under s. 14 (1). Again, in view of the importance paid in the argument to *Re Smith-Bosanquet* (12), I think that I must refer to it at a little length now. I am bound to say at once that the matter is not made easier (though I am not saying this by way of criticism of the law reporter) by the report (13) and particularly the report of the argument. I start by reading the headnote:

"Under a settlement of real and personal estate made by will in 1905, there was a power given to the tenant for life to appoint for the benefit of his widow any part of the income of the residuary trust estate not exceeding £2,000 a year for the rest of her life. The tenant for life by his will made in 1934, appointed in exercise of this power to his wife who survived him, an annuity of £2,000 free of all deductions except income tax and surtax, to be charged on and payable out of the income of the residuary personal estate of the settlor. On the death of the tenant for life in 1939 estate duty upon the residuary estate became payable at the rate of thirty-two per cent."

I pause to observe that the appointor was making an appointment under a power in regard to estates settled in 1905, thirty years earlier, and it was therefore ex facie a case to which s. 14 obviously applied. The author of the headnote concludes that note as follows:

(10) [1898] 2 Ch. 643.

(11) [1952] 2 All E.R. 164; [1952] Ch. 603.

(12) [1940] 3 All E.R. 519; [1940] Ch. 954.

(13) [1940] Ch. 954.

- A "Held, that the appointment was within the terms of the power, and that the widow was entitled to an annuity of £2,000 clear, without any liability under s. 14 (1) of the Finance Act, 1894, to contribute to the estate duty payable on the death of her husband, the direction that it should be paid 'free of all deductions' being an express provision to the contrary within that subsection."
- B It is quite plain that, if that headnote correctly summarises the judgment, then BENNETT, J., based himself, and according to the headnote based himself exclusively, on the view that the dispensing power under s. 14 had been intentionally and successfully invoked. I need not read the facts, because they are sufficiently stated in the headnote. The argument by learned counsel for the widow is stated to be as follows (14):
- C "The power to pay the annuity out of the income of the residuary estate, means out of such income after the estate duty has been paid . . . The annuity is not a jointure, but an apportioned part of a much larger total income. The income of the residuary estate can only be ascertained after the estate duty payable on the death has been paid. The annual sum of £2,000 means the net sum of £2,000, after deduction of income tax and surtax thereon, but free of all other deductions. The appointment was within the terms of the power."
- D

Then, in parenthesis, there are these six words: "Counsel were stopped by the court". It is to be observed that that argument, on the face of it, goes entirely on the view that the appointment was the appointment of the net sum payable out of a total net residuary income and there is no reference to s. 14 from first to last in it. I have already stated that the difficulty in apprehending that line of reasoning is that this was an appointment of settled properties settled under a will thirty years earlier than the making of the appointment. There then follows the record of the argument of counsel for the infant tenant in tail (14):

- E "The appointment is an excessive execution of the power. The widow will get under it not £2,000 only, clear of all deduction, but £2,000 plus her share of the estate duty which she would otherwise have had to pay. It is equivalent to an annuity of £2,620."
- F

- I am bound to say that that last figure has defeated me. I can see that as a matter of arithmetic £640 would be thirty-two per cent. of £2,000, so that if the figure had been £2,640 it would have been more easily intelligible; but on any view that is the wrong way round to calculate it, I should have thought. But that is merely by the way. The report of the argument continues (14):
- G

- "The words 'without any deduction' amount to an additional grant, not justified by the power. Unless the power authorises the appointment of an annuity free of all deductions, which it does not in the present case, the appointment is not within the terms of the power . . . The case comes within the rule laid down in *Re Parker-Jervis* (15). The widow should be treated as tenant for life of the capitalised value of her annuity, and pay during her life interest on the estate duty to which that value is liable."
- H

- I need not read the last paragraph. Observe again that there is no reference whatever (16), in terms at any rate, to s. 14. BENNETT, J., begins his judgment by a recital of the facts, and he sets out in full s. 14 (1) of the Finance Act, 1894, which, so far as I am aware, is the first time in the report that that Act is referred to or mentioned at all. The learned judge goes on (17):
- I

(14) [1940] Ch. at p. 956.

(15) [1898] 2 Ch. 643.

(16) That is, in the report [1940] Ch. 954; cf., however, the report in [1940] 3 All E.R. at p. 520, letter F. The reports in 109 L.J.Ch. 440 and 164 L.T. 267 do not report the argument.

(17) [1940] 3 All E.R. at p. 521; [1940] Ch. at p. 959.

"The case of the infant defendant [the tenant in tail] is put in this way. The appointment made in favour of the widow is an appointment of the yearly sum of £2,000 free of all deductions except income tax and surtax. The words 'free of all deductions' amount to an express provision to the contrary within the meaning of the Finance Act, 1894, s. 14 (1), and exonerate the appointee from the liability for estate duty or the rateable proportion of the estate duty which would be recoverable from her under the provisions of s. 14 (1) if the words had not been in the appointment."

I observe that the learned judge is there saying that the infant defendant's argument appears to concede that it is an invocation of s. 14 but that, because it thereby increases the total amount of the benefits, it is excessive. I have pointed out that, if that was the argument for the infant defendant, it is not so reported. However, BENNETT, J., proceeds (18):

"The argument is that . . . because the appointor's widow is exonerated from estate duty, therefore the appointor, the donee of the power, has made an exercise of the power which is in excess of the authority which its terms conferred upon him. The argument is that, unless in the power there are words expressly enabling the donee of it to make an appointment free of all deductions, an appointment so made is not warranted by the terms of the power. I do not accept the argument. It seems to me that, so long as the appointment made in exercise of the power does not charge the income of the residuary trust fund with a greater annual sum than £2,000, the appointment is within the terms of the power, and the appointment which the donee of the power has made does not have the effect of charging the annual income of the residuary trust fund with a greater sum annually than £2,000. The widow gets no more than £2,000 out of the income of the residuary trust fund. It is true that she is absolved from the liability, which otherwise might be imposed upon her, of having to pay a proper rateable part of the estate duty leviable when her husband died upon the residuary trust fund under the testator's will, but, in my judgment, that does not exceed the authority which is conferred upon the donee of the power by the terms of the testator's will. I think, therefore, that the answer to the question raised is that the widow is entitled . . . to a clear annuity of £2,000 . . . without any liability to contribute towards estate duty payable on the death of George Richard Bosanquet Smith-Bosanquet [the appointor or the lady's husband]."

I quite agree that there is language in the last paragraph which seems to some extent to reflect the reported argument put forward on behalf of the widow. But, reading the last paragraph with that which preceded, which in turn follows the citation of s. 14 (1), I cannot now, I must say, resist the conclusion that the learned judge accepted (what may indeed have been conceded) that the words in the appointment did in terms constitute, if they were effective to do so, an invocation of the dispensing power of s. 14 (1); and that, of course, is clearly reflected in the last two or three lines of the headnote.

I ought now to go back to see what was said about that case in *Re Keele Estates* (19). My judgment dealing with that case first (20) consists of a recital, including a reference to the argument of counsel for the widow. I then pass on to consider a later case, *Re Sebright, Public Trustee v. Sebright* (21), which came before VAISEY, J., who in fact had been counsel for the widow in *Re Smith-Bosanquet* (22). I do not propose to take up time by referring to *Re Sebright* (21). The learned judge, VAISEY, J., had felt some difficulty about it, but in the course

(18) [1940] 3 All E.R. at p. 522; [1940] Ch. at p. 959.

(19) [1952] 2 All E.R. 164; [1952] Ch. 603.

(20) [1952] 2 All E.R. at p. 174; [1952] Ch. at p. 624.

(21) [1944] 2 All E.R. 547; [1944] Ch. 287.

(22) [1940] 3 All E.R. 519; [1940] Ch. 954.

A of *Re Sebright* (23) Sir Norman Touche is reported (24) as having put the matter thus as regards the earlier decision in *Re Smith-Bosanquet* (25):

"... the annuity was payable out of the income of a residuary trust fund the amount of which was only arrived at after payment of estate duty."

B That, as I observed in my judgment, reflected Mr. Vaisey's argument in *Re Smith-Bosanquet* (25). The citation from Sir Norman Touche's argument proceeds (26):

"That does not apply here. The judgment in that case does not make it clear on what ground it was decided, but if it is indistinguishable from the present case, it was not correctly decided."

C I say in my judgment (27):

"We are here concerned with a charge on the corpus and with the language of the two instruments [the enabling will and the deed of appointment]. I do not think that the decisions in *Re Sebright* (23) or in *Re Smith-Bosanquet* (25) are of such a character as to be indistinguishable in any event from the present case, and I, therefore, feel at liberty to decide the present case, as did ROXBURGH, J., without regard to the decisions in those cases. But, if I comprehend the cases aright, I think Sir Norman Touche in his argument in *Re Sebright* (23) correctly justified the decision in *Re Smith-Bosanquet* (25) on the ground that the sum appointed was payable out of the income of a residuary trust fund, which would be arrived at after all relevant deductions for death duties... I need not say more about those two cases, for I think that they do not cover a case such as the present, where in plain terms (as I think) authority was given to charge the settled estates with a capital sum of a limited amount and where the necessary effect of the language of the appointment or the first alternative in the deed of appointment would inevitably be to charge the settled estates with a larger figure than that figure."

F I ought to add that ROMER, L.J., expressed agreement with my judgment and said (28):

"... in particular, I should like to associate myself with the observations which [the Master of the Rolls] has made with regard to *Re Smith-Bosanquet* (25) and *Re Sebright* (23)."

G I apprehend that what was said about *Re Smith-Bosanquet* (25) is obiter, because I had already stated, and ROMER, L.J., agreed with me, that in any case *Re Keele Estates* (29) turned on the construction of the language used and was not in pari materia with *Re Smith-Bosanquet* (25). But, on further reflection, as I have already said, and after attending to the argument in this case, I am unable now to say that at any rate one ground, part of the basis of BENNETT, J.'s decision, was not this, that he thought that the appointment free of duty of the jointure was an invocation of s. 14 (1) of the Finance Act, 1894, and as such was effective.

I The result, therefore, is that I conclude that *Re Keele Estates* (29) does not carry counsel for the inheritors home, because the inferences, and particularly the last of them, which he sought to draw from that decision do not follow. It, therefore, comes to this: that the question in the present case is open before this court, and is, I think, twofold, viz., first, are the words of appointment in the settlement of 1923 apt as an invocation of the dispensing provision of s. 14 (1) of the Finance Act, 1894; and, second, if so, was such a dispensation

(23) [1944] 2 All E.R. 547; [1944] Ch. 287.

(24) [1944] Ch. at p. 291.

(25) [1940] 3 All E.R. 519; [1940] Ch. 954.

(26) [1944] Ch. at p. 292.

(27) [1952] 2 All E.R. at p. 175; [1952] Ch. at p. 625.

(28) [1952] 2 All E.R. at p. 175; [1952] Ch. at p. 626.

(29) [1952] 2 All E.R. 164; [1952] Ch. 603.

within the powers of the appointor, having regard to the terms which I have already read in the wills of the second and third Earls of Lonsdale ? A

As regards the first point I think that the answer must plainly be in the affirmative, and I refer in support of that view to the decision in this court of *Re Lord Fitzhardinge, Lord Fitzhardinge v. Jenkinson* (30). In that case the question arose not with regard to an exercise of the power of appointment, but as regards the document conferring the power. That document, so far as B relevant, is sufficiently cited in the headnote (30):

"A testator, who died in October, 1857, by his will, dated in September, 1856, empowered any tenant for life to charge on the estates thereby settled a jointure, not exceeding £3,000 a year, for his widow 'free from all taxes and deductions except property tax and legacy or succession duty.'" C

It will suffice if I read a passage from the judgment of SIR NATHANIEL LINDLEY, M.R., where he says (31):

"That disposes of the case, subject to one remark that has to be made on s. 14 of the Finance Act, 1894. [Counsel for the appellants] has argued that the expression 'free from all taxes and deductions except property tax or legacy or succession duty' is not an express provision contrary to the enactment of s. 14. In terms as a matter of criticism it perhaps is not, but if you look at the substance of it, it is as plain as a provision to the contrary can be. It is only by minute criticism of the words that [counsel for the appellants] can say that this does not expressly provide for deductions to be made under s. 14." D

It seems to me to follow that if in an appointment of a jointure the added formula "free of duty" is used then equally the appointor must be taken to be referring to the last words of s. 14 (1) of the Act of 1894. E

There remains the second question, however: Was such a dispensation within the powers of the appointor, having regard to the terms of the wills of the second and third Earls, which I have read? I have thought this to be a more difficult question, since I feel that the result may, under modern conditions, work somewhat hardly or unfairly against the inheritor, and I also confess to some doubt what, in terms of conveyancing, a deed giving power to appoint a jointure should say if it is or is not intended to confer a dispensing power under the section. But, on the whole, I think that this question also should be answered in the affirmative. If there be unfairness, I think that must be properly attributable to the chances of the passage of time, and settlers today will no doubt fix the amount of any jointure which they give a tenant for life power to appoint in the light of the present-day rates of taxation or use such words as may be appropriate to limit the dispensing power of the appointor. F

I think, therefore, as a matter of English, that what the appointor has said here is within the terms of s. 14 (1), on the ordinary meaning of its language. I think, in other words, that the instrument of appointment, the settlement of 1923, should constitute, and does constitute, a "disposition" within the language of the subsection. I read again the relevant terms of the section: G

"In the case of property which does not pass to the executor as such, an amount equal to the proper rateable part of the estate duty may be recovered by the person, who . . . has paid such duty, from the person entitled to any sum charged on such property (whether as capital or as an annuity or otherwise,) under a disposition not containing any express provision to the contrary." I

As a matter of strict law it is no doubt true to say that the jointress in this case has the charge for her jointure by the joint effect of the wills of the second and third Earls and the exercise by the sixth Earl of the powers of appointment

- A conferred on him by the second and third Earls; but that does seem to me to exclude the proposition that the jointure is, as a matter of the fair use of words, charged "under a disposition" (viz., under the appointment) which does contain a provision to the contrary. For, if for some purpose the deed of appointment must be read with, or as one with, the wills conferring the power, still it was the appointment which specified and created the charge.
- B Parliament in 1894 must surely have known when enacting this section that there would be many outstanding settlements which could not sensibly have conferred such a dispensing power on the person having the right to appoint a jointure. Finally, I think that we ought not in this court in 1959 to overrule *Re Smith-Bosanquet* (32), which has, after all, stood for nineteen years. During that period it is likely to have been followed in practice, and although it may be
- C said that the grounds attributed to BENNETT, J., were not there correctly or not completely stated in this court, the decision was approved, albeit obiter, in *Re Keele Estates* (33). I therefore think that if *Re Smith-Bosanquet* (32) is now to be said to be wrong that should be a matter to be dealt with on an appropriate occasion by the House of Lords, which will also, no doubt, consider this case and *Re Keele Estates* (33) and do any necessary reconciliation. For
- D reasons which I have tried to state, I think that VAISEY, J., correctly decided the present point, and I would therefore dismiss the appeal.

SELLERS, L.J.: The estate duty which the Finance Act, 1894, first imposed obviously had to fall for final payment or allocation on some part of the estate on which it was levied. Whatever might be thought to be fair now when

E taxation is heavy (and the argument that the burden of the tax should be borne rateably without qualification is not all one way) s. 14 (1) of the Act of 1894, while making provision for the proper rateable part of the estate duty to be recovered in the appropriate circumstances, decreed that it could be recovered

"from the person entitled to any sum charged on such property (whether as capital or as an annuity or otherwise,) under a disposition not containing

F any express provision to the contrary."

This seems to give a right to the person making the disposition to provide that the capital or annuity of which he is making a disposition should not bear the burden of the tax. His right with regard to the incidence of the tax is, therefore, given and recognised by statute and is independent of any prior deed or authority

G which gave the power to charge any property, at least where the deed placed no express restrictions to the contrary. I agree with the learned judge that the appointments in this case were so worded as to free the payments from any deduction for estate duty, or, more accurately, so as to free a person entitled to any sum charged from any liability to contribute a rateable part of the estate duty. The disposition would appear to be the final disposition making the

H charge. In this case the dispositions were not in excess of the powers granted and in my opinion they should stand unaffected by the estate duty or any part thereof. I agree with the conclusion of BENNETT, J., in *Re Smith-Bosanquet* (32), summarised, I think accurately, in the headnote to that case.

Reliance was placed by the appellant on *Re Keele Estates* (33) which in terms distinguished *Re Smith-Bosanquet* (32), and therefore, as my Lord has indicated

I more fully, does not bind this court on the issues which are now before it. I would dismiss the appeal.

HARMAN, L.J.: I agree. In my judgment the confusion, if there be confusion, into which the reporter in *Re Smith-Bosanquet* (34) fell arises from

(32) [1940] 3 All E.R. 519; [1940] Ch. 954.

(33) [1952] 2 All E.R. 164; [1952] Ch. 603.

(34) [1940] Ch. 954; cf. [1940] 3 All E.R. 519.

this, that s. 14 of the Finance Act, 1894, was quite a novel and revolutionary piece of legislation. The estate duty on property not passing to the executor as such was charged on the corpus of the estate. The revolution effected by s. 14 was to relieve the inheritance pro tanto of that burden by distributing it among the portioners and annuitants coming ahead of the inheritors. The effect of the section is to give a dispensing power to the disposer who created the charge. The disposer in this case, as in others of the sort, seems to me necessarily to be the person who exercises the power, be it a jointure or a portion, because it is he, after all, who makes the power effective. If he does not exercise the power, no charge is thrown on the inheritance. He may exercise the power up to the limit of the figure he is given. When he adds the words "free of duty" or similar words he is not exercising the power at all. It is, in my judgment, a fallacy to treat it as if he were exercising further the power. It is true that he burdens the inheritance and frees the jointress; but that is a right given to him by the statute. It is not necessary to refer to the power at all. Therefore VAISEY, J.'s observations are, in my view, right, that, provided the jointress gets no more than the donor of the power intended she should have, there is no question of an excessive exercise. Whether I should have construed the appointment in *Re Keele Estates* (35) as the Court of Appeal did, is not to the point; so construed the appointment there was clearly in excess of the power. Therefore I regard it as a decision on the construction of the very peculiar words there used and not really *ad rem* in the present case. I agree with my brethren in thinking that the contrary intention which must be expressed in the document must be contained not in the donor's words, but in the donee's words, because he is the person who is creating the charge which is the necessary pre-condition of the dispensing power. The exercise of the dispensing power does not entitle the donee to a charge at all; it merely relieves him of this extra liability created by s. 14. It is a mistake, I think, to treat the exercise of the statutory dispensing power as a further exercise of the power of appointment. I would dismiss this appeal.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Francis Miller & Steele*, agents for *Dickinson, Miller & Turnbull*, Newcastle-upon-Tyne (for the third and fourth defendants); *Crawley, Arnold, Ellis & Ellis* (for the plaintiffs); *Ellis, Peirs & Co.* (for the first and second defendants).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

A HAZELDINE AND OTHERS v. MINISTER OF HOUSING
AND LOCAL GOVERNMENT AND ANOTHER.

[COURT OF APPEAL (Hodson and Ormerod, L.J.J., and Upjohn, J.), November 2, 3, 1959.]

B *Compulsory Purchase—Police purposes—Housing for police—Whether land required for the “purpose of any of the functions of the police authority”—Police Act, 1946 (9 & 10 Geo. 6 c. 46), s. 15, s. 5 (3).*

In s. 15 of the Police Act, 1946, the authorisation to purchase compulsorily any land which is required “for the purpose of any of the functions of the police authority” enables land to be acquired compulsorily for housing police, where the housing is reasonably necessary for the provision of an efficient police service.

C Appeal dismissed.

[As to the acquisition of land for police purposes, see 30 HALSBURY’S LAWS (3rd Edn.) 62, para. 100, text and notes (e) (f).

For the Police Act, 1946, s. 5, s. 15, see 18 HALSBURY’S STATUTES (2nd Edn.) 166, 175.]

D Appeal.

The owners of certain land (Mr. Hazeldine and others) appealed against the decision of LORD PARKER, C.J., dated Oct. 30, 1958, dismissing their application (made under para. 15 of Sch. 1 to the Acquisition of Land (Authorisation Procedure) Act, 1946) and upholding the validity of an order for the compulsory acquisition of their land for houses for police officers made by the Cheshire Police Authority and confirmed by the Minister of Housing and Local Government under s. 15 of the Police Act, 1946, as amended.

E I. D. L. Glidewell for the owners.

J. R. Cumming-Bruce for the Minister and the acquiring authority.

F HODSON, L.J.: No question arises as to the procedure which was taken under the Acquisition of Land (Authorisation Procedure) Act, 1946, but the point taken by the owners is that there was no statutory power in the circumstances of this case to acquire their land. The respondents to the appeal are the Minister of Housing and Local Government, who has supported the order, and the Cheshire Police Authority, the acquiring authority.

G The land in question which was required for the housing of police officers is situated in the neighbourhood of Cheadle Hulme in Cheshire, where there is a large divisional police headquarters. At the back there is a builder’s yard and adjacent land owned by the third appellant’s mother and occupied by him as a tenant, and his wife is the owner of a cottage adjoining, and the Cheshire Police Authority were minded to take the land at the back other than the builder’s yard for houses for police officers. The compulsory purchase order was made first of all in draft form. Objections having been made to the order, a public

H hearing took place and after the inspector’s report, the Minister confirmed the order. So far as the facts are concerned, there is no appeal and it is not contended that there can be any successful appeal against the finding of fact, which was to the effect that it was reasonably necessary for the purposes of the local police authority that the land should be acquired for the provision of houses for police officers in order that the police might be housed reasonably near their work in order that they might carry out their duties efficiently.

I It is necessary to refer to the relevant statutory provisions, which are contained in the Police Act, 1946. Section 3 provides for voluntary schemes for the amalgamation of county and county borough police forces, and sub-s. (2) says:

“Subject to the provisions of this Act, an amalgamation scheme shall make provision with respect to the following matters, that is to say:—(a) the establishment of a combined force for the combined area, the transfer to that force of members of the constituent forces, and the appointment as first chief constable of the combined force of such person as may be specified in the scheme;

(b) the maintenance of the combined force by a combined police authority constituted in accordance with the provisions of the scheme, and the transfer to that authority of the police functions of the constituent authorities."

In s. 19 (1) of the Act "combined police authority" is defined as meaning "the authority responsible for the maintenance of a combined force". By s. 5 of the Act it is provided:

"(3) A combined police authority shall have the same powers as the council of a county or county borough with respect to the acquisition of land for police purposes, including the powers in that behalf conferred on such councils by this Act, and to the appropriation and disposal of such land, and the provisions of this Act and of the Local Government Act, 1933, (1), with respect to the acquisition, appropriation and disposal of land by such councils shall have effect accordingly as if references therein to the council of a county or county borough included references to a combined police authority."

"(4) For the purpose of the discharge of their functions under the scheme, the combined police authority constituted by a county scheme shall have the powers of a county council, and the combined police authority constituted by a borough scheme shall have the powers of a county borough council . . ."

Section 15 provides (2) for the compulsory purchase of land for police purposes by county and county borough councils, and says:

"The council of any county or county borough being a separate police area may be authorised by the Minister of Health (3) to purchase compulsorily any land, whether situated within or without the county or borough, which is required for the purpose of any of the functions of the police authority for the county or borough."

It is to be noted that there is no express provision in the sections which I have read, nor indeed in the Police Act, 1946, enabling a police authority compulsorily to acquire land for the purpose of housing. The argument for the owners rests on that omission, for they say, and rightly say, that in other cases as, for example, in the Fire Brigades Act, 1938, express provision was made (4) that the powers of a fire authority should include "power to provide accommodation", etc., "including housing and other accommodation for members of any such fire brigade and furniture reasonably required for such accommodation; (b) to purchase compulsorily by means of an order made by the authority and confirmed by the Minister of Health any land required for the purposes of their functions under this Act."

Looking back at the history of the legislation with regard to the police, we were referred to the County Police Act, 1840, which provided by s. 12 for the provision of station houses and strong rooms, and said:

"It shall be lawful for the justices in general or quarter session assembled of any county in which or in any part of which constables shall be appointed under the first-recited Act (5), if they think fit, to order that station houses and strong rooms, or either of them, for the temporary confinement of persons taken into custody by the constables, be provided in such places as the said justices shall think fit . . ."

That, of course, was in the early days of the police force as we now know it. Reference was also made to the Town Police Clauses Act, 1847, and to the

(1) The words "and the Acquisition of Land (Authorisation Procedure) Act, 1946" were added here by that Act.

(2) Section 15 is printed as amended by the Acquisition of Land (Authorisation Procedure) Act, 1946, s. 6 and Sch. 4.

(3) The functions were transferred to the Minister of Housing and Local Government, by the Transfer of Functions (Minister of Health and Minister of Local Government and Planning) Order, 1951 (S.I. 1951 No. 142), art. 3 and Sch. 1, Pt. 1, and the Minister was re-named by S.I. 1951 No. 1900.

(4) See the Fire Brigades Act, 1938 (1 & 2 Geo. 6 c. 72), s. 1 (6) (a) (b). The Act was repealed by the Fire Services Act, 1947 (10 & 11 Geo. 6 c. 41), s. 39 and Sch. 6.

(5) I.e., the County Police Act, 1839.

A Metropolitan Police Act, 1886. The metropolitan police, as was pointed out to us, are under the authority of the Home Secretary, but there is a receiver who has, by s. 2 of the Metropolitan Police Act, 1886, power with respect to the construction of buildings and purchase of land:

“The police receiver from time to time may provide, by building or otherwise, a central office and such police stations, offices, houses, and buildings as are required for the purposes of the metropolitan police force . . .”

B In s. 15 of the Police Act, 1946, there is no express reference to housing for the police, and it has been argued both here and in the court below that a statute which takes away compulsorily land from a private person in the public interest must be strictly construed, that the word “functions” means duties, and that there is no reason to expand that word so as to include the provision of houses.

C However, one must take the whole phrase and, giving full weight to the point that there is an omission of any direct provision with regard to housing, one has to consider what is the proper construction of the language used by Parliament in s. 15. The words are

“The council . . . may be authorised . . . to purchase compulsorily any land . . . which is required for the purpose of any of the functions of the police authority for the county or borough.”

D The functions in question are the functions of the police authority. As the Lord Chief Justice said, and I respectfully agree with him, the functions of the police authority are not limited in any way but they must be to provide an efficient police service. Although the duties of a policeman on the beat are to be considered independently of the functions of the authority, yet his functions are to maintain law and order, and the functions of the authority itself must necessarily include such things as are reasonably necessary for the provision of an efficient service. There being no question on the facts of this case whether there was any evidence on which the conclusion could have been reached that the provision of housing was necessary, I have no doubt that as a matter of law those words are satisfied by the order in this case, which is to the effect that the provision of houses is required for the purpose of the functions of the police authority. The matter does not seem to me to be capable of further elaboration, and I only conclude by saying that I am in full agreement with the decision of the Lord Chief Justice (6), and I would dismiss this appeal.

(6) The reasons of LORD PARKER, C.J., are apparent from the following extract from his judgment delivered on Oct. 30, 1958:—“I think that it is clear, and indeed counsel for the owners would agree, that it was a very good thing that there should be houses near this police station, but counsel says, quite rightly, that the Police Act, 1946, s. 15, is giving power to acquire compulsorily a citizen's land, and that the matter should be looked at strictly. He says, in effect, that if looked at strictly, the word ‘functions’ in s. 15 means official duties, something which is laid on the authority by Parliament, and he points out that whereas a duty is imposed on the authority to provide, for instance, police stations and equipment, there is no statutory duty on the authority to provide houses. He contrasts that with the case of the metropolitan police, who are given express powers to acquire houses. I am very grateful to counsel for all his industry. He has said everything that can be said, but approaching this as a matter of the wording of this Act, I can see no reason for treating ‘functions’ in that narrow way, or indeed, for reading ‘for the purpose of’ as confined to the carrying out of the particular statutory functions. In s. 15 the words ‘for the purpose of the functions’ mean that the justification is to be found if the land is needed for the proper discharge by the police authority of its duties, those duties being perfectly general, not limited by the statute in particular, and being to provide an efficient police force, to provide an efficient service, and to ensure law and order.

I “It is not without interest that the sidenote to s. 15 reads ‘Compulsory purchase of land for police purposes by county and county borough councils’, and, although in the ordinary way one would not look at such a sidenote in order to interpret the statute, yet it is rather curious in the present case that s. 5 (3) gives a combined police authority such as this, the same powers as the council of a county or county borough have in respect to the acquisition of land for police purposes. In other words the words ‘police purposes’ are used there as synonymous with ‘for the purpose of any of the functions of the police authority’.

“Despite all that counsel for the owners has said, I am quite satisfied that this application fails, and must be dismissed.”

ORMEROD, L.J.: I agree. Counsel on behalf of the owners has argued that the words of s. 15 of the Police Act, 1946, must be construed strictly and that a strict construction of the words "for the purpose of any of the functions" will not admit of a power vested in the police authority to acquire land for the purpose of building houses for the police. There can be no doubt that the statute, or this portion of the statute, being one providing for the compulsory acquisition of land, should be construed strictly. The only question here is whether in the circumstances the section warrants the very narrow construction which counsel for the owners submits should be put on it. As counsel for the Minister has very properly said, there is another canon of construction, and that is that Parliament in imposing duties may by implication impose the power by which those duties can be performed, and those two matters have to be considered when the meaning which should be put on the words "for the purpose of any of the functions" has to be considered. There is no doubt here—it has been admitted by counsel for the owners both here and in the court below—that the provision of houses for the police in this area would be of advantage to the police authority in performing their functions. The evidence of the chief constable at the inquiry before the inspector of the Minister, which has been quoted by the Lord Chief Justice in his judgment, was:

"I say from my general experience of police forces and my special experience in Cheshire that a particular difficulty in the administration of and operation of a police force arises from the fact that we have to provide a twenty-four hour service on every day of the year in the majority of our activities."

He was obviously concerned with the necessity of having his police housed in such a way that he was able to provide men to deal with such emergencies as might arise from day to day and almost from hour to hour. It appears that the Minister on the recommendation of the inspector accepted that position and accepted that it was necessary that police houses should be built in this area. If it is in fact a necessity then the question arises whether the section is sufficiently wide to contain the powers to build the houses. The wording of the section is such that the local authority may acquire land which is required for the purpose of any of the functions of the police authority. The function of the police authority is to provide and maintain an efficient police force, and for the provision and maintenance of an efficient police force it is essential that they should be adequately housed. If there is no other reasonable way of housing them than by providing houses for them, it appears that the language of this section is wide enough to allow that to be done. In the circumstances, I agree that this appeal should be dismissed.

UPJOHN, J.: I agree and do not desire to add anything.

Appeal dismissed.

Solicitors: *Jagues & Co.*, agents for *Whittingham, Glass & Morrison*, Manchester (for the owners): *Solicitor, Ministry of Housing and Local Government.*

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

FILDES (formerly SIMKIN) v. SIMKIN.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Phillimore, J.), June 23, October 5, 6, 1959.]

Magistrates—Husband and wife—Maintenance order—Discharge—Date—Re-marriage of wife, after divorce, prior to date of complaint for discharge—Payments by former husband to collecting officer continued after re-marriage—Whether any jurisdiction to remit sums paid prior to date of complaint for discharge—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 5 (c)—Magistrates' Courts Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 55), s. 76.

A maintenance order under s. 5 (c)* of the Summary Jurisdiction (Married Women) Act, 1895, for payment of £3 weekly by S. was made in favour of his wife on Feb. 22, 1952. The weekly sum was thereby ordered to be paid to the collecting officer on behalf of the wife. In 1954 S. and his wife were divorced. In June, 1957, the wife ceased to collect the money. In the summer of that year S. went to Ecuador, where he had since remained. On Nov. 30, 1957, the wife re-married. On Feb. 16, 1959, she was asked to visit the collecting officer's office, and he then first learnt of her re-marriage. She was paid the amounts due under the maintenance order down to Nov. 30, 1957. S. continued weekly payments, and first learnt of the re-marriage in 1959. On May 12, 1959, S. applied by complaint for an order that the maintenance order should be discharged. On May 22, 1959, the justices made an order discharging the maintenance order from that date and decided to remit, under s. 76† of the Magistrates' Courts Act, 1952, the sum due under the maintenance order from Nov. 30, 1957, down to the date of the order of discharge. On appeal,

Held: under s. 76 of the Magistrates' Courts Act, 1952, the justices had no jurisdiction to remit sums that had been paid to the collecting officer on behalf of the wife before the date of the complaint for discharge of the maintenance order; and, as payment under s. 5 (c) of the Summary Jurisdiction (Married Women) Act, 1895, to the collecting officer was equivalent to payment to the wife, there was no jurisdiction to make an order which would have the consequence that the accumulated payments made prior to May 12, 1959 (the date of the complaint for discharge) would be returned to S.

Smyth v. Smyth ([1956] 2 All E.R. 476) applied.

Appeal allowed in part.

[As to the magistrate's power to discharge an order for maintenance, see 12 HALSBURY'S LAWS (3rd Edn.) 491, para. 1091 and SUPPLEMENT; and for cases on the subject, see 27 DIGEST (Repl.) 722, 723, 6907, 6909, 6911 and 3rd DIGEST SUPP.]

For s. 5 (c) of the Summary Jurisdiction (Married Women) Act, 1895, see 11 HALSBURY'S STATUTES (2nd Edn.) 851.

For ss. 74-76 of the Magistrates' Courts Act, 1952, see 32 HALSBURY'S STATUTES (2nd Edn.) 478-480.]

Cases referred to:

Bragg v. Bragg, [1925] P. 20; 94 L.J.P. 11; 132 L.T. 346; 27 Digest (Repl.) 722, 6907.

* The terms of s. 5 of the Summary Jurisdiction (Married Women) Act, 1895, so far as material are as follows:—"The court of summary jurisdiction to which any application under this Act is made may make an order . . . containing all or any of the provisions following, viz.:— . . . (c) A provision that the husband shall pay to the applicant personally, or for her use, to any officer of the court or third person on her behalf, such weekly sum not exceeding five pounds . . ." The word "five" was substituted for "two" by the Married Women (Maintenance) Act, 1949, s. 1.

† The relevant terms of s. 76 of the Magistrates' Courts Act, 1952, are stated at p. 701, letter D, post.

Smyth v. Smyth, [1956] 2 All E.R. 476; [1956] P. 427; 120 J.P. 307; [1956] A 3 W.L.R. 210; 3rd Digest Supp.

Style v. Style & Keiller, [1954] 1 All E.R. 442; [1954] P. 209; [1954] 2 W.L.R. 306; 3rd Digest Supp.

Appeal.

This was an appeal by the wife against a decision of the magistrates of the county borough of Bolton, on May 22, 1959, discharging a maintenance order which had been made in her favour on Feb. 22, 1952. She had been divorced from the husband in 1954 and on Nov. 30, 1957, had married another man. The order dated May 22, 1959, merely ordered that the maintenance order be discharged. The discharge was not ante-dated. The decision of the justices was that the order should be discharged from the date of the hearing (May 22, 1959), but that they would remit the sum due under the maintenance order from Nov. 30, 1957, to date. In their reasons, they based this decision on s. 76 of the Magistrates' Courts Act, 1952, finding that "the section gives us power to remit 'the whole or any part of the sum due under the order' ". They considered that s. 76 was wide enough to enable them in a proper case "to remit amounts due even when a man has paid them". They decided to remit for the reasons stated at p. 701, footnote (8), post. The wife appealed. By her notice of appeal she stated that the justices "(a) discharged an order made on Feb. 22, 1952, under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, by the said justices . . . for the said county borough on the application of Marjorie Fildes (formerly Simkin) wherein it was adjudged that the said Peter Pendlebury Simkin had been guilty of desertion and ordered to pay to the clerk of the justices of the said county borough on behalf of the appellant [wife] the weekly sum of £3 until such order be altered varied or discharged in due course of law; (b) made an order remitting the sum due under the order from Nov. 30, 1957, to date".

The facts appear in the judgment of LORD MERRIMAN, P.

J. G. K. Sheldon for the wife.

The husband did not appear and was not represented.

LORD MERRIMAN, P.: This is an appeal by a wife from a decision on May 22, 1959, of the Bolton borough justices, who on that date discharged an order dated Feb. 22, 1952, for £3 a week, on the ground that since the making of the order the wife had not merely been divorced, but had re-married in November, 1957.

About the propriety of the order of discharge no question arises at all, but it is on the curious situation reached by the operation of the order thus discharged that the present point arises.

The husband, taking advantage of s. 5 (c) of the Summary Jurisdiction (Married Women) Act, 1895 (1), which is the foundation of the magistrates' jurisdiction, had paid, not to the applicant personally but for her use to an officer of the court, the weekly sum which had been ordered in February, 1952. The fact that she had obtained a divorce against him cannot, of course, possibly have escaped the notice of the husband, because he must have been served with the proceedings, and there is no suggestion to the contrary. But apparently nobody knew about the re-marriage in 1957 until an amount of something like £219 odd had accumulated in the hands of the officer of the court. Attention was drawn to this matter and he sent for the wife to find out why she was not collecting the money, as she had used to do fortnightly. It then came to his knowledge, as I understand for the first time, that not only had she been divorced, about which he knew nothing either, but also that she had been re-married. The result was that he decided to pay over that part of the accumulated money, amounting to £78, which had been paid in before the date of the re-marriage, but he kept in suspense the balance, about £141. This is really the sum and substance of the

(1) Section 5 (c) is set out at footnote * ante p. 697.

A dispute in this case; for the husband, in his complaint to the magistrates' court for revocation of the original order, complained that it should be revoked as from the date of the re-marriage in November, 1957. He does not in so many words ask for the money to be paid out to him, but the magistrates have taken it that that is the proper effect of his complaint, and the question is whether they had any right to act on the basis that he should be allowed to have the money back.

B Before I go on I must point out that we have not had the advantage of the husband's presence, or any argument on his behalf. The case first came before us on June 23, 1959, when we adjourned it in order that the husband, who is in Ecuador, might come if he were so minded; there was a suggestion that he might be here in October. Well, it turns out that he is not here. He has written a letter very similar to a letter which he wrote on the previous occasion. Of course he would be glad to have this money, but I gather that he is content to leave that to the court. His real desire to be heard is not so much on that topic as on some fancied claim for defamation of character which has arisen out of his going to Ecuador so I understand it is alleged, rightly or wrongly, with some money belonging to the wife. With that it is manifest that we have nothing whatever to do. We could not possibly entertain any such question in connexion with this issue which falls to us to determine. So we think that no good purpose would be served by adjourning the case till next June, which now appears to be the next date when he is likely to be in this country; but that we ought to deal with the matter on the material before us, and with the assistance of a very admirable statement of the facts and the reasons for their decision by the magistrates.

E In effect, the magistrates set out the dates—the marriage, which was in May, 1943, the original order, which, as I have already said, was made on Feb. 22, 1952, the decree nisi, which was pronounced on Nov. 27, 1953 (on the ground of the same desertion, presumably, as had been the ground of the order), the making absolute of that decree on Jan. 12, 1954, the collection by the officer of the court, the fact that the wife ceased to call to collect the money after June 4, 1957, and the fact that early in 1959 she was asked to call at the court to discuss the matter, which she did, and then the fact of her re-marriage on Nov. 30, 1957.

F The husband was represented before the magistrates by a solicitor—as was also the wife—whose solicitor submitted that there was no jurisdiction to discharge the order retrospectively. At this point I think that it is desirable that one should look exactly at the wording of the husband's complaint, which is the foundation, as has so often been explained, of the magistrates' jurisdiction. The complaint was that the order of February, 1952, should be set aside, the complainant alleging that since the making of the said order the wife had obtained a decree absolute of divorce and had re-married on Nov. 30, 1957; "wherefore", H the complaint goes on, "he intends to apply to the court to discharge the said order as from Nov. 30, 1957".

I Now, of course, there is all the difference in the world between the re-marriage as a ground for discharging the order prospectively and accepting the date of the re-marriage as the date as from which the order should be discharged. The two things are in different hemispheres, and the question really is whether the husband has any right to ask the court (as in effect they have done) to discharge the order as from Nov. 30, 1957. I have already referred to the divorce, which was made absolute in the beginning of 1954. It is well settled by *Bragg v. Bragg* (2) and a string of cases in this court (3), and finally in the Court of Appeal

(2) [1925] P. 20.

(3) i.e., *Plunkett v. Plunkett*, [1937] 3 All E.R. 736; [1937] P. 208; *Kirk v. Kirk*, [1947] 2 All E.R. 118; *Prest v. Prest*, [1949] 2 All E.R. 790; [1950] P. 63; *Abson v. Abson*, [1952] 1 All E.R. 370; [1952] P. 56; *Chorlton v. Chorlton*, [1952] 1 All E.R. 611; [1952] P. 169; *Pilcher v. Pilcher* (No. 2), [1956] 1 All E.R. 463.

(4) which upheld the propriety of that decision, that divorce per se does not avoid an order under the married women's code, if I may so call it for short, in a magistrates' court. It requires an order of that court, who may, or may not, as they please, make an order discharging the original order on the ground of the divorce, having considered at their discretion all the circumstances of the case. I need only add to that line of cases that the Divorce Court itself constantly acts on that basis, inasmuch as instead of inviting or compelling the parties to go through the procedure necessary, for example, to obtain custody of the children, or maintenance for the wife, or for the wife and children of whom she has the custody, the court relies, and encourages the parties to rely, on an existing magistrates' court order. The manifest convenience of that practice has often been alluded to. It saves expense, and certainly in past years has afforded much better facilities for enforcement by leaving it standing than if the matter were brought into the High Court.

I need say no more about that, but it does lead to this reflection. The magistrates have in effect acted on what they thought would be better justice—and it is an argument not at all without common sense—namely, to return this money to the husband. *Prima facie*, it sounds an extremely sensible thing to do (5). But even so, when we are talking about justice and equity and the rest of it, one has to remember that there is an old maxim that it is only to the vigilant, not to those who go to sleep, that equity lends its assistance (6). This man went very firmly to sleep in connexion with the divorce. He may not have been entitled as of right to get the order set aside, but it would have been a ground on which, if he had chosen to do so, he could have brought the matter before the court. He did nothing, and he continued to do nothing, although he must have known, if he knew anything at all about divorce, that the making of a decree absolute would entitle the wife to re-marry. But he has just gone on in Ecuador or wherever he happened to be for the time being, in blissful unconcern with the constant payments, through his bank or otherwise, to this wife who had been re-married. So there is something to be said about the equitable aspect of this matter, even though it might be thought that in common decency the wife (although, of course, she was under no legal obligation to communicate with the court) would have let her husband have a postcard to say that she was now re-married and was being supported by a new husband. However, she did not, and we have got, therefore, to decide this matter on principle.

Now, I know of no authority at all which enables a court of summary jurisdiction to ante-date an order earlier than the date of the complaint. That they are not bound by the date of the hearing, but can date the operation of the order as from the date of the complaint is, I think, perfectly well established, and I do not propose to cite any authorities for that. But when one looks at the Act of 1895 itself, it seems to me to be of the essence of s. 5 that the orders are prospective. Let us examine the things the magistrates have power to do under s. 5. First of all, there is the separation order, the non-cohabitation clause "be no longer bound to cohabit"—the words are plainly prospective. Then there is that the legal custody of any child under sixteen, and so forth, may be committed to the applicant—again the words are plainly prospective. Then there is the provision to which I have already referred, the payment of maintenance, "that the husband shall pay to the applicant personally, or for her use, to any officer of the court" and so forth, such a weekly sum not exceeding the then

(4) *Wood v. Wood*, [1957] 2 All E.R. 14; [1957] P. 254.

(5) The justices were relying on the practice as stated in *STONE'S JUSTICES' MANUAL* (1959 Edn.), Vol. I, p. 1171, where in a footnote quoting *Bellenden (formerly Satterthwaite) v. Satterthwaite*, [1948] 1 All E.R. 343, it is stated "the discretion of the justices to vary or discharge the order is unfettered where there is fresh evidence that after a divorce a wife has re-married and so has secured a fresh legal right to be supported".

(6) See, as regards the maxim *vigilantibus et non dormientibus lex succurrit*, 14 *HALSBURY'S LAWS* (3rd Edn.) 641.

A limit of £2, "as the court shall, having regard to the means both of the husband and wife, consider reasonable"; and then follows the question of costs.

Now, there is not a hint there that the grounds for the making of an order which are set out in s. 4, as amended, can be the starting point in point of date of any order made on any one of those grounds. On the contrary it is as plain as anything can be, I think, that the order, whatever form it takes, is a prospective order; and, as I have ventured to suggest in the course of the argument, it is, as far as I know, unheard of to say that because a husband deserted his wife on Jan. 1 in any year an order made on Jan. 1 of the succeeding year can be dated back to the date of the desertion. It really is not necessary to follow out the very curious consequences which would result from any such order. To mention only one, it would ipso facto create arrears for twelve months which never became arrears when they were not paid from time to time as those months slipped by. I cannot believe that there is any such power.

C There remains to be considered, however, the ground on which the magistrates have thought that they have jurisdiction. Founding themselves on s. 76 of the Magistrates' Courts Act, 1952, the marginal note of which is "Power to remit arrears", and which reads as follows:

D "On the hearing of a complaint for the enforcement, revocation... or discharge [I am missing out immaterial words] of an... order... enforceable as an affiliation order, the court may remit the whole or any part of the sum due under the order"—

E the magistrates have held that this sum of £141 is an amount due under the order, and can therefore be remitted. I do not take that view. I think that this section, which is one of a small group of sections numbered 74 to 76 under the heading "Arrears under affiliation order, etc." refers to the remission of sums due and unpaid, and I cannot find any sort of reference in these sections to sums which have in fact been paid under the authority of s. 5 (c) of the Act of 1895 to the court officer on behalf of the wife.

F In my opinion, sensible as it may appear to be, this order for the repayment or ante-dating of the revocation and consequent repayment of the sum of £141 is misconceived.

I have not referred to a case in the High Court (7), about which PHILLIMORE, J., knows and to which I hope he will refer, which tends in the same direction.

G PHILLIMORE, J.: I agree, and since we are differing from the justices I would seek to put the matter in my own words.

H It is quite clear, and the justices have made it quite clear in para. 8 of their reasons (8), that in taking the course which they took in this case they were swayed by their opinion of the merits, and I confess to some sympathy with them in that view. But in seeking to remit the amounts which this husband was liable for under the order which the wife had obtained against him, the amounts in question being sums paid to the collecting officer since her re-marriage, they sought to found themselves on s. 76 of the Magistrates' Courts Act, 1952, and, as my Lord has pointed out, their power under that section was to remit the whole or any part of the sum due under the order.

I Now if, of course, it had been intended that their power to remit should be retrospective and should extend back beyond the date of any complaint brought by the party seeking remission, then that is something which must have been

(7) *Smyth v. Smyth*, [1956] 2 All E.R. 476; [1956] P. 427.

(8) Paragraph 8 of the justices' reasons reads as follows—"We thought it would be better justice to return the money to the ex-husband, who had paid it in the belief that he was paying it to the ex-wife who was living in the state of a single woman and who was relying on his contribution for at least a part of her maintenance, rather than pay it to an ex-wife who had in fact re-married and not disclosed the fact to the two people she might have been expected to inform, namely, the ex-husband and the collecting officer."

made clear beyond any possibility of dispute in the wording of the statute. A
In the absence of such language it would be quite wrong, in my opinion, for us
to put any interpretation on that section which would give it retrospective
effect. There is no indication that Parliament intended that the magistrates
should have any such power. The sums with which they were dealing, totalling
£141, were sums which had been paid under their own order to the collecting
officer of the court prior to the date of the husband's complaint.

In my judgment, under s. 76 they had power as from the date of that complaint B
to remit any sum which was then due, that is to say any sum which was accruing
due under the order, but they had no power whatever to remit sums which had
in fact been paid, and it is, I think, quite clear that under the provisions of
s. 5 (c) of the Summary Jurisdiction (Married Women) Act, 1895, payment to
the collecting officer was equivalent to payment to the wife. He received it for C
her use and on her behalf.

In taking the view that I have expressed I am fortified by observing that this
court in *Smyth v. Smyth* (9), when discharging at the instance of a husband an
order for maintenance in favour of a wife, discharged it as from the date of the
complaint, and I think, too, that some assistance is to be derived from the parallel
jurisdiction in the Divorce Court, as illustrated by the report of *Style v. Style &* D
Keiller (10). That was a case in which the husband was seeking a settlement of
his wife's property under s. 24 (2) of the Matrimonial Causes Act, 1950, a section
(11) which is worded in very wide terms, and the Court of Appeal, in dealing with
the question of settlement, were asked to determine from what date it should be
made effective. SINGLETON, L.J.'s judgment begins at p. 443, but there is a
short passage on p. 444 in which, I think, he really states the practice. After E
reciting the section he says:

"The section appears to me to give the injured husband a right to ask
the court to order such settlement as it thinks reasonable to be made of the
property, or any part thereof, for the benefit of the innocent party. If
application is not made until some considerable time after the decree absolute
has been granted, I do not think that the court should order a settlement F
which would have the effect of securing income as from the date of the
decree absolute. On the other hand, I cannot think it is right to say, as
counsel for the wife submitted, that where the hearing of an application
by the injured party is held up for one reason or another, perhaps for years,
the court has no power to deal with the period elapsing between the notice
of application and the execution of the settlement. The rights of the G
injured party, the husband, might be entirely defeated if that were so.
He might be dead before the litigation ended, or before a settlement was
executed. [And then this is the sentence I have particularly in mind]
Once notice of application is given to the wife, the court ought to regard
that as done which ought to have been done, if and when the court comes to
a conclusion that the settlement ought to have been ordered. It is only H
thus that the section can be made effective and given its true meaning. In
those circumstances, I feel that the court should say that the order should
apply as from Feb. 1, 1951, i.e., the date on which notice of application
was given to the wife's solicitors."

That case, of course, is dealing with a different statute and a different section, I
but at the same time, as a statement of the principle to be applied it is, I think,
of some assistance.

For these reasons I agree that the justices' order by which they sought to
remit the moneys due prior to the date of the application made by the husband
in this case should be reversed.

(9) [1956] 2 All E.R. 476; [1956 P. 427.

(10) [1954] 1 All E.R. 442; [1954] P. 209.

(11) See 29 HALSBURY'S STATUTES (2nd Edn.) 411.

A **LORD MERRIMAN, P.:** The result, then, is that the appeal will be allowed to the extent only that the order has been ante-dated to the date of the re-marriage. The order will stand in so far as it revokes or discharges the original order. The magistrates dated it from May 22, 1959, which was the date of the hearing. Our judgment is that it should have been ante-dated to May 12, 1959, which is the date of the complaint. But, in fact, nothing turns on those

B ten days, because the money which is the subject of the dispute was already and long since has been in the court (12). There is no change in the monetary situation between those dates. Breaking it up in terms of the notice of appeal, so that there may be no misapprehension about it, there is no disturbance of the justices' finding under (a) that the order should be discharged, but only under (b) that the sum should be remitted as from Nov. 30, 1957, to date.

C *Order varied. Appeal allowed in part.*

Solicitors: Woodcock, Ryland & Co., agents for Russell & Russell, Bolton (for the wife).

[Reported by N. P. METCALFE, ESQ., Barrister-at-Law.]

D

WHITWORTH PARK COAL CO., LTD. (In Liquidation)
v. INLAND REVENUE COMMISSIONERS.

E RAMSHAW COAL CO., LTD. (In Liquidation) v. INLAND
REVENUE COMMISSIONERS.

BRANCEPETH COAL CO., LTD. (In Liquidation) v. INLAND
REVENUE COMMISSIONERS.

[HOUSE OF LORDS (Viscount Simonds, Lord Reid*, Lord Radcliffe, Lord Tucker* and Lord Keith of Avonholm), July 15, 16, 20, 21, 22, November 5, 1959.]

F *Income Tax—Profits—Computation of profits—Year of assessment—Interim income payments in respect of compensation on nationalisation of coal industry—Payments in respect of specified periods—Whether income of those periods or of years of receipt—Income Tax Act, 1918 (8 & 9 Geo. 5 c. 40), Sch. D, Case VI, r. 2.*

G *Coal Mining—Nationalisation of industry—Colliery company—Interim income—Income tax—Coal Industry Nationalisation Act, 1946 (9 & 10 Geo. 6 c. 59), s. 22 (2), (3)—Coal Industry (No. 2) Act, 1949 (12, 13 & 14 Geo. 6 c. 79), s. 1 (2).*

H On Jan. 1, 1947, the colliery assets of the first appellant (which was a company under the control of not more than five persons within s. 21 of the Finance Act, 1922) were transferred to the National Coal Board under the Coal Industry Nationalisation Act, 1946, and the company became entitled to compensation from the Crown for those assets. The compensation became due on Jan. 1, 1947, subject to determination of its amount and would not, therefore, be paid for a substantial time. For the period between Jan. 1, 1947, and the date on which compensation was fully satisfied the

I company was entitled to "interim income". Under s. 22 (2) (a) of the Act, the right to interim income for the period between Jan. 1, 1947, and the issue of stock or the making of a payment in satisfaction of any amount of compensation was to be satisfied by making "in addition to the issue of the stock then issued in satisfaction of that amount of compensation or to

(12) The sum of £141 was still in the hands of the collecting officer.

* LORD REID and LORD TUCKER were present at the hearing of the appeal but, as they were prevented by illness from taking their seats in the House in the present Parliament, they were not present when the opinions of the House were delivered.

the making of the money payment then made in satisfaction of that amount of compensation . . . a money payment of an amount equal to interest for that period on that amount of compensation at such rate or rates as may be prescribed as respects that period or different parts thereof by order of the Treasury." These payments were to be made at the same time as the compensation was paid or satisfied. Under s. 22 (3) "revenue payments" were to be made in respect of each of the two years beginning with Jan. 1, 1947, equal to one half of the comparable ascertained revenues of the company attributable to activities for which its transferred interests were used or owned. No time was fixed for making these payments. Section 22 (5) provided for adjustments for under-payments and over-payments arising from payment before all relevant facts for giving effect to the provisions were ascertainable and adjustments of payments were in fact made in subsequent payments. By s. 1 (2) of the Coal Industry (No. 2) Act, 1949, modified revenue payments were in substitution, so far as they went, for the right to interim income.

From Jan. 1, 1947, the company was, as a consequence of the nationalisation, an investment company within the meaning of s. 20 (1) of the Finance Act, 1936, and the whole of its actual income was deemed to be the income of the members under s. 14 of the Finance Act, 1939. In 1948, 1949, 1950 and 1951, the company received payments in respect of interim income (viz., payments within s. 22 (2) of the Act of 1946) and revenue payments under s. 22 (3) of the Act of 1946 and under s. 1 (2) of the Act of 1949. All these payments were conceded to be income of the company for tax purposes. The Special Commissioners of Income Tax in their apportionment of the income of the company among the members under s. 21 of the Finance Act, 1922, assessed the payments (viz., both those made under s. 22 (2) of the Act of 1946 and the revenue payments made under s. 22 (3) and the Act of 1949) as income of the company in the year in which they were received and as being so assessable under Case III of Sch. D. The company contended that the payments should be assessed as income of the year or period in respect of which each was paid, and that they were so assessable under Case VI of Sch. D. On appeal,

Held (LORD RADCLIFFE dissenting): the payments were assessable to tax under Sch. D, Case III, and should each be included in the actual income of the company of the year in which it was received, for the following reasons:—

(i) although r. 19 and r. 21 of the All Schedules Rules to the Income Tax Act, 1918, did not apply to payments by the Crown out of moneys provided by Parliament, that did not prevent Case III of Sch. D from applying (see p. 711, letter F, and p. 712, letter C, post);

(ii) the requirements of Case III were satisfied because all the payments made to the company were pure profit income and of a recurring character (see p. 712, letters G and H, post);

(iii) the payments made to the company (which were not trading receipts as the company was not then engaged in trade) were each "income arising" within Case III, r. 2, during the year of assessment in which the payment was received (see p. 714, letter A, and p. 725, letter B, post).

(iv) (per VISCOUNT SIMONDS, LORD REID and LORD TUCKER) the income so received could not be spread back over previous years because there was nothing in the Rules applicable to Case III to warrant that (see p. 714, letter E, post); moreover income could not be "income arising" before it became payable and, though these receipts could be regarded as accruing during earlier years, yet they could not be regarded as having become payable during those years (see p. 714, letter G, post).

Inland Revenue Comrs. v. Butterley Co., Ltd. ([1956] 2 All E.R. 197) applied.

- A** Per LORD KEITH OF AVONHOLM: if the payments were treated as coming under Case VI of Sch. D they would still be income of the company arising in the years in which they were received (see p. 725, letter E, post).
- Decision of the COURT OF APPEAL ([1958] 2 All E.R. 91) affirmed on different grounds.
- B** **[Editorial Note.** The Income Tax Act, 1918, has been repealed and replaced by the Income Tax Act, 1952. Schedule D, Case III, r. 1 (a) and Case VI, r. 2, and All Schedules Rules, r. 19 and r. 21, to the Act of 1918 have been replaced respectively by s. 123 (1), s. 135 (2), s. 169 and s. 170 of the Act of 1952.
- As to annual payments chargeable to tax under Sch. D, see 20 HALSBURY'S LAWS (3rd Edn.) 247, 248, para. 453; and for cases on the subject, see 28 DIGEST (Repl.) 161-177, 638-709.
- C** As to the basis of computation of income under Sch. D, Case VI, see 20 HALSBURY'S LAWS (3rd Edn.) 289, para. 528; and for cases on the subject, see 28 DIGEST (Repl.) 216-221, 913-953.
- As to chargeability of the Crown to income tax and whether the Crown is a "person" within the Income Tax Acts, see 20 HALSBURY'S LAWS (3rd Edn.) 598, 599, para. 1171; and for cases on the subject, see 28 DIGEST (Repl.) 18, 67, and 3rd DIGEST Supp.
- D** For the Income Tax Act, 1918, Sch. D, Case III, r. 1 (a) and Case VI, r. 2, and All Schedules Rules Applicable to Sch. A, B, C, D and E, r. 19 and r. 21, see 12 HALSBURY'S STATUTES (2nd Edn.) 167, 173, 188, 190; and for the Income Tax Act, 1952, s. 123 (1), s. 135 (2), s. 169 and s. 170, see 31 HALSBURY'S STATUTES (2nd Edn.) 116, 132, 162, 165.
- E** For the Coal Industry Nationalisation Act, 1946, s. 22, see 16 HALSBURY'S STATUTES (2nd Edn.) 304; and for the Coal Industry (No. 2) Act, 1949, s. 1, see 28 HALSBURY'S STATUTES (2nd Edn.) 1014.]
- Cases referred to:
- F** *Dewar v. Inland Revenue Comrs.*, [1935] All E.R. Rep. 568; [1935] 2 K.B. 351; 104 L.J.K.B. 645; 153 L.T. 357; 19 Tax Cas. 561; 28 Digest (Repl.) 333, 1475.
- Ensign Shipping Co., Ltd. v. Inland Revenue Comrs.*, (1928), 139 L.T. 111; 12 Tax Cas. 1169; 28 Digest (Repl.) 414, 1836.
- Forth Conservancy Board v. Inland Revenue Comrs.*, [1931] All E.R. Rep. 679; [1931] A.C. 540; 100 L.J.P.C. 193; 145 L.T. 121; 95 J.P. 160; sub nom. *Inland Revenue Comrs. v. Forth Conservancy Board*, 16 Tax Cas. 103; 28 Digest (Repl.) 48, 181.
- G** *Gardner, Mountain & D'Ambrumenil, Ltd. v. Inland Revenue Comrs.*, [1947] 1 All E.R. 650; 177 L.T. 16; 29 Tax Cas. 69; 2nd Digest Supp.
- Grey v. Tiley*, (1932), 16 Tax Cas. 414; 28 Digest (Repl.) 219, 941.
- H** *Hanbury, Re, Coniskey v. Hanbury*, (1939), 20 A.T.C. 333.
- Hawley v. Inland Revenue Comrs.*, (1925), 134 L.T. 502; 9 Tax Cas. 331; 28 Digest (Repl.) 332, 1470.
- Hill v. Gregory*, [1912] 2 K.B. 61; 81 L.J.K.B. 730; 106 L.T. 603; 6 Tax Cas. 39; 28 Digest (Repl.) 159, 625.
- Holden (Isaac) & Sons, Ltd. v. Inland Revenue Comrs.*, (1924), 12 Tax Cas. 768; 28 Digest (Repl.) 417, 1851.
- I** *Howe (Earl) v. Inland Revenue Comrs.*, [1919] 2 K.B. 336; 88 L.J.K.B. 821; 121 L.T. 161; 7 Tax Cas. 289; 28 Digest (Repl.) 350, 1549.
- Inland Revenue Comrs. v. Butterley Co., Ltd.*, [1956] 2 All E.R. 197; [1957] A.C. 32; 36 Tax Cas. 411; [1956] 2 W.L.R. 1101; 28 Digest (Repl.) 377, 1645.
- Inland Revenue Comrs. v. City of London Corpn. (as the Conservators of Epping Forest)*, [1953] 1 All E.R. 1075; 117 J.P. 280; 34 Tax Cas. 293, 315; [1953] 1 W.L.R. 652; 28 Digest (Repl.) 171, 690.

- Inland Revenue Comrs. v. Haddington (Earl)*, 1924 S.C. 456; 8 Tax Cas. 711; 28 Digest (Repl.) 356, 803. A
- Lambe v. Inland Revenue Comrs.*, [1933] All E.R. Rep. 417; [1934] 1 K.B. 178; 103 L.J.K.B. 69; 150 L.T. 190; 18 Tax Cas. 212; 28 Digest (Repl.) 333, 1474.
- Lambert Bros., Ltd. v. Inland Revenue Comrs.*, (1927), 12 Tax Cas. 1053; 28 Digest (Repl.) 413, 1834. B
- Leigh v. Inland Revenue Comrs.*, [1928] 1 K.B. 73; 96 L.J.K.B. 853; 137 L.T. 303; 11 Tax Cas. 590; 28 Digest (Repl.) 334, 1482.
- L.C.C. v. A.-G.*, [1901] A.C. 26; 70 L.J.Q.B. 77; 83 L.T. 605; 65 J.P. 227; 4 Tax Cas. 265; 28 Digest (Repl.) 191, 790.
- Moss' Empires, Ltd. v. Inland Revenue Comrs.*, [1937] 3 All E.R. 381; [1937] A.C. 785; 1937 S.C. (H.L.) 35; 106 L.J.P.C. 138; 157 L.T. 396; 21 Tax Cas. 264; 28 Digest (Repl.) 170, 688. C
- Newcastle Breweries, Ltd. v. Inland Revenue Comrs.*, [1927] All E.R. Rep. 287; 96 L.J.K.B. 735; 137 L.T. 426; sub nom. *Inland Revenue Comrs. v. Newcastle Breweries, Ltd.*, 12 Tax Cas. 927; 28 Digest (Repl.) 413, 1833.
- St. Lucia Usines & Estates Co., Ltd. v. St. Lucia (Colonial Treasurer)*, [1924] A.C. 508; 93 L.J.P.C. 212; 131 L.T. 267; 28 Digest (Repl.) 167, 486. D
- Simpson v. Maurice's Exors.*, (1929), 14 Tax Cas. 580; 28 Digest (Repl.) 203, 850.
- Smith v. Smith (No. 2)*, [1923] P. 191; 92 L.J.P. 132; 130 L.T. 8; 28 Digest (Repl.) 178, 721.
- Try, Ltd. v. Johnson*, [1946] 1 All E.R. 532; sub nom. *Johnson v. Try, Ltd.*, 174 L.T. 399; 27 Tax Cas. 167; 28 Digest (Repl.) 36, 164. E

Appeals.

Consolidated appeals by Whitworth Park Coal Co., Ltd. (in liquidation), Ramshaw Coal Co., Ltd. (in liquidation) and Brancepeth Coal Co., Ltd. (in liquidation) against orders of the Court of Appeal (JENKINS, ROMER and ORMEROD, L.JJ.) dated Mar. 12, 1958, and reported sub nom. *Inland Revenue Comrs. v. Whitworth Park Coal Co., Ltd. (in liquidation)*, *Inland Revenue Comrs. v. Ramshaw Coal Co., Ltd. (in liquidation)*, *Inland Revenue Comrs. v. Brancepeth Coal Co., Ltd. (in liquidation)*, [1958] 2 All E.R. 91, affirming orders of HARMAN, J., dated July 31, 1957, whereby he allowed appeals by the Crown against determinations of the Special Commissioners of Income Tax. The facts are set out in full in the report at [1958] 2 All E.R. at p. 94. See also letter I, *infra* and p. 709, post. F

F. N. Bucher, Q.C., and *P. M. B. Rowland* for the appellants.

John Pennycuik, Q.C., *E. Blanshard Stamp* and *A. S. Orr* for the Crown.

Their Lordships took time for consideration.

Nov. 5. The following opinions were read. G

VISCOUNT SIMONDS: My Lords, at the conclusion of the argument in this case I found myself in full agreement with my noble and learned friend LORD REID. He thereafter wrote an opinion to which, since I concurred in it at all points, I intended to add nothing. He has, however, been prevented by illness from taking his seat in your Lordships' House in the present Parliament and cannot speak in it. I have, therefore, with his permission, adopted his opinion as my own and I will now state it. H

My noble and learned friend, LORD TUCKER, who is also unable to be here today, has intimated to me that he takes the same view.

My Lords, the first appellants, which I shall call "the company", owned and operated a colliery until Jan. 1, 1947, when its colliery assets were vested in the National Coal Board under the Coal Industry Nationalisation Act, 1946. Thereafter it was an investment company to which the provisions of s. 21 of the Finance Act, 1922, and s. 14 of the Finance Act, 1939, had to be applied. Directions I

A under these sections were given to the company with regard to the years 1948-49, 1949-50 and 1950-51 under which its "actual income" for those years fell to be apportioned among its members, so that surtax would become payable as if the amounts so apportioned were parts of the incomes of the members. When another company is a member of such a company, a sub-apportionment has to follow and the second and third appellants are only concerned with such sub-apportionments. No separate point arises in their cases; it is agreed that the decision of the company's appeal must rule these other cases and I shall, therefore, say no more about them.

The "actual income" from any source of a company subject to such a direction is, under para. 6 of Sch. 1 to the Act of 1922, the income from that source estimated in accordance with the provisions of the Income Tax Acts. Under C some of these provisions, the income of the taxpayer for a particular year is the income which he actually receives during that year. Under others that is not so, and it may make a great difference to liability for surtax if particular income payments are included in the actual income of one year rather than in that of another. For example, if five years' arrears of interest are paid in one year, it is clearly to the advantage of the surtax payer that these arrears should D be spread back so as to be regarded as income of the years when the interest fell due or accrued rather than that the whole sum should be regarded as income of the year of receipt. The income payments with which this case is concerned are a number of payments made to the company by the Ministry of Fuel and Power under the Act of 1946 and the Coal Industry (No. 2) Act, 1949, during the three years which I have mentioned. The contention of the Crown is that all these E payments form part of the actual income of the company for these years and that is denied by the company. So it is necessary to decide which provisions of the Income Tax Act applied to these payments, and that depends on the nature of the payments. Then, having decided which provisions apply, it will be necessary to decide what they mean.

When the Act of 1946 was passed, it was realised that it would take a considerable F time to work out and satisfy the rights to compensation which arose under it, and this Act provided rights to interim income under s. 19 and s. 22, of which the relevant parts are as follows:

"19.—(1) Compensation in respect of a transfer of transferred interests or of an overhead expenses increase shall be due on the primary vesting date, G subject to determination of the amount thereof.

"(2) For the period between the primary vesting date and the date on which any such compensation is fully satisfied, there shall be a right to interim income, to be satisfied in accordance with the provisions of s. 22 of this Act.

"(3) Provision may be made by regulations for authorising the partial H satisfaction of such compensation before the determination of the amount thereof has been completed.

"22.—(1) The right conferred by sub-s. (2) of s. 19 of this Act to interim income for the period between the primary vesting date and the date of the satisfaction in full of compensation in respect of a transfer of transferred interests, or of an overhead expenses increase, shall be satisfied in accordance I with the provisions of this section.

"(2) Subject to the provisions of sub-s. (3) and sub-s. (4) of this section as to the revenue payments therein mentioned,—(a) the said right conferred by sub-s. (2) of s. 19 of this Act shall be satisfied, so far as regards interim income for the period between the primary vesting date and the time when any amount of compensation in respect of a transfer of transferred interests or of an overhead expenses increase is satisfied, by making, in addition to the issue of the stock then issued in satisfaction of that amount of compensation or to the making of the money payment then made in satisfaction of that

amount of compensation, as the case may be, a money payment of an amount equal to interest for that period on that amount of compensation at such rate or rates as may be prescribed as respects that period or different parts thereof by order of the Treasury; . . .

" (3) The following provisions of this subsection shall have effect as to the making to colliery concerns, and to subsidiaries within the meaning of Sch. 1 to this Act of such concerns, of payments in respect of each of the two years beginning with the primary vesting date and the first anniversary thereof respectively, that is to say,—(a) a colliery concern or such a subsidiary shall be entitled in respect of each of the said two years to a payment of an amount equal to one half of the comparable ascertained revenue of the concern, or of the subsidiary, as the case may be, attributable to activities thereof for which the transferred interests thereof were used or owned; (b) the payments to be made under the last preceding paragraph are in this section referred to as 'revenue payments', and shall be money payments; (c) . . . [Method of computing comparable ascertained revenue]; . . .

" (4) The provision made by the last preceding subsection shall be deemed, in the case of any colliery concern or of any such subsidiary, to be in substitution for the provisions of sub-s. (2) of this section, so far as regards additions thereunder for the said two years or any part thereof to compensation for a transfer of transferred interests being compensation attributable to transferred interests of that concern or subsidiary, except as to any excess of the aggregate amount of such additions over the aggregate amount of the revenue payments of that concern or subsidiary.

" (5) The Minister may by regulations make such provision supplementary to or consequential on the provisions of this section as appears to him to be necessary or expedient, and in particular, but without prejudice to the generality of this subsection, provision may be made by regulations made thereunder for making adjustments requisite for giving effect to the last preceding subsection and for making good any underpayment or overpayment to a colliery concern or such a subsidiary which may occur in consequence of the making of additions or revenue payments under this section before all the facts relevant for giving effect to the last preceding subsection have become ascertainable."

Section 22 (2) is comparatively simple. Whenever a part of the compensation is satisfied, the company is to be paid a sum equal to interest on that part from Jan. 1, 1947, until the date when that part is satisfied. But then sub-s. (3) confers a further right to receive "revenue payments" which are to be equal to half the "comparable ascertained revenue" for the years 1947 and 1948; and sub-s. (4) provides that these are to be in substitution for the provisions of sub-s. (2), at least so far as they go. Then further provision was apparently thought necessary, and that further provision is contained in s. 1 of the Act of 1949. All these provisions are extremely complicated, but I think that it is sufficient to say that, in effect, the Act of 1949 provides for further payments analogous to revenue payments under s. 22 (3) of the Act of 1946 in respect of 1949 and subsequent years. I do not think that a meticulous examination of these provisions is necessary, and I do not propose to quote from the Act of 1949.

I can now turn to the Case Stated, and I would set out the main parts of para. 2 and para. 4:

" 2.—(A) The sole question for our determination was whether, in computing the actual income of the company for the purpose of the said apportionments, interim income received by the company under the provisions of the Coal Industry Nationalisation Act, 1946 (hereinafter called the Act of 1946), and the Coal Industry (No. 2) Act, 1949 (hereinafter called the Act of 1949), should be included in the actual income of the year in which it was

A received or (as the company contended) of the year or period in respect of which it was paid, . . .

B “ 4.—(1) The company received from time to time payments from the Ministry of Fuel and Power (hereinafter called ‘ the Ministry ’) for or in respect of interim income under the provisions (in the case of some of such payments) of the Act of 1946 and (in the case of others of such payments) of that Act and of the Act of 1949. The said payments are set out in tabular form below, and were made under deduction of income tax; each payment was accompanied by a letter from the Ministry and a Certificate of Deduction of Income Tax in the form of (or in a form similar to) the letter and certificate both dated Jan. 26, 1949, copies of which are annexed hereto, marked A1 and A2 respectively, and form part of this Case. The other letters and tax deduction certificates which were produced to us are not annexed hereto but are available for reference if required. Each such letter states that the payment relates to a claim by the company for interim income for a stated period.

	“ Serial	Date of	Gross	Net	Period for which it is
	Number	Receipt	amount of	amount	stated to be paid in
	(1)	Aug. 7, 1948	payment	paid	accompanying letter
D			£9,068	£4,987	Eighteen months
	(2)	Jan. 26, 1949	£2,733	£1,503	ended June 30, 1948
	(3)	Sept. 12, 1949	£68	£37	Half year ended Dec. 31, 1948
E					From Jan. 1, 1949, to Sept. 12, 1949
	(4)	Mar. 28, 1950	£1,837	£1,011	For the year ended Dec. 31, 1949
	(5)	July 14, 1950	£1,616	£889	Half year ended June 30, 1950
F					From July 1, 1950, to Aug. 11, 1950
	(6)	Aug. 11, 1950	£5	£3	From July 1, 1950, to Aug. 11, 1950
	(7)	Nov. 13, 1950	£7	£4	From July 1, 1950, to Nov. 13, 1950
	(8)	Feb. 21, 1951	£1,519	£835	Half year ended Dec. 31, 1950
G					Two years ended Dec. 31, 1948
	(9)	May 25, 1951	£1,343	£705	Two years ended Dec. 31, 1948
	(10)	Aug. 9, 1951	£810	£425	Half year ended June 30, 1951”

H There follows a number of particulars about these ten payments but, again, I do not think that in the end these particulars throw light on the present question. It will be observed from the table which I have set out from the Case that, although all these sums were paid during the three years in question, to a large extent the periods for which they were stated to be paid fall outside these three years; accordingly, if the company is right, a considerable proportion of these payments should not be included in the actual income of the company for these three years. The only provisions of the Income Tax Acts which could apply to these payments are those of Case III or of Case VI of Sch. D, and it is admitted that one or other of these Cases must apply. The Crown argue that Case III applies and that r. 21 of the General Rules applicable to All Schedules also applies. If that is right then, admittedly, the Crown must succeed. The company, on the other hand, argues that Case III does not apply at all and that the payments fall within Case VI or, alternatively, that, even if Case III does apply, r. 21 does not apply. If either of these alternative contentions is right then difficult questions of construction arise.

The Special Commissioners held

"that the payments in question were chargeable to income tax under the provisions of Case VI of Sch. D to the Income Tax Act, 1918, and were not chargeable under Case III of the said schedule nor under Sch. C. We further held that the said payments formed part of the actual income of the company for the years or other periods for which they were stated to have been paid, and accrued from day to day throughout such years or periods."

On appeal, HARMAN, J., held that these payments were within Case III, and he also held that r. 21 applied, so he allowed the Crown's appeal. He dealt with r. 21 so shortly that it would seem that the argument against its applicability cannot have been fully developed before him. The Court of Appeal held that r. 21 did not apply to these payments and that, as r. 19 did not apply either, that prevented these payments from falling within Case III. They held that the payments fell within Case VI, but they held that, under the rules of Case VI, these payments were income of the years of their receipt. Accordingly, they dismissed the company's appeal.

I must now set out and consider these provisions of the Income Tax Act.

"Rules applicable to Case III

"1. The tax shall extend to—(a) any interest of money, whether yearly or otherwise, or any annuity, or other annual payment, whether such payment is payable within or out of the United Kingdom, either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract, or whether the same is received and payable half-yearly or at any shorter or more distant periods; . . .

"2.—(1) The tax shall, subject as hereinafter provided, be computed—(a) as respects the year of assessment in which the profits or income first arise, on the full amount of the profits or income arising within that year; and (b) as respects subsequent years of assessment, on the full amount of the profits or income arising within the year preceding the year of assessment; . . .

"(2) Tax shall be paid on the actual amount computed as aforesaid without any deduction."

The remainder of the rules do not appear to be material for the present purpose.

"Rules applicable to Case VI

"1. The nature of the profits or gains, and the basis on which the amount thereof has been computed, including the average, if any, taken thereon, shall be stated to the commissioners.

"2. The computation shall be made, either on the full amount of the profits or gains arising in the year of assessment, or according to an average of such a period, being greater or less than one year, as the case may require . . .

"General Rules applicable to Schedules A, B, C, D and E

"19.—(1) Where any yearly interest of money, annuity, or any other annual payment (whether payable within or out of the United Kingdom, either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract, or whether payable half-yearly or at any shorter or more distant periods), is payable wholly out of profits or gains brought into charge to tax, no assessment shall be made upon the person entitled to such interest, annuity, or annual payment, but the whole of those profits or gains shall be assessed and charged with tax on the person liable to the interest, annuity, or annual payment, without distinguishing the same, and the person liable to make such payment, whether out of the profits or gains charged with tax or out of any annual payment liable to deduction, or from which a deduction has been made, shall be entitled, on making such payment, to deduct and retain thereout a sum representing

A the amount of the tax thereon at the rate or rates of tax in force during the period through which the said payment was accruing due . . .”

B “ 21.—(1) Upon payment of any interest of money, annuity, or other annual payment charged with tax under Sch. D, or of any royalty or other sum paid in respect of the user of a patent, not payable, or not wholly payable, out of profits or gains brought into charge, the person by or through whom any such payment is made shall deduct thereout a sum representing the amount of the tax thereon at the rate of tax in force at the time of the payment.

C “ (2) Where any such payment as aforesaid is made by or through any person, that person shall forthwith deliver to the Commissioners of Inland Revenue, for the use of the Special Commissioners, an account of the payment, or of so much thereof as is not made out of profits or gains brought into charge, and of the tax deducted out of the payment or out of that part thereof, and the Special Commissioners shall assess and charge the payment of which an account is so delivered on that person.

D “ (2A) The Special Commissioners may, where any person has made default in delivering an account required by this rule, or where they are not satisfied with the account so delivered, make an assessment according to the best of their judgment, and if any person neglects or refuses to deliver an account so required, he shall forfeit the sum of £100 over and above the tax chargeable.”

E It will be convenient first to assume that these payments were annual payments within the meaning of Case III and to consider whether, on that assumption, r. 21 can be applied to them. It was argued, I think rightly, that r. 21 cannot be applied to payments made by the Crown. I do not base my opinion on any presumption or general rule as to applying to the Crown statutory provisions which do not bind it either expressly or by clear implication. In my view, an examination of the provisions of r. 21 shows that these provisions cannot be applied, and can never have been intended to apply, to the Crown. Rule 19 deals with annual payments, etc., “ payable wholly out of profits or gains brought into charge to tax ”, and r. 21 deals with payments “ not payable, or not wholly payable, out of profits or gains brought into charge ”. Neither expression appropriately describes payments out of money provided by Parliament, and, moreover, in all ordinary cases the Crown has other authority for deducting tax in making income payments. It can only be in a most exceptional case that the Crown would have to rely on r. 21 as its only warrant for deducting tax. It is plain that between them r. 19 and r. 21 are intended to cover all cases of annual payments, etc., made by a taxpayer. Under both there is provision for deducting tax when making the payment, but the purpose is quite different according to whether or not the money which is paid has already borne tax. If it has, then the Crown has no interest because the same money is not to be taxed twice, and the authority to deduct tax is for the purpose of enabling the taxpayer to recoup himself when he has already paid tax on the money which he has now to pay away; and the payee has to submit to this deduction of tax because it ought in the end to fall on him. But if the money has not borne tax, then the Crown has an interest because the money becomes on payment a part of the taxable income of the payee. So the payer is bound to deduct tax and to pay it to the Revenue. Rule 21 operates not as an authority to deduct tax but as an obligation to do so and to account to the Revenue for the tax deducted, and the whole purpose of r. 21 appears to me to be to enable the Revenue to recover from the payer tax which is really due by the payee. That, I think, appears even more clearly from the original form of r. 21 which first appeared as s. 24 (3) of the Customs and Inland Revenue Act, 1888. Before then a payer of interest, etc., out of money which had not borne tax was under no obligation to deduct tax, and the tax was payable by the payee, but provisions authorising the payer to retain tax out

of money which had already borne tax so as to recoup himself go back to 1842. A
Section 24 (3) of the Act of 1888 provided that, on payment of interest, etc., not
payable, or not wholly payable, out of profits brought into charge, the payer

“... shall deduct thereout the rate of income tax in force at the time of
such payment, and shall forthwith render an account to the Commissioners
of Inland Revenue of the amount so deducted ... ; and such amount shall B
be a debt from such person to Her Majesty, and recoverable as such
accordingly ... ”

In my opinion, it would need not interpretation but complete redrafting to turn
that provision or its modern equivalent into an authority to the Crown to deduct
tax when making payments out of moneys provided by Parliament.

Two questions now arise. Can Case III apply to payments which do not C
come within either r. 19 or r. 21, and, if it can, is the nature of the payments
in this case such that Case III should be applied to them? The Court of Appeal
answered the first of these questions in the negative but they gave no reasons,
and I do not see why Case III cannot be applied if the nature of the payments
is such that, apart from this point, they would come within the scope of that Case.
I would agree with the Court of Appeal if direct assessment were impossible D
under Case III, either because the rules of Case III are inadequate or for any other
reason, but it was not argued that there can never be direct assessment under
Case III. Moreover, r. 19 and r. 21 are not linked with Case III in the Act; they
appear among the General Rules applicable to All Schedules. It is true that all
but the most unusual cases under Case III, r. 1 (a), do fall within either r. 19 or
r. 21, but that does not seem to me to mean that these rules must be held to E
control the applicability of Case III, r. 1 (a). So I pass on to consider whether
the nature of these payments is such that Case III cannot apply to them.

It was argued that the decision of this House in *Inland Revenue Comrs. v.*
Butterley Co., Ltd. (1) showed that these payments are unique in character and
that, therefore, they cannot be annual payments within the meaning of Case III. F
“Annual payment” must, it is said, be read in its context, and must in some way
resemble or be ejusdem generis with interest or annuities, but these payments
are sui generis. That argument appears to me to be no more than a play on
words. One must look at the true nature of the payments. It is well recognised
that many payments which in the ordinary sense of the words might well be G
called annual payments do not come within Case III. One limitation is that
Case III only applies to payments received as pure profit income; that is because
no deductions are permitted under Case III. And further, the payments must
recur, or at least be of a recurring character. I think that the payments in this
case comply with both these requirements.

An argument was submitted to the effect that these payments were not
received as pure profit income of the company because there ought, on proper H
accounting principles, to be an allowance in respect of deductions, i.e., expenses
necessary to “earn” or achieve these payments. But any such argument must
be based on facts, and there are no facts in the Stated Case to support it. On the
contrary, para. 2 of the Case, which I have already quoted, clearly shows that
this point was never raised before the commissioners. In my opinion, we cannot
do otherwise in this case than regard these payments as pure profit income.

I
On the matter of recurrence, the Court of Appeal drew a distinction between
those payments which were made under s. 22 (2) of the Act of 1946 and the others,
but I do not think that there is room for any such distinction. All the payments
were payments of “interim income” under s. 19 of the Act of 1946, and they
should, in my view, be regarded as a single series of payments although their
amounts were determined by different provisions of the Acts of 1946 and 1949.

(1) [1956] 2 All E.R. 197; 36 Tax Cas. 411.

A Otherwise I agree with the opinion of the Court of Appeal that the requirements of Case III are satisfied in the case of these payments.

If I am right so far, the decision of this case depends on the proper interpretation of Case III, r. 2, which enacts the method of assessment of Case III payments. Under that rule, the income of any year of assessment is the "income arising" during either that year or the previous year, and I may add that, if the payments were held to fall within Case VI, substantially the same question would arise because there the words "profits or gains arising" would have to be construed. To my mind, the most difficult question in this case is to determine the meaning of these two words "income arising". Do they include only money which has been received, or do they also include money which is due and payable but has not yet been received, or money which has accrued but is not yet payable?

B Most of the argument on this point turned on the meaning of the word "arising", but I do not think that that is the most important word. No income can arise before there is any income, and as soon as there is income the income has arisen. The word "income" appears to me to be the crucial word, and it is not easy to say what it means. The word is not defined in the Act, and I do not think that it can be defined. There are two different currents of authority. It appears to me to be quite settled that, in computing a trader's income, account must be taken of trading debts which have not yet been received by the trader. The price of goods sold or services rendered is included in the year's profit and loss account although that price has not yet been paid. One reason may be that the price has already been earned and that it would give a false picture to put the cost of producing the goods or rendering the services into his accounts as an outgoing but to put nothing against that until the price has been paid.

E Good accounting practice may require some exceptions, I do not know, but the general principle has long been recognised. And if in the end the price is not paid it can be written off in a subsequent year as a bad debt.

But the position of an ordinary individual who has no trade or profession is quite different. He does not make up a profit and loss account. Sums paid to him are his income, perhaps subject to some deductions, and it would be a great hardship to require him to pay tax on sums owing to him but of which he cannot yet obtain payment. Moreover, for him there is nothing corresponding to a trader writing off bad debts in a subsequent year, except perhaps the right to get back tax which he has paid in error. The case has often arisen of a trader being required to pay tax on something which he has not yet received and may never receive,

G but we were informed that there is no reported case where a non-trader has had to do this, whereas there are at least three cases to the opposite effect—*Lambe v. Inland Revenue Comrs.* (2); *Dewar v. Inland Revenue Comrs.* (3), and *Grey v. Tiley* (4), and I would also refer to what was said by LORD WRENBURY in *St. Lucia Usines & Estates Co., Ltd. v. St. Lucia (Colonial Treasurer)* (5). I certainly think that it would be wrong to hold now for the first time that a non-trader to whom money is owing but who has not yet received it must bring it into his income tax return and pay tax on it. And for this purpose I think that the company must be treated as a non-trader, because the *Butterley* case (6) makes it clear that these payments are not trading receipts.

H

I I would not put it that there is any general or universal principle that sums not yet paid must or must not be brought into assessment to income tax. There are two quite different cases. Traders pay tax on the balance of profits and gains and bring money owed to them into account in striking that balance, but ordinary individuals are not assessable and do not pay tax until they get the money, because until then it is not part of their income. There may well be difficult

(2) [1933] All E.R. Rep. 417; 18 Tax Cas. 212.

(3) [1935] All E.R. Rep. 568; 19 Tax Cas. 561.

(4) (1932), 16 Tax Cas. 414. (5) [1924] A.C. 508.

(6) [1956] 2 All E.R. 197; 36 Tax Cas. 411.

border-line cases which do not clearly fall into either of these classes, and I do not attempt to foresee how that should be decided, but the payments in this case being pure profit income and not being trading receipts must, I think, be put in the second of these classes. Part of these sums accrued during the years 1946-47 and 1947-48, but, in my view, the company could not have been assessed and required to pay tax on amounts which accrued during those years but had not been paid when the assessment was made even if the exact amount which had accrued could have been determined. But then it was argued that, although payment of tax could not have been demanded before the sums were received, now that they have been received they can be spread back over the years during which they were accruing. I would willingly accede to that argument if I saw anything in the Income Tax Acts which I thought would warrant it. In a case where the whole or parts of money received during one year had become due and payable in one or more earlier years there is much to be said for the view that, although no part of it can be taxed until it is received, it ought when taxed to be spread back and regarded as income of the year or years when it became due; a debtor ought not to be able to alter his creditor's liability for surtax by delaying payment of his debt. There is some authority for holding that that was the effect of s. 5 (3) (c) of the Act of 1918. But that has now been superseded. On one view, s. 39 (1) of the Finance Act, 1927, achieves the same result in the case of payments to which r. 19 applies. But in the case of payments to which r. 21 applies spreading back has clearly been excluded by s. 39 (2) of the Act of 1927. It was not argued that the appellants could, in the present case, derive any advantage from s. 34 of the Act of 1927. And there appears to be no provision expressly dealing with payments to which neither r. 19 nor r. 21 applies. In the present case, it appears to me that any authority for spreading back these payments would have to be inferred from the terms of the rules of Case III. I have already stated my view that, in this case, no income arose until the money was received, and I cannot see how receipt of the money can alter the meaning of "income arising" so as to make it possible after receipt to hold that income arose not at the date of receipt but at some earlier date. And if the income had not arisen in the earlier year I can find no ground for taxing it as part of that earlier year's income.

But even if it were possible to spread income back to the years when it became due and payable, that would not cover the present case. In the present case, the income can be regarded as accruing during the earlier years, but I do not think that it can be regarded as having become due and payable then in the sense that the company could have demanded payment then. I can find nothing on which to base an inference that income, once it has been received, can be regarded as having arisen not only before it was received but even before it was payable and while it was merely accruing. For these reasons I must hold that these payments were income arising at and not before the dates when they were received by the company and, therefore, these appeals should be dismissed.

LORD RADCLIFFE: My Lords, these appeals raise two questions as to the determination of income for the purposes of the Income Tax Acts. One seems to me to be mainly of technical or administrative significance; the other is of considerable general importance. The first question is whether the various sums of money paid to the appellants under the Coal Industry Nationalisation Act, 1946, s. 22 (2) (a) or s. 22 (3), or the Coal Industry (No. 2) Act, 1949, s. 1 (2), were assessable under Case III or Case VI of Sch. D. It is not in dispute that they are taxable income under one or other of those heads. Following on a decision between these two cases, certain arguments are developed for or against the substantial question in issue, whether, for the purposes of the surtax direction which has been made under s. 21 of the Finance Act, 1922, as extended by s. 14 of the Finance Act, 1939, the income of the appellants is to be computed on the basis that each payment forms part of the income of the revenue year in which it was

A received or, alternatively, is to be written back, when received, over the years in respect of which it was paid.

Under r. 1 of the Rules applicable to Case III, the subject of charge is "any interest of money, whether yearly or otherwise, or any annuity, or other annual payment". The payments with which we are concerned are payments of what the statute calls "interim income"; they take the form either (i) of a "revenue payment" for each of the calendar years 1947 and 1948 equal to one half of the comparable ascertained revenue of the concern before nationalisation, or (ii) of a payment for 1949 and subsequent years of a further calculated sum based on the amount by which one-third of the comparable ascertained revenue might exceed interest on any sum of compensation satisfied before the end of the year, or (iii) of a sum "equal to interest" from the vesting date (Jan. 1, 1947) to the date on which any compensation was paid or satisfied, so far as not covered by the other two forms of interim income. I do not think it necessary or useful to dwell on the details of these complicated and barely intelligible provisions. It is sufficient to say that all the payments made represented some form of compensation, in the form of interim income, for the fact that, as from Jan. 1, 1947, the concern had been dispossessed of its assets, the use and benefit of which passed to the Crown, and, until compensation in money or stock was provided had been left without the means of earning an equivalent income from the employment of the compensation. Nor do I think it useful to distinguish between the various forms which these payments of interim income took according to the different statutory rules which were their warrant. None of them, in my view, constituted "interest of money" or an "annuity" for the purpose of Case III of Sch. D.

E It is much more difficult to say whether any of them constituted an "other annual payment" under this Case.

Neither the Acts nor the courts have supplied any definition of these words, "other annual payment". There is authority for saying that "the category is quite a limited one" (*Re Hanbury, Coniskey v. Hanbury* (7)). There is ample authority for saying that not all payments that are made annually are annual payments under Case III (*Earl Howe v. Inland Revenue Comrs.* (8); *Hill v. Gregory* (9)). The reason for limitation lies in the fact that, for the courts, Case III annual payments have been inseparably associated with payments from which tax is deductible in accordance with General Rules 19 or 21, and it has been thought to be inconsistent with the idea of tax being deducted at the source at the standard rate to allow within the Case payments that are likely to be gross receipts of the payee and not "pure income profit". Although this distinction may be a good general guide in determining the scope of Case III, it does not in all circumstances throw a very certain light on the duty of the payer, who is not necessarily in a position to know whether or not the sum he pays will be treated as "pure income" or a gross receipt in the computation of the payee's tax.

H That, in itself, perhaps, argues for a restricted interpretation of the words "annual payment". The word "annual" has not been found to admit of any significant interpretation. To the courts it means no more than "recurrent"—see, e.g., *Moss' Empires, Ltd. v. Inland Revenue Comrs.* (10)—or even "capable of recurrence". That may be so; but I think that it would be both bad logic and bad law to deduce that, merely because a payment is in fact recurrent or capable of recurrence, it is, therefore, to be treated as an annual payment.

I In the end, the question what is or is not such a payment is a question of judgment formed in the light of the considerations that I have alluded to. On the whole, I should not regard these payments as coming within the description. Although they could and were, indeed, likely to recur in the sense that several payments might well be so called for before full compensation was provided, they were essentially the temporary product of an exceptional measure

(7) (1939), 20 A.T.C. 333. (8) (1919), 7 Tax Cas. 289. (9) (1912), 6 Tax Cas. 39.

(10) [1937] 3 All E.R. 381; 21 Tax Cas. 264.

of state expropriation. The income provided was in that respect casual. Such temporary and casual incomes appear to me to fit less naturally into Case III, with its interest of money, annuities and other annual payments, than into Case VI, which has always been regarded as the Case that covers what I may call the oddities of Sch. D. To my mind, this interim income presents itself as just one of these oddities; and in any choice between the claims of Case III and Case VI, I would favour the claims of the latter.

There is another independent reason for preferring Case VI. That is the reason which determined the judgment of the Court of Appeal on this point. Your Lordships are at one, I believe, in holding that neither r. 19 nor r. 21 of the General Rules is so expressed as to be capable of requiring or authorising the deduction of tax from these payments made by the Crown. I agree with that, and I need not recite my reasons separately. If so, not only are the payments not income "chargeable with income tax by way of deduction", with the consequence that s. 39 (2) of the Finance Act, 1927, has no application at all and provides no rule to determine the year to which they are to belong as income; but also there is at any rate strong *prima facie* ground for saying that payments for which the tax scheme provides no deduction at source are not annual payments within the meaning of Case III. For, as is indicated by the decisions to which I have referred, the courts have tended to treat liability to deduction at source as affording a distinguishing mark of a Case III annual payment; and if, here, the freedom from deduction would be due not so much to the nature of the payment as to the accident that it is made by the Crown itself and not by a subject, that circumstance serves only to reinforce the point already made that these interim payments are an exceptional form of income for which the regular scheme of the Income Tax Acts has made no provision.

I turn now to the important question whether the sums paid are bound by law to be treated as income of the revenue year in which they were received, regardless of the fact that some or all of them were avowedly paid by the Crown as income of periods preceding the revenue year of receipt. It is sufficient to take as an illustration payments 1, 2 and 9 itemised in para. 4 (1) of the Case Stated (11). These payments cover the interim income to which the appellants were entitled in respect of the calendar years 1947 and 1948; they were made under s. 22 (3) (a) of the Act of 1946 which itself describes the payments as due "in respect of" those two years; and in each case they were accompanied by an official letter identifying the period to which they related. In the most obvious sense they represented income of the three revenue years 1946-47, 1947-48 and 1948-49, and were due to be apportioned between those years accordingly. Yet because the first payment (in respect of the eighteen months to June 30, 1948) was not made until Aug. 7, 1948, nor the second payment (in respect of the half year ended Dec. 31, 1948) until Jan. 26, 1949, the Crown claims that these two payments must be allocated wholly to the revenue year 1948-49; and because the third payment was made on May 25, 1951 (as a further payment in respect of the two years ended Dec. 31, 1948), it is similarly claimed as income of the revenue year 1951-52, with which, if I may be pardoned for begging the question, it has nothing in the world to do.

Only one or two further points need to be noticed. Neither the Act of 1946 nor the Act of 1949 fixed a date of payment for the compensation due by way of interim income. It was left to the Crown to make its payments as and when it could or would, due allowance being made for the vast administrative task involved in ascertaining and checking the multifarious compensation claims to which nationalisation gave rise. Secondly, if the argument of the Revenue on this appeal is well founded, the dates actually selected for payment have led to the most unfortunate "bunching" of assessable income for the purposes of surtax, no income at all, for instance, being attributable to the revenue year 1947-48.

(11) See p. 709, letters D to G, ante.

- A Surtax is a steeply progressive tax and in connexion with it bunching of income is always to be regretted, since it is much to the detriment of any taxpayer with a high marginal rate. I do not make any apology, therefore, for saying that I should be sorry if I thought that the Revenue's claim was well-founded in law. I am of opinion that it is not. I think that it is both right in principle and in accordance with previous authority to attribute these various payments to the
- B years or parts of years in respect of which they were paid. To take one instance, I think that the first payment of £9,068 (wrongly paid net of income tax) should be distributed between the three years 1946-47, 1947-48 and 1948-49.

It is not easy to give an account of my reasons for this conclusion without burdening the House with an opinion of altogether immoderate length. I believe, however, that the substance of them can be conveyed by the following

C propositions, for whose brevity of statement I apologise.

- (i) In computing profits or gains or other income chargeable under Sch. D for any year the basis of computation is the income that "arose or accrued" during that year. The year in which a payment is actually received is not necessarily the year in which the income which it represents arose or accrued.
- D (ii) There is no fundamental or general principle of income tax law that the year in which a payment is made must be taken to be the year to which the assessable income belongs. On the other hand, there may be special statutory rules that do secure just this result, as, for instance, the provision made by s. 39 (2) of the Finance Act, 1927, that, in estimating total income, income chargeable with tax by way of deduction at the standard rate in force for any year is to be deemed to be income of that year. This rule could be very injurious to the taxpayer,
- E but it was evidently intended that it should not operate to the injury of the payer of supertax or surtax, since, by s. 34 of the same Finance Act (see, now, s. 238 of the Income Tax Act, 1952) he is allowed to spread any income affected by the rule as if it accrued from day to day; nevertheless, where the rule applies, *cadit quæstio*. But then there arises this dilemma; if this would have been the legal result
- F anyway according to general principle, why introduce the rule in 1927 with regard to the special class of payments made under deduction? And why, if there was such a principle, had r. 19 of the General Rules provided until s. 39 (1) was enacted that tax was to be deducted "at the rate or rates of tax in force during the period through which the payment was accruing due"? Lastly, does s. 34 of the Act of 1927 represent a principle or an exception from a principle?
- G (iii) Subject to the operation of any such special rules, when a payment is received in one year and it can be clearly seen that it ought to be treated as income arising in another year, the law not only permits but requires that it should be attributed to that other year. This principle has been frequently acted on in the case of traders—see *Isaac Holden & Sons, Ltd. v. Inland Revenue Comrs.* (12); *Lambert Bros., Ltd. v. Inland Revenue Comrs.* (13); *Ensign Shipping Co., Ltd. v. Inland Revenue Comrs.* (14)—and has twice received the indorsement
- H of this House—see *Newcastle Breweries, Ltd. v. Inland Revenue Comrs.* (15); *Gardner, Mountain & D'Ambrumenil, Ltd. v. Inland Revenue Comrs.* (16).
- (iv) In the case of trading income the ordinary test for determining the year to which a payment "belongs" is to ascertain the year in which it was "earned" or in which entitlement to the payment arose. As VISCOUNT CAVE, L.C., said in
- I the *Newcastle Breweries* case (17):

"The rum was taken in 1918, and the right to some payment arose at once, though there was delay in ascertaining the amount to be paid."

The present case reproduces that situation precisely; but it is so much the

(12) (1924), 12 Tax Cas. 768. (13) (1927), 12 Tax Cas. 1053.
 (14) (1928), 12 Tax Cas. 1169. (15) [1927] All E.R. Rep. 287; 12 Tax Cas. 927.
 (16) [1947] 1 All E.R. 650; 29 Tax Cas. 69.
 (17) [1927] All E.R. Rep. at p. 292; 12 Tax Cas. at p. 953.

clearer as to the date of entitlement in that the Nationalisation Act itself prescribed the date from which the right to payment arose and the periods of time to which each payment of income was to relate.

(v) The principle applied in the cases I have just mentioned is not attributable to any special quality of trading income or other income chargeable under Case I or Case II. There is no relevant distinction involved in the fact that Case I income is computed on the "balance" of the profits or gains. What distinction could that be? To put it in its simplest form, the balance is merely the gross receipts less the expenses, and it is the excess of those receipts that is brought to charge. Case II income is not described as computable on the "balance". Yet if a professional income is computed on the basis that debts are receipts, as nearly all such incomes are today, is not the same principle to be applied?

(vi) Neither is it a relevant distinction that, in computing Case I income, trade debts are habitually treated as receipts. The suggestion which appears in *Try, Ltd. v. Johnson* (18) that this practice, which governs a very considerable slice of the total tax yield, is somehow an anomaly because a departure from a fundamental conception of income tax legislation that profits are ascertained in reference to receipts, is, with great respect to the learned Master of the Rolls who made it, a misconception. For this purpose, trade debts are receipts. The truth, as I understand it, is that very long ago it was accepted by traders that to measure receipts by trade debts rather than by cash incomings gave a truer measure of the year's profit income. I hope that it is not pedantic to point out that in our economy there are few payments that amount to anything more than transfers of debts. I do not think that appreciation of the fact that some debts are equivalent to receipts need be confined to traders or professional men, but obviously such a method of computation can have only a limited application to other forms of income—see, e.g., *Lambe v. Inland Revenue Comrs.* (19). I should myself have thought that Crown debts created by statute were a sufficiently solid category and that we need not look for an allowance for bad debts. But no part of this interesting question is directly in point here.

(vii) The proof of what I have said lies, I think, in the fact that in none of the cases in which the principle of "writing back" was applied was this principle based by the court on any practice of computing income that was peculiar to traders or even on the supposition that, at the close of the year in which the profit was held to have arisen, anything could have been entered as a receipt in respect of the right to, or the expectation of, the future payment which ultimately matured. Such a point is simply not noticed as relevant. It was relevant, of course, that the payment made had its origin in a trading transaction or a transaction analogous to trade, because otherwise the receipt would not have been taxable at all. But that is a different point. In fact, in two of the cases, there was no debt—merely an uncovenanted payment—see, e.g., *ROWLATT, J.*, in the *Isaac Holden* case (20): "It was uncertain whether they would ever receive more at that time: they certainly had no right to demand more", and the remarks of *VISCOUNT SIMON* in the *Gardner, Mountain* case (21). In my opinion, therefore, it is not only safe but necessary to treat these decisions as directed wholly on the general principle of relating back payments made in one year to the year or years in which the income which they represent can be seen to have arisen. They are decisions on the meaning or rather on the application of the word "arising" in connexion with Sch. D.

(viii) There have been other decisions which have more or less bearing on the present issue. In *Hawley v. Inland Revenue Comrs.* (22), *ROWLATT, J.*, decided

(18) [1946] 1 All E.R. at p. 539; 27 Tax Cas. at p. 181.

(19) [1933] All E.R. Rep. 417; 18 Tax Cas. 212.

(20) (1924), 12 Tax Cas. at p. 772.

(21) [1947] 1 All E.R. at p. 653; 29 Tax Cas. at p. 93.

(22) (1925), 9 Tax Cas. 331.

- A a supertax appeal relating to two payments covering several years' income in accordance with the principle of "spreading"; in *Grey v. Tiley* (23), he decided a case, not obviously distinguishable, in accordance with the principle of "bunching". The latter case was settled by the Crown before it was heard by the Court of Appeal. His decision in *Grey v. Tiley* (23) was, he thought, required by his own earlier decision in *Leigh v. Inland Revenue Comrs.* (24), a case which in fact turned
- B on the meaning of the word "receivable" in the Income Tax Act, 1918, s. 5 (3) (c), the section which was repealed to make way for new provisions in 1927. But *Leigh's* case contains a passage (25) about "receivability without receipt for the purpose of income tax" being "nothing at all", which is, in my view, too widely expressed. In any event, the proposition is of no assistance when the situation is reached that money has been received and the question has then to be answered
- C in which revenue year it should be treated as arising. It is not then of any significance to ask whether there could have been an assessment on some debt or estimated claim at the close of the earlier year. Lastly, in *Inland Revenue Comrs. v. Earl of Haddington* (26), the converse case of a single deductible payment out of income was treated by the Court of Session as due to be "spread" over the two years to which it related. This, too, was a decision which turned
- D primarily on the meaning of the word "payable" in the tax legislation relating to Scotland.

(ix) It is evident to me that in some cases the argument against spreading has been thought to rest on or be supported by a supposed principle of income tax law that, at the close of the year of charge, the taxpayer is entitled to "know where he is" and to expect a final clearance of tax according to the ascertained

E results of the year—see *Try, Ltd. v. Johnson* (27); *Grey v. Tiley* (23). I can make little of this general principle anyway under a system which allows additional assessments and less of it in relation to the realities of current practice in dealing with the complexities of industrial, commercial and personal incomes in the modern economy. But, however that may be, I imagine that this solicitude would readily be foregone by a taxpayer in favour of getting his true income

F fairly distributed over the appropriate tax years, and he would think his peace of mind bought at altogether too dear a price, if the cost of it proved to be a quite fortuitous surcharge on his tax bill.

I am in favour of allowing the appeals.

- G **LORD KEITH OF AVONHOLM:** My Lords, I would place the payments here in question within Case III of Sch. D to the Income Tax Act, 1918, as coming under the description of "other annual payment" in r. 1 (a) of that Case. The fact that they owe their origin to statutory enactment, which is not a source specifically recognised by the rule, does not, for the reasons stated by HARMAN, J., and the Court of Appeal, exclude them from coming within the rule (*Smith v. Smith* (No. 2) (28); *Inland Revenue Comrs. v. City of London Corpn. (as the Conservators of Epping Forest)* (29)). The nature of the payments as prescribed
- H by s. 19 and s. 22 of the Coal Industry Nationalisation Act, 1946, and s. 1 of the Coal Industry (No. 2) Act, 1949, brings them, I think, easily under the rule. They are expressly described in s. 19 of the Act of 1946 as "interim income". Section 22 fixes the measure by which that interim income is to be quantified. It is clear that that income was going to be paid for at least two years. Its
- I complete and final quantification and so its full satisfaction might have to be postponed, but there would at least be substantial payments to account. I can draw no distinction between the payments under sub-s. (2) and sub-s. (3) of s. 22. They are complementary to one another, and in certain events sub-s. (2) may not be invoked at all. Where both are invoked, each makes its respective

(23) (1932), 16 Tax Cas. 414.

(24) (1927), 11 Tax Cas. 590.

(25) (1927), 11 Tax Cas. at p. 595.

(26) (1924), 8 Tax Cas. 711.

(27) [1946] 1 All E.R. 532; 27 Tax Cas. 167.

(28) [1923] P. 191.

(29) [1953] 1 All E. R. 1075; 34 Tax Cas. 293.

contribution to the interim income provided for by s. 19 of the Act. The "revenue payments" under s. 22 (3) (a) of the Act of 1946 may be regarded as an instalment to account of the money payment calculated under s. 22 (2) (a), although for the years 1947 and 1948 there was to be no recoupment in the event of the "revenue payments" being found to have exceeded the sum calculated, under that subsection, as satisfying the right to interim income. It may be true to say, as the Court of Appeal have said (30), that it is difficult to discern the quality of recurrence in the payment made under sub-s. (2) (a), but as the subsection is part of the machinery for fixing the "interim income" and filling any deficiencies of amount resulting after payment of the "revenue payments" under sub-s. (3), I think the payment made under it should be regarded as part of an annual payment. The circumstances here seem to me to be every bit as potent to bring these payments under the words of r. 1 (a) of Case III as were the circumstances in *Moss' Empires, Ltd. v. Inland Revenue Comrs.* (31) to make the payments under guarantee in that case so chargeable. With this qualification I would agree with the Court of Appeal that these payments have the characteristics required of "other annual payments" under r. 1 of Case III. There is nothing, in my opinion, in the decision of this House in *Inland Revenue Comrs. v. Butterley Co., Ltd.* (32) to preclude that conclusion.

If, then, these payments came under r. 21 of the General Rules of the Income Tax Act there would be a simple end to this case. Tax would be deducted from the payments at the rate of tax in force at the time of the payments as being annual payments charged with tax under Sch. D and not payable out of profits or gains brought into charge. By s. 38 of the Finance Act, 1927, the tax deducted would be tax at the standard rate, and by s. 39 (2) of the same Act the payments would be treated as income of the year in which the deduction was made, i.e., of the year in which the payments were received by the appellants. The appeal of the appellants would be dismissed and the order of *HARMAN, J.*, reversing the determination of the Special Commissioners would stand affirmed.

The contention, however, of the appellants is that r. 21 does not apply to the Crown and that, accordingly, the payments being payments by the Crown do not come under the rule. Rule 21 stems from s. 40 of the Income Tax Act, 1853, which "entitled" and "authorised" the payer to deduct the tax at the time of payment. Had the rule continued in this form, I can see no reason why the Crown equally with the subject should not have deducted tax from such payments. The section did not, however, compel the deduction of tax, and *LORD MACNAGHTEN* in *L.C.C. v. A.-G.* (33), also thought that it did not compel the payer to account to the Crown for the tax if deducted, though *LORD DAVEY* in the same case took, I think, a different view on this point. Section 40, though not expressly repealed, was, in effect, replaced by s. 24 (3) of the Customs and Inland Revenue Act, 1888, which directed that

"... the person by or through whom such interest or annuities shall be paid shall deduct thereout the rate of income tax in force at the time of such payment, and shall forthwith render an account to the Commissioners of Inland Revenue of the amount so deducted...; and such amount shall be a debt from such person to Her Majesty, and recoverable as such accordingly..."

The rule as so modified was carried into the Income Tax Act, 1918 (which also repealed the Act of 1853 and s. 24 of the Act of 1888). The Finance Act, 1927, made certain amendments for reinforcing the machinery for recovery of tax so deducted and, in its amended form, is the rule now under consideration. One, if not the main, reason for the amendment, was to place a direct assessment on the payment

(30) [1958] 2 All E.R. at p. 106; [1958] Ch. at p. 821.

(31) [1937] 3 All E.R. 381; 21 Tax Cas. 264.

(32) [1956] 2 All E.R. 197; 36 Tax Cas. 411.

(33) (1900), 4 Tax Cas. at pp. 296, 299.

- A and so secure priority of ranking in bankruptcy or liquidation which would not have been available to a mere debt due to the Crown. My Lords, it seems strange that a rule, which in its original form would, I think, have entitled the Crown to deduct tax, should, when strengthened for the protection of the Crown, by improving the machinery for the recovery of the tax, cease to apply to the Crown. Much, I think, might be said for the view that what was compulsory
- B on the subject was permissive to the Crown and that, if the Crown deducted tax, the other directives of the rule became clearly inoperative, because the circumstances for their operation could never arise. But I find it unnecessary to pursue this line further as your Lordships take the view that r. 21 cannot be invoked by the Crown. I am content to proceed on this view.

- C It is then contended by the company, r. 21 being out of the way, that the payments fall to be attributed to the years in respect of which they were paid. As the commissioners made no direction in respect of the year 1947-48 no question in respect of that year now arises. The directions in issue are directions in respect of payments in the years 1948-49, 1949-50 and 1950-51, with reference to which the dispute is whether the year of receipt or the period of accrual is to count. By r. 2 of the Rules applicable to Case III in its original form under the Act of
- D 1918 and in its form as amended by the Finance Act, 1922, tax is to be computed on the amount of income "arising" in a particular year. The word "arising" is to be found in various contexts in the Income Tax Acts. By Sch. C to the Act of 1918 tax is charged "in respect of all profits arising from interest, annuities, dividends, and shares of annuities payable out of any public revenue". It is difficult to see how this can mean anything other than that tax shall be charged on profits
- E from the receipts of interest, etc. If interest is not received there can be no profits. Passing over for the moment the opening paragraph of Sch. D, we find in the Rule applicable to Case II of that schedule that the tax shall extend, *inter alia*, to "all profits and earnings of whatever value arising from employments". "Arising" here might reasonably be taken as referring to the source of the profits and earnings, as also in r. 2, the proviso to r. 4 (1) and r. 5 of the Rules
- F applicable to Cases I and II. Under Case III, which is the material Case here, r. 2 originally provided that the tax should be computed "on the full amount arising" within a particular year. As amended in 1922, the rule provides that the tax shall be computed "on the full amount of the profits or income arising within" certain specified years. As we are concerned here only with tax on
- G any annuity, or other annual payment", I think that, as in Sch. C, the natural reading of r. 2 is to apply it, in the case of income, to income received in the specified years. Rule 1 of Case IV, as amended by the Finance Act, 1926, yields, I think, a similar inference. It is suggested that the rule shows a clear differentiation between income arising and income received. I can see no such distinction. We are faced here again with a computation

- H "on the full amount [of the income] arising in the year preceding the year of assessment, whether the income has been or will be received in the United Kingdom or not, subject in the case of income not received in the United Kingdom"

- I to certain deductions and allowances. Here, also, I think income arising means income received, which in this case means received abroad, and that income received in the United Kingdom is income remitted in some form to the United Kingdom, which could only be from income already received abroad. The same construction falls, in my opinion, to be given under Case V to "income arising from stocks, shares or rents" and "income arising from possessions". More careful consideration, I think, must be given to the words in r. 2 of Case VI, which does not refer to "income arising" but to "the profits or gains arising in the year of assessment". This is a sweeping-up Case charging tax

"in respect of any annual profits or gains not falling under any of [Cases I A to V] and not charged by virtue of any other schedule."

(Schedule D, para. 2.) It is frequently applied to what are called casual profits, or to isolated transactions, but is not necessarily so confined (see *Forth Conservancy Board v. Inland Revenue Comrs.* (34)). While it does not cover the profits of any concern "in the nature of trade" which come under Case I (see definition of "trade" in s. 237), it can be invoked to cover the profits of transactions analogous to trade and other transactions which require the striking of a balance of profits and gains. In such cases the method of assessment may differ from that applied in the case of receipt of a pure income profit. Under Case VI, the words "profits or gains arising in the year of assessment" will be apt to cover both. Reference was made for the appellants to s. 35 of the Finance Act, 1926. This section provides for apportionments of profits or gains chargeable under Case I, Case II, r. 4 of Case III or Case VI. The purpose of this section is, I think, clear. It is to provide for the apportionment of profit over a series of years when that has been earned not by activities conducted in one year, but by activities continued over a number of years. This may happen in the exercise of a trade or profession, or business of cattle or milk dealers curiously brought under Case III by r. 4. By association it would seem reasonably clear that the profits and gains under Case VI covered by the section are similar profits and gains of analogous activities assessed under this Case. B C D

The word "accruing" with reference to income or profits and gains is of infrequent use in the Act of 1918. Paragraph 1 (a) of Sch. D provides that tax shall be charged in respect of annual profits or gains arising or accruing to persons "from any kind of property whatever" and "from any trade, profession, employment, or vocation". Paragraph 1 (b) makes no reference to profits or gains arising or accruing. It charges tax directly on E

"All interest of money, annuities, and other annual profits or gains not charged under Sch. A, B, C or E, and not specially exempted from tax."

In this respect it follows closely s. 2, Sch. D, of the Income Tax Act, 1853. To F take up at once the matter of taxation of the profits of a trade or vocation, it is familiar law that, under Cases I and II, with which I think may be classed some instances under Case VI, where profits and gains are ascertained on an earnings basis, a receipt can be related back, for purposes of assessment to tax, to a year prior to the year of receipt. In such case, the receipt is itself not income subject to tax, but a payment to be brought into computation for the purpose of striking a balance of profits and gains of the earlier year. It may in effect result in a G pure profit to the trader or professional or other earner, but that is only if all his expenses have already been allowed for in assessing the profits and gains brought into charge for tax. This practice is not, I think, based in any way on the use of the word "accruing" in para. 1 of Sch. D, which it may be noted is not used in Cases I and II of that schedule, but on a recognition of the method by which H traders and others are accustomed to ascertain their profits for any year. This is no argument for applying such a rule to receipt of a pure income profit. The only other references in the Act of 1918 to accrual of income are in s. 5 (3) (c) dealing with supertax and r. 19 of the General Rules. Section 5 (3) (c) may have been introduced to avoid any difficulties arising from the language of r. 19 in the matter of assessments to supertax. It does not apply any principle of I accrual, but rather supersedes it. It has been considered in some cases to which I refer later, and for the moment I pass to r. 19. This rule in the Act of 1918 authorises deductions from payments of any yearly interest of money, annuity or other annual payment

"at the rate or rates of tax in force during the period through which the said payment was accruing due."

- A That does not help the appellants. The deduction is not an assessment of tax. The rule expressly says so. The rule has an ancient origin dating back to 1803 (43 Geo. III, c. 122, s. 208) when there was only one rate of deduction. The deduction authorised by the Act of 1918 dates from the Customs and Inland Revenue Act, 1864, and remained until changed by s. 39 (1) of the Finance Act, 1927, to the form which at present obtains authorising deduction "at the standard rate for the year in which the amount payable becomes due". In either form it is, in my opinion, of no assistance to the appellants and is in contrast with r. 21 which requires deduction of tax at the rate in force at the time of payment.

- Counsel for the appellants submitted that the general principle (if any) of the Income Tax Acts is to charge income when received in the period in which it was earned or arising. It is for that reason that I have examined in some detail any provisions of the Act of 1918 that may be thought relevant. I have been unable to extract from them any such principle. The inferences, indeed, I think point in the opposite direction. The appellants would seem to be in something of a dilemma. Either they must say that income arising means "income accruing", in which case it should be taxed during each year of accrual, whether received or not; or that it only arises when received and thereafter should be taxed for the years in which it has accrued. The first alternative might be productive in many cases of great hardship and injustice to the taxpayer. The second alternative ignores the twofold difficulty that, if receipt fixes the date of the income arising, the Act says it shall be charged with tax on the amount of that income in the following year and that there is no statutory provision for spreading the income received over the years of accrual. Special provision was made by s. 34 of the Finance Act, 1927, in a case of assessment to supertax, now to surtax, for relief in such a case, but that does not touch the present issue and no reference was made to this section in the course of the argument.

- Several cases were cited touching the meaning of "income arising" under the Income Tax Acts. The one decision which is directly in point on the issue here is the decision of ROWLATT, J., in *Grey v. Tiley* (35), a case of commission earned in one year and partly paid in two instalments in subsequent years. The learned judge held in a case of assessment under Case VI that the instalments fell to be charged in the years of receipt as profits or gains arising in the years. In so holding, he applied the reasoning expressed by him in the earlier case of *Leigh v. Inland Revenue Comrs.* (36). The question there was a different one, being concerned with the measure of liability to supertax under s. 5 (3) (c) of the Act of 1918. The ratio of these judgments was followed in *Lambe v. Inland Revenue Comrs.* (37), by FINLAY, J., and in *Dewar v. Inland Revenue Comrs.* (38), by the Court of Appeal. While these latter cases merely decided that interest which was accruing but had not been received could not be charged to tax, the necessary correlative follows that income assessable to tax only arose when it was received. Against this view some reliance was placed on the judgments in *Simpson v. Maurice's Exors.* (39) and *Inland Revenue Comrs. v. Earl of Haddington* (40). The first of these cases creates, in my opinion, no difficulty. The assessments were there made under Case IV and Case V on the income arising from securities and stocks and shares, belonging to a naturalised and domiciled British subject, which had been paid into certain German banks during the 1914-18 war. None of this income was received in England till 1923. It was held by the Special Commissioner, ROWLATT, J., and the Court of Appeal that the income arose when it was received by the German banks on behalf of the stockholder or his representatives.

(35) (1932), 16 Tax Cas. 414.

(36) (1927), 11 Tax Cas. 590.

(37) [1933] All E.R. Rep. 417; 18 Tax Cas. 212.

(38) [1935] All E.R. Rep. 568; 19 Tax Cas. 561.

(39) (1929), 14 Tax Cas. 580.

(40) (1924), 8 Tax Cas. 711.

The *Earl of Haddington's* case (41) calls for rather more consideration. ROWLATT, J., thought it was in conflict with his decision in *Leigh's* case (42), as did FINLAY, J., in *Lambe's* case (43). Some of the expressions of opinion by the judges in the case could lead to that conclusion. But the case was a very special case. The Earl had succeeded his grandfather as heir of entail in possession to the estate of Tynninghame. His father (Lord Binning) who would have succeeded to the estate had died some five months earlier, on Jan. 12, 1917. On the occasion of his marriage, Lord Binning had, by virtue of the Entail Acts, burdened the entailed estates with a liferent annuity of £2,125 in favour of his widow and also with a provision in favour of the younger children of the marriage. On Lord Binning's death, it was found that the estate was burdened by these provisions to a greater extent than was permissible under the Entail Acts and after his succession to the entailed estate the Earl brought a petition to restrict the annuity of Lord Binning's widow to the sum of £1,627 14s. 1d. and the younger children's provisions to £7,234 5s. This application was granted by an interlocutor of the court dated Nov. 27, 1918, and a bond and disposition in security to secure the children's provisions was granted by the Earl. The position thus was that there had been, since the death of Lord Binning on Jan. 12, 1917, an effective liferent annuity belonging to his widow and secured on the rents of the entailed estate and provisions to the children secured by bond and disposition in security as from the same date. There was no question of Lord Binning's widow or children having waived their rights or of the Earl being unable to satisfy them. The widow and children were in possession of their provisions from the death of Lord Binning with all the rights attached to them by statute. As LORD ORMDALE put it (44) the right to the provisions had vested at the death of the heir-apparent. The widow and children might be said to be domini of the sums in question as they became due, to use an expression used by LORD HANWORTH, M.R., and MAUGHAM, L.J., in *Dewar's* case (45). The question in the case was whether, under s. 66 (2) of the Finance (1909-10) Act, 1910 (the precursor of the original s. 5 (3) (c) of the Income Tax Act, 1918), the sums in question were payable in each year as they accrued or in the year in which they were in fact paid. Owing to the proceedings for restriction which had been taken by the Earl, the first two years' payments were not made till the second fiscal year after Lord Binning's death. He sought to deduct the whole of these payments from his income of that year in order to reduce the supertax exigible from him in that year. The court held that he could only deduct one-half of the payments as the other half must be held to have been payable in the previous year. ROWLATT, J.'s view in *Leigh's* case (42) was that "payable" was the correlative of "receivable" in the same section of the Act and that, as there was no receivability without receipt, there could be no payability without payment. The case is no direct authority on the meaning of "income arising" under any of the Cases, but in *Grey v. Tiley* (46) he clearly regarded the principle of that case as applicable to the meaning of "profits or gains arising" under Case VI. For the reasons I have given, it may be possible to reconcile the *Earl of Haddington's* case (41) with *Leigh's* case (42). But in any event, looking to its specialties, I could not regard it as an apt precedent in support of the appellants' case. Reliance was also placed by counsel for the appellants on *Hawley v. Inland Revenue Comrs.* (47). I find difficulty in discovering the ratio of the decision of ROWLATT, J., in that case. But as the same learned judge in *Grey v. Tiley* (46) had his previous decision in *Hawley* (47) before him, which he found himself able to distinguish, I must assume there is no conflict between the two decisions. His reasoning and decision in *Grey v. Tiley* (46) are perfectly clear and, in my opinion, entirely applicable to the case now under appeal.

(41) (1924), 8 Tax Cas. 711.

(42) (1927), 11 Tax Cas. 590.

(43) [1933] All E.R. Rep. 417; 18 Tax Cas. 212.

(44) (1924), 8 Tax Cas. at p. 723.

(45) [1935] All E.R. Rep. at pp. 573, 578; 19 Tax Cas. at pp. 573, 580.

(46) (1932), 16 Tax Cas. 414.

(47) (1925), 9 Tax Cas. 331.

- A Other cases were cited but, except for the decision of the Privy Council in *St. Lucia Usines & Estates Co., Ltd. v. St. Lucia (Colonial Treasurer)* (48), I find them of little help on the point at issue here. The *St. Lucia* case (48) was decided on the words "income arising or accruing" in a Colonial Ordinance. It was held that no income arose or accrued until receipt. This decision is in line with the reasoning of ROWLATT, J., FINLAY, J., and the Court of Appeal in the cases
- B already cited.

In the result, I have come to the opinion that the payments received by the appellants were income of the year in which they were received and as such were subject to direction and apportionment under s. 21 of the Finance Act, 1922.

- C The Court of Appeal took the view that the payments fell within Case VI of Sch. D. That was mainly because they thought that the only annual payments to which Case III, r. 1 (a), could apply were payments from which deduction of tax could be made under r. 19 or r. 21. They also pointed out that certain payments from public funds were separately provided for in Case III. I do not find these considerations compelling. If the payments are of the character that would bring them under r. 19 or r. 21 if made by any person or body other than the Crown, I do not see how they lose their character by the accident that the person
- D liable to pay happens to be the Crown. The payments from public funds dealt with in Case III are small payments not exceeding fifty shillings and interest on exchequer bonds and other securities issued under the authority of the Treasury or under the War Loan Acts during the 1914-18 war, from which tax was not deducted at the source. Special considerations applying to such payments which have put them into Case III and not into Sch. C seem to me to have no
- E bearing on the question of what is the appropriate Case for the payments here under the Coal Industry Nationalisation Act. But this difference of view is, in my opinion, immaterial. Treated as coming under Case VI they would still, in my opinion, for the reasons I have tried to express, be income arising in the year of payment (49). It is said, however, that, as the appellants have not received the tax deducted, the deductions cannot, on the view that income only
- F arises when received, be held to be the income of the appellants. This submission is more ingenious than sound. Income for the purpose of the Income Tax Acts is gross income whether paid with or without deduction of tax. If r. 21 had applied to the tax deducted here the income that arose would still have been the gross income. It is because it is the taxpayer's income that tax is deducted from it. The same, in my opinion, applies here. This contention
- G was rejected and, I consider, rightly rejected by the Court of Appeal.

I would dismiss these appeals.

Appeals dismissed.

Solicitors: *Tamplin, Joseph & Flux*, agents for *Darling, Heslop & Forster*, *Darlington* (for the appellants); *Solicitor of Inland Revenue*.

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

LONDON LIBRARY v. CANE (VALUATION OFFICER) AND ANOTHER.

[COURT OF APPEAL (Hodson and Ormerod, L.J.J., and Wynn-Parry, J.), October 12, 13, 14, November 4, 1959.]

Rates—Exemption—Literary society—Purposes of literature exclusively—“Annual voluntary contributions”—Subscription library—Benefit confined to members—Whether instituted for purposes of literature exclusively—What were annual voluntary contributions—What proportion sufficient to make society one supported in part by such contributions—Scientific Societies Act, 1843 (6 & 7 Vict. c. 36), s. 1.

The charter of the London Library recited that: “... ‘The London Library’ was established in the year 1841 by Thomas Carlyle and other eminent persons... to supply the great want in London of a library embracing every department of literature and philosophy and from which books might be taken for use by members to their own homes”. The tangible advantages of membership were restricted to members and neither in the bye-laws nor in circulars to members was any concern displayed as to what use they made of the books. The income of the library included legacies and income from investment funds created by legacies; it enjoyed rental relief attributable to donations and legacies of members applied to building costs, and it received gifts of books. It claimed to be entitled to exemption from rates under the Scientific Societies Act, 1843, s. 1*, as a society “instituted for purposes of... literature... exclusively” and “supported... in part by annual voluntary contributions”.

Held: (i) the library was not instituted for the purposes of literature exclusively, because it supplied books to members for such use as they chose to make of the books, so that the benefit or convenience of members (as distinct from purposes of literature) was an object of the library and was an object that was not merely incidental to the purpose of literature; accordingly the library was not entitled to exemption from rates under s. 1 of the Scientific Societies Act, 1843.

Dicta of LORD WATSON in *Inland Revenue Comrs. v. Forrest* ((1890), 15 App. Cas. at p. 348) and of DENNING, L.J., in *British Launderers’ Research Assocn. v. Hendon Borough Rating Authority* ([1949] 1 All E.R. at p. 23) applied, and dictum of EVE, J., in *Re Prevost* ([1930] 2 Ch. at p. 386) adopted and applied.

Birmingham (Churchwardens) v. Shaw ((1849), 10 Q.B. 868) overruled.

(ii) annual voluntary contributions within s. 1 meant voluntary contributions which the library might reasonably expect to receive year by year and on which it might reasonably rely for the provision of its annual expenditure (see p. 732, letter B, post); but did not include either a proportion of investment income attributable to legacies received or a proportion of rental relief attributable to gifts applied to building costs (see p. 732, letter F, post).

(iii) whether a source of revenue was “annual” within s. 1 should be decided by regarding it from the recipient’s point of view (see p. 731, letter I, post); accordingly annual voluntary contributions might include not only donations but also legacies, if received frequently enough to be an annual source of revenue.

(iv) gifts in kind received annually by the library, such as gifts of books from publishers and others, were voluntary contributions within s. 1 (see p. 732, letters H and I, post).

Liverpool Corpn. v. West Derby Union ((1905), 92 L.T. 467) not followed.

* The relevant terms of s. 1 are printed at p. 728, letter D, post.

- A (v) The library would be supported in part by annual voluntary contributions within the proviso to s. 1 of the Act of 1843 if the contributions, being considered for each of several recent years (viz., in the present case the five years, 1953-57), were not so small as to come within the de minimis rule (see p. 732, letter E, and p. 731, letter F, post); but the percentages over these years, which varied in fact between $2\frac{1}{2}$ and six per cent., were insufficient to justify a finding that the library was supported in part by annual voluntary contributions (see p. 733, letter C, post).

B Dicta of DENNING, L.J., and JENKINS, J., in *Battersea Metropolitan Borough v. British Iron & Steel Research Assn.* ([1949] 1 K.B. at pp. 462, 457) and dictum of SOMERVELL, L.J., in *Nonentities Society v. Linley* ((1954), 47 R. & I.T. at p. 428) considered.

- C Appeal dismissed.

[As to the conditions of exemption of scientific and literary societies from rates, see 21 HALSBURY'S LAWS (2nd Edn.) 12, para. 26; and for cases on the subject, see 38 DIGEST 496-499, 502-531.]

For the Scientific Societies Act, 1843, s. 1, see 14 HALSBURY'S STATUTES (2nd Edn.) 7.]

- D Cases referred to:

Battersea Metropolitan Borough v. British Iron & Steel Research Assn., [1949] 1 K.B. 434; [1949] L.J.R. 646; 2nd Digest Supp.

Birmingham (Churchwardens) v. Shaw, (1849), 10 Q.B. 868; 116 E.R. 329; sub nom. *Re Birmingham New Library, Ex p. Birmingham Overseers*, 18 L.J.M.C. 89; sub nom. *R. v. Shaw, Birmingham JJ.*, 13 L.T.O.S. 23; 13 J.P. 395; 38 Digest 496, 502.

British Launderers' Research Assn. v. Hendon Borough Rating Authority, [1949] 1 All E.R. 21; [1949] 1 K.B. 462; [1949] L.J.R. 416; 113 J.P. 72; 2nd Digest Supp.

Clarendon (Earl) v. St. James's (Rector, etc.), (1851), 10 C.B. 806; 20 L.J.M.C. 213; 17 L.T.O.S. 75; 15 J.P. 340; 138 E.R. 319; 38 Digest 494, 493.

Inland Revenue Comrs. v. Forrest, (1890), 15 App. Cas. 334; 60 L.J.Q.B. 281; 63 L.T. 36; 54 J.P. 772; 3 Tax Cas. 117; 38 Digest 496, 503.

Liverpool Corpn. v. West Derby Union, (1905), 92 L.T. 467; 69 J.P. 277; 38 Digest 494, 494.

Nonentities Society v. Linley, (1954), 47 R. & I.T. 426; 25 D.R.A. 305.

Prevost, Re, Lloyds Bank, Ltd. v. Barclays Bank, Ltd., [1930] 2 Ch. 383; 99 L.J.Ch. 425; 143 L.T. 743; Digest Supp.

R. v. Brandt, (1851), 16 Q.B. 462; 20 L.J.M.C. 119; 16 L.T.O.S. 437; 15 J.P. 191; 117 E.R. 956; 38 Digest 496, 505.

R. v. Cockburn, (1852), 16 Q.B. 480; 18 L.T.O.S. 302; 117 E.R. 962; sub nom. *R. v. St. Martin-in-the-Fields (Churchwardens & Overseers)*, 21 L.J.M.C. 53; 16 J.P. 198; 38 Digest 495, 495.

R. v. Gaskell, (1851), 16 Q.B. 472; 21 L.J.M.C. 29; 18 L.T.O.S. 72; 15 J.P. 755; 117 E.R. 959; 38 Digest 494, 489.

R. v. Manchester Overseers, (1851), 16 Q.B. 449; 20 L.J.M.C. 113; 16 L.T.O.S. 435; 15 J.P. 193; 117 E.R. 951; 38 Digest 497, 510.

Case Stated.

- I The appellant library appealed to the Lands Tribunal against a decision of a local valuation court of Central London Local Valuation Panel given on Aug. 21, 1957 (reported (1958), 108 L.Jo. 604; 4 R.R.C. 239), confirming the assessment of a hereditament described as London Library, 14, St. James's Square, Westminster, at £11,000 gross value, £9,163 rateable value in the valuation list for Westminster City. The grounds of the appeal were that the court had misdirected itself in law and as to the facts in finding that the library was not entitled to exemption under the Scientific Societies Act, 1843. On July 29, 1958, the tribunal (SIR WILLIAM FITZGERALD, President) dismissed the

appeal and affirmed the decision of the local valuation court. The library A
 appealed by way of Case Stated to the Court of Appeal. It contended that
 the tribunal was wrong in law in holding that the library was not a society
 instituted for purposes of literature exclusively and was not supported wholly
 or in part by annual voluntary contributions, and so that it was not entitled to
 exemption from rates under the Act of 1843.

Geoffrey Lawrence, Q.C., and F. A. Stockdale for the library. B

J. P. Widgery, Q.C., and P. R. E. Browne for the valuation officer.

R. W. Bell for the rating authority.

Cur. adv. vult.

Nov. 4. **HODSON, L.J.:** The judgment that I am about to read is the C
 judgment of the court. The question in this appeal is whether the London
 Library is liable to be assessed for the purpose of rating or whether it is exempt
 from rates under the provisions of the Scientific Societies Act, 1843. Section 1
 of the Act so far as material to this appeal is as follows:

"...No person or persons shall be assessed or rated, or liable to be D
 assessed or rated . . . in respect of any land, houses, or buildings . . . belonging
 to any society instituted for purposes of science, literature, or the fine arts
 exclusively . . . provided that such society shall be supported wholly or in
 part by annual voluntary contributions . . ."

The proposal for rating of the London Library was made on Jan. 24, 1957, E
 and the assessment was confirmed on Aug. 21, 1957, by the local valuation court
 for Central London. The appeal by the London Library to the Lands Tribunal
 was dismissed on July 29, 1958, by the learned President, from whose decision
 this appeal is brought. The history of the library is fully set out in the decision
 of the Lands Tribunal and need not be repeated. It has in fact for many years
 been exempt from rates on the ground that it is instituted for the purposes of
 literature exclusively and fulfils the other requirements of the Act of 1843.

The library contends that, while it is clear that the object of the library must F
 be exclusively for the enhancement, promotion and dissemination of literature,
 the fact that the members pay an annual subscription does not destroy the
 exclusiveness of the objects. They submit that the means employed by the
 library for attaining those objects do not disqualify, provided the means, as they
 say is the case of those employed by the library, do not amount to a distinct G
 collateral object.

A number of cases decided in the middle of the last century was cited in support
 of the contention that the London Library was not disqualified by reason of its
 having a collateral object in addition to the object of the promotion of literature.
 These authorities begin with *Birmingham (Churchwardens) v. Shaw* (1), where
 the question at issue was never challenged, followed expressly in 1851 in *R. v.* H
Manchester Overseers (2). In the same volume of the Queen's Bench reports
 there are also *R. v. Brandt* (3), *R. v. Gaskell* (4) and *R. v. Cockburn* (5). In
 the same year there was *Clarendon (Earl) v. St. James's (Rector, etc.)* (6), which
 related to the London Library itself. In all these cases (except that of *R. v.*
Brandt (3)) the court found itself bound by *Birmingham v. Shaw* (1), which is
 scarcely distinguishable from the present, to come to a conclusion which would
 be favourable to the library here. On the other hand, there are passages in the I
 earlier cases which lead one to the conclusion that the attention of the court was
 not always focussed on the word "exclusively" in the statute. Compare the
 observations of LORD CAMPBELL, C.J., in *R. v. Manchester Overseers* (7) to the
 effect that the members seemed not to have for their "chief" object their own

(1) (1849), 10 Q.B. 868.

(2) (1851), 16 Q.B. 449.

(3) (1851), 16 Q.B. 462.

(4) (1851), 16 Q.B. 472.

(5) (1852), 16 Q.B. 480.

(6) (1851), 10 C.B. 806.

(7) (1851), 16 Q.B. at p. 458.

A recreation and amusement. In *R. v. Brandt* (8) he referred to the "principal" object which the members had in view, although in *R. v. Cockburn* (9), the last of the series, he referred to the fact that the statute had anxiously introduced the word "exclusively" into both the preamble and the enactment.

If there was any misconception about the effect of the statute, it was laid at rest by the House of Lords in *Inland Revenue Comrs. v. Forrest* (10). LORD

B WATSON, referring to s. 1 of the Act of 1843, said (11):

"Then it is not sufficient compliance with the plain language of the Act that a society be established chiefly for the purpose of promoting science, literature, or the fine arts. One or other of these must be its exclusive object; so that an institution which also contemplated some other, though altogether subsidiary object, could not claim the benefit of the exemption."

C The principle there stated has been enunciated clearly in this court in *British Launderers' Research Asscn. v. Hendon Borough Rating Authority* (12), where DENNING, L.J., used the following words (13):

"There is one thing which is clear both on the wording of the statute and on the cases. The word 'exclusively' must be given its full effect.

D It is not sufficient that the society should be instituted 'mainly' or 'primarily' or 'chiefly' for the purposes of science, literature, or the fine arts. It must be instituted 'exclusively' for those purposes. The only qualification—which, indeed, is not really a qualification at all—is that other purposes which are merely incidental to the purposes of science or literature or

E the fine arts, that is, merely a means to the fulfilment of those purposes, do not deprive a society of the exemption. Once, however, the other purposes cease to be merely incidental but become collateral—that is, cease to be a means to an end but become an end in themselves; that is, become additional purposes of the society—then, whether they be main or subsidiary, whether they exist jointly with or separately from the purposes of science,

F I think, made clear by the opinions of LORD WATSON and LORD MACNAGHTEN in *Inland Revenue Comrs. v. Forrest* (14)."

There is no real dispute between the parties as to the approach to the problem, and it is recognised that, in so far as the library serves individual members, it must do so incidentally and not as an end in itself in order to claim exemption.

G The only question is whether, on the true construction of the charter, the library can contend that the object of the library is literature exclusively, for no question here arises of activities of the library outside the scope of the charter. The charter recites:

H "That the association or society now existing and known as 'The London Library' was established in the year 1841 by Thomas Carlyle and other eminent persons under the patronage of H.R.H. the late Prince Consort to supply the great want in London of a library embracing every department of literature and philosophy and from which books might be taken for use by members to their own homes."

Reference to the bye-laws, which again are set out in full in the decision of the learned President, shows that the advantages of the library are restricted to

I members. No doubt, since many of the members are corporate bodies, through those bodies a large number of persons other than individual members may have access to the volumes of literature contained in the library, but the tangible benefits of the library are restricted to the members themselves. The relevant

(8) (1851), 16 Q.B. at p. 468.

(9) (1852), 16 Q.B. at p. 491.

(10) (1890), 15 App. Cas. 334.

(11) (1890), 15 App. Cas. at p. 348.

(12) [1949] 1 All E.R. 21; [1949] 1 K.B. 462.

(13) [1949] 1 All E.R. at p. 23; [1949] 1 K.B. at p. 467.

(14) (1890), 15 App. Cas. 334 at pp. 348, 352, 353.

findings of fact contained in the learned President's decision are as follows: A

"What then is the true purpose of this library? I think the answer is to be found in the first paragraph of the charter: '... a library embracing every department of literature and philosophy and from which books might be taken for use by members to their own homes.' And the provision imposed by the library 'A member's rights are personal and cannot be assigned or shared.' All the evidence confirms that in their use of the hereditament the [library] has rigorously adhered to the terms of their charter and has ensured the practical application of those terms by their bye-laws and circulars to members and prospective members. In no place in either the bye-laws or circulars is any concern displayed by the [library] as to what use the members should make of those books except of course to return them in good condition. In the hands of some members the books may be the means of disseminating the priceless gifts of literature to the general public. That may be, indeed probably is, the pious hope of the committee but it is not the main aim of the committee; that aim, as I see it, is to supply the books to the members for use as those members see fit, be that use their own personal gratification or the passing on of the fruits of their literary genius to the general public. If I have thus correctly interpreted the charter and bye-laws, and the actual activities of the [library] as disclosed by the evidence, how can I say that the primary purpose is not the convenience of its members?" B C D

As the learned President pointed out, the books may in the hands of some members be the means of disseminating literature to the public. At the same time, this is not the object of the library, which, though it may be said to be instituted for the purposes of literature, cannot be said to have been instituted for this purpose exclusively when the whole scheme of the charter and bye-laws made thereunder from which the library has never strayed is that the books of the library are to be supplied to members for such use as the members choose to make of them, whether it be their own instruction or enjoyment or the passing on of the fruits of their study to the public at large. In view of the President's findings of fact as to the activities of the library, which are we think plainly within the terms of the charter correctly construed by him, the library cannot succeed. We find ourselves in agreement with EVE, J., in *Re Prevost, Lloyds Bank, Ltd. v. Barclays Bank, Ltd.* (15) in a passage which was material to the conclusion which he reached in the matter under his consideration, when he said of the London Library (16) "that the library is not a charity but an institution for mutual benefit." Accordingly, we cannot hold that the benefits to the members are not the object of the library and can be treated as if they were no more than incidental to the object of literature. E F G

The learned President has held further that the London Library was not supported wholly or in part by "annual voluntary contributions", and we have been asked to deal with this topic also, although we agree with his view on the first part of the case. If a society is to be exempt from rating under s. 1 of the Scientific Societies Act, 1843, it must satisfy the court that it is supported wholly or in part by annual voluntary contributions. This library has submitted that it is so supported and has submitted figures of its income from all sources for the ten years prior to Jan. 28, 1957, the material date. The learned President was of the opinion that only a small part of the amount submitted could be regarded as derived from annual voluntary contributions and that the proportion of these to the total income of the library was too small to be considered to be partly supporting the library. H I

There was really no dispute between the parties whether the sums contended for by the library supported the library, provided that they were sufficiently

A large, or whether they were voluntary. For the law on these matters reference was made to *Battersea Metropolitan Borough v. British Iron & Steel Research Assn.* (17), where DENNING, L.J., said (18):

B “A society is only ‘supported in whole or in part by voluntary contributions’ if it has to rely on them for the continuance of its work. The sum of £2,000 is too small a proportion of the whole income to enable that inference to be drawn.”

JENKINS, J., in the same case said (19):

“The substance of each case must be looked at to see whether the payments claimed to be voluntary contributions are, in substance, made as a matter of business, or as a matter of bounty.”

C Later on the same page he goes on to say (19):

“A reasonable construction must be placed on the section, and I think it requires that the association should be dependent for its support either wholly or to something more than a merely nominal extent on voluntary contributions.”

D SOMERVELL, L.J., in *Nonentities Society v. Linley* (20) cited these passages and went on to say:

E “I am not saying that that, or perhaps any possible construction of the statute, leaves a very easy or satisfactory issue of fact to be determined by the tribunal of fact, but it does, I think, decide that the voluntary contributions must be a substantial element in the finances of the undertaking, and it also lays down that that is to be decided *prima facie* by a comparison between the amount of the voluntary contributions and the gross income of the undertaking.”

F Whether such a proportion is “substantial” may again be a difficult question of fact. Counsel for the library has submitted that the proviso is satisfied if the contributions are not so small as to come within the *de minimis* rule and we think that a reasonable statement of the principle laid down by DENNING, L.J., and JENKINS, J., and accepted by SOMERVELL, L.J.

G The chief discussion on this part of the case was whether many of the payments, e.g., legacies, submitted for consideration by the library could come within the description of “annual”. It was submitted by the library both before this court and before the tribunal that the word “annual” should be interpreted as applying to the receiver as well as to the giver. Counsel for the valuation officer accepted this view to some extent, but submitted that annual contributions must have the quality of being recurrent or be capable of being recurrent although not necessarily from the same source. He submitted that legacies, for instance, described by the learned President as “once for all” payments, could not come within the definition if his submission was right. Counsel for the respondent rating authority supported the stricter view that “annual” should apply to the giver only, that a contribution should be one the annual recurrence of which from the same source might reasonably be expected. The learned President accepted this last view. He said:

I “It seems to me that where the section refers to ‘annual voluntary contributions’ it means annual by the contributor.”

We do not feel able to accept this view. In our judgment the receiver must be considered when deciding whether contributions are annual. There are many ways in which a society may be voluntarily supported. It may in the first place be founded and endowed by the provision of a fund, by a single benefactor or otherwise, the interest on which is enough to provide for its continued support.

(17) [1949] 1 K.B. 434.

(19) [1949] 1 K.B. at p. 457.

(18) [1949] 1 K.B. at p. 462.

(20) (1954), 47 R. & I.T. 426, see at p. 428.

Such support in our view would be outside the scope of the definition. On the other hand it may look for support, not only to regular annual subscriptions, but to the proceeds of street collections and the many other ways of raising money for charities and similar organisations. It may well be that legacies of varying amounts are left to the society from time to time. Clearly a legacy will come only once from a particular person, but legacies may come to a society with sufficient frequency to justify it in looking to them year by year as probable revenue. We are not of course considering legacies of large sums which the tribunal might think should properly be regarded as capital endowment. Annual voluntary contributions are in our judgment voluntary contributions which the society may reasonably expect to receive year by year and on which it may reasonably rely wholly or in part for the provision of the necessary annual expenditure of the society.

The library produced to the tribunal a schedule showing the sums which it was contended should be treated as annual voluntary contributions. The figures produced were for the ten years prior to the material date, and a yearly average was taken and compared with the yearly average of the total revenue. This showed a percentage which the library contended was sufficient to show that it relied on these payments for partial support. It was submitted by counsel for the valuation officer that to take an average was not the method best designed to give a true picture of the position. He contended that the figures should be examined for the years immediately prior to the material date to see whether in each of these years there were voluntary contributions sufficient to be taken into consideration, and that, unless there were such payments, the society should not have the benefit of the section. It did appear from the figures submitted by the library that the five years prior to the material date showed a reasonably consistent pattern and we were of the opinion that the proper way to approach the matter was to consider the figures for these five years in the manner submitted by counsel for the valuation officer.

There were, however, three other items of figures which the library contended should be included in the calculation of annual voluntary contributions. One item was a proportion of investment income attributable to funds created by legacies, and the second was a proportion of rental relief attributable to donations and legacies of members applied to building costs. Neither of these items could in our view be included, as they could not in any way be regarded as annual contributions. The third item, however, was in a different category. It appears that the library receives annually gifts of books from publishers and other persons. These are considered by the librarian, and those which he thinks suitable for the library are retained and the remainder are sold. The estimated average value of these gifts for the three years prior to the material date was £700, and the library claimed that this sum should be included in the sum of annual voluntary contributions. The learned President said that he found it difficult to distinguish between a gift of books and annual sums of money for the purchase of books, but considered himself bound by the decision of the Divisional Court in *Liverpool Corpn. v. West Derby Union* (21), where KENNEDY, J., said (22):

“to treat a gift of books to an institution as a voluntary contribution would hardly seem to me to come within the fair meaning of the Act.”

We do not feel able to accept that view. The library exists, as its name implies, as a collection of books for use in the manner prescribed by its charter. In order properly to fulfil its purpose, it must be kept up to date by buying new books as they are published, provided of course that they come within the classification of books with which the library is concerned. We are unable to see why gifts of this kind, which help the library year by year to fulfil its purpose, should not be regarded as contributions because they are gifts in kind and not in money.

- A It may be, of course, that a gift might be made to the library of a rare book of great value. It is not suggested that this has occurred in the years under consideration, and it is unnecessary, therefore, to express a view on it, except to say that a gift in such a case might in certain circumstances be regarded rather in the nature of a capital endowment than a contribution to which the library might look for its partial support year by year.
- B It appears then on the facts before the court that the sums the library is entitled to regard as annual voluntary contributions are (a) donations of money, (b) legacies, and (c) gifts of books. Treating the sum of £700 as the average sum to add to the income of the years 1952-53 and 1953-54 as well as to the three following years, the approximate percentages of the annual voluntary contributions for the five years from 1952-53 to 1956-57, both inclusive, appear to be
- C $2\frac{1}{2}$ per cent., four per cent., three per cent., three per cent. and six per cent. respectively. In our view, these sums, looked at year by year, are not sufficiently large to enable us to come to the view that they contribute partially to the support of the library. The appeal, therefore, is dismissed.

Appeal dismissed. Leave to appeal to the House of Lords granted.

- D Solicitors: *Gedge, Fiske & Co.* and *Monier-Williams & Keeling* (for the library); *Solicitor of Inland Revenue* (for the valuation officer); *Allen & Son* (for the rating authority).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

E

ELLIOTT v. GREY.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Cassels and Edmund Davies, J.J.), October 30, 1959.]

- F *Insurance—Motor insurance—Third-party risks—Using motor vehicle on road while uninsured—Broken down car parked on road outside owner's house—Car not completely immovable, but in such condition that it could not be mechanically propelled—Owner having no intention of driving or moving car at material time—Whether car in use on road—Road Traffic Act, 1930 (20 & 21 Geo. 5 c. 43), s. 35 (1).*
- G The appellant was charged under the Road Traffic Act, 1930, s. 35 (1)*, with using a motor car on a road on Feb. 7, 1959, without there being in force in relation to the user an insurance policy in respect of third-party risks complying with the requirements of Part 2 of the Act. On Feb. 7 the car was standing on the road outside the appellant's house, having been placed there by the appellant after it had broken down on Dec. 20, 1958.
- H Before Feb. 7, 1959, the appellant had jacked up the wheels, removed the battery and terminated his insurance cover. On Feb. 7, 1959, he had unjacked the wheels, cleaned the car, and sent its battery to be recharged, but the car could not be mechanically propelled because the engine would not work. He had no intention of driving it on Feb. 7, 1959, or of moving it from its position on the road. On the question whether, on that date, the car
- I was being used by him, within the meaning of s. 35 (1),

Held: the words "to use . . . a motor vehicle on a road", in s. 35 (1) of the Road Traffic Act, 1930, meant "to have the use of a motor vehicle on a road", and, as the car could be moved on Feb. 7, 1959, even though it could not be driven, the appellant had the use of it on a road, within the meaning of s. 35 (1).

Appeal dismissed.

* The relevant terms of s. 35 (1) are printed at p. 735, letter I, post.

[As to compulsory insurance in regard to motor vehicles, see 22 HALSBURY'S LAWS (3rd Edn.) 363, para. 748. A

For the Road Traffic Act, 1930, s. 35 (1), see 24 HALSBURY'S STATUTES (2nd Edn.) 602.]

Case Stated.

This was a Case Stated by the justices for the County Borough of South Shields in respect of their adjudication as a magistrates' court sitting at South Shields on Mar. 23, 1959. B

On Mar. 6, 1959, an information was preferred by the respondent, the chief constable of the county borough, against the appellant charging him with an offence against s. 35 (1) of the Road Traffic Act, 1930, in that on Feb. 7, 1959, he unlawfully used a motor car on Belloc Avenue, South Shields, there not being in force in relation to him as user of such a motor vehicle by him such a policy of insurance or such a security in respect of third-party risks as complied with the requirements of Part 2 of the Act of 1930. The following facts were found. The appellant was, on Feb. 7, 1959, the owner of a motor car which was standing parked outside his house at 54, Belloc Avenue. The motor car was a motor vehicle within the meaning of s. 1 of the Act of 1930, and Belloc Avenue was a road within the meaning of s. 121 of the Act. The appellant was the person responsible for the car being there on the road. From the date of the purchase until a date in the middle of January, 1959, the appellant had an insurance policy in relation to his user of the car, and the policy complied with the requirements of Part 2 of the Act of 1930. On Dec. 20, 1958, the car broke down and could not be driven because its carburettor broke, its self-starter would not work, and its starting handle would not fit into the starting-handle hole because its worm end would not fit. Immediately after the breakdown the appellant decided to lay the car up outside his house and in performance of that intention, at some date before Feb. 7, 1959, he placed the car on the road outside his house. The car had to be man-handled into position, as it could not be driven at all. It remained there on the road until Feb. 7, 1959, jacked-up, with its wheels off the ground and with its battery removed. The appellant clearly intended to use the car when it suited his purpose. In the middle of January, 1959, he caused his insurance policy to be suspended, intending to make it effective again as soon as he had put the car into running order again. On Feb. 7, 1959, he had been working on the car and had cleaned it, oiled its locks and lowered it to the ground, sent its batteries away to be recharged, removed the broken carburettor and replaced it with a new one. He also examined the self-starter, and found that its solenoid needed renewing. On that date, the car could not be mechanically propelled because its engine could not work and the petrol in its tank had evaporated. The appellant had no intention of driving the car on that date or of moving it from its position on the roadway. Another car collided with the appellant's car on Feb. 7, 1959. When required by the police to produce his certificate of insurance, the appellant was unable to do so and stated that he had sent the insurance back saying he had laid the vehicle up from December, 1958. C D E F G H

It was contended by the appellant that the car was not being used by him on Feb. 7, 1959, because (i) user of a motor vehicle did not include putting it on a road and maintaining it in one position in a condition in which, physically, that vehicle could not be driven and was not available for use as a motor vehicle; (ii) a motor vehicle was not being used when in a garage; (iii) if a motor vehicle was immobilised and in a yard and was pushed into the street to be taken away as scrap, it could not be said to be being used; and (iv) the legislation used careful words: e.g., in the offence of causing a motor car to stand on the road without the necessary lights, the word "cause" was used and not the word "use"; and that the word "cause" would cover a laid-up vehicle, whereas the word "use" would be inappropriate. It was contended for the respondent I

- A (among other contentions): (a) that the purpose of s. 35 of the Road Traffic Act, 1930, was to ensure that, when a motor vehicle was on the road, there should be proper cover against such third-party risks as might occur in consequence of the vehicle being on the road; (b) that throughout the Act the word "drive" was constantly used in connexion with offences involving driving, whereas in s. 35 the word "use" was used, and it was obviously intended to
- B cover a motor vehicle both when it was being driven and when it was not being driven on the road; (c) that a motor vehicle left standing could run away and cause injury or damage to a third party; that a stationary vehicle could give rise to a liability for injury to a third party; and that a vehicle which was stationary on a road could be used to keep property in.

- C The justices were of the opinion that the motor car was being used by the appellant as charged, and convicted him, but owing to the mitigating circumstances, discharged him absolutely under s. 7 of the Criminal Justice Act, 1948, and ordered him to pay three guineas towards the costs of the prosecution.

J. W. Miskin for the appellant.

Frank Whitworth for the respondent.

- D **LORD PARKER, C.J.:** This is an appeal by way of Case Stated by justices for the County Borough of South Shields before whom an information was preferred by the respondent against the appellant that he, on Feb. 7, 1959,

- "unlawfully did use on Belloc Avenue a motor car, there not being in force in relation to him as user of such a motor vehicle by him such a policy of insurance or such a security in respect of third-party risks as complied
- E with the requirements of Part 2 of the Road Traffic Act, 1930, contrary to s. 35 (1) of the said Act."

The justices went into the matter, as the Case shows, with very considerable care and in the end came to the conclusion that the offence was made out, and convicted the appellant.

- F The short facts here are these. At 10.30 p.m. on Feb. 7, 1959, the appellant was the owner of a motor car which was then parked outside his house in Belloc Avenue, South Shields. Another motor vehicle had collided with the appellant's motor car while it was so stationary. That, no doubt, attracted the attention of the police. It is also clear that at that time there was not in force the necessary policy of insurance or such security as complied with the requirements of the Act. What had happened, however, was that, as long ago as Dec. 20, 1958,
- G the car had broken down and could not be driven. Apparently its carburettor broke, the self-starter would not work, and its starting-handle would not fit into the starting-handle hole because its worm end would not fit. Immediately that happened the appellant placed the car outside his house and left it there, and it was still there on Feb. 7, 1959. He also jacked the car up so that its wheels were off the ground and removed the battery. Having done that and having
- H decided not to drive the car until it was repaired, he terminated his insurance cover. On this very day, Feb. 7, 1959, however, he had, because I suppose spring was coming on, cleaned the car, oiled its locks, sent the battery to be recharged and replaced the old carburettor with a new one. He found that the self-starter solenoid needed renewing. He also had un-jacked the car. It is
- I found that at the time in question, Feb. 7, the car could not be mechanically propelled because the engine would not work, and also that the appellant on that day had no intention of driving it or removing it from its position.

The short question in this appeal, therefore, is what is meant by the words "use . . . a motor vehicle on a road" within the meaning of s. 35 of the Road Traffic Act, 1930. Section 35 (1) provides:

"Subject to the provisions of this Part of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force . . ."

Then the subsection goes on to refer to the necessary insurance cover. One A
 thing seems to be clear, and that is that "use" there is used in contradistinction
 to the word "drive" which appears in other sections, such as s. 11 and s. 12,
 dealing with dangerous and careless driving. Prima facie, "use" is a wider term
 and includes something more than driving, and certainly it would include moving.
 The other thing which I think is clear (and, indeed, it was conceded by counsel B
 for the appellant, who argued this case with great care) is that an offence may
 well be committed under s. 35 in the intervening periods between driving or
 between moving. But counsel for the appellant says that the ordinary use of
 the words "to use" in relation to a motor car contemplates some active move-
 ment, either driving it or taking part in a journey in it or moving it, and that the
 word "use" is quite inapt in relation to a motor car which cannot be used
 because it is out of action, and not merely because it needs a little petrol but C
 because the machine cannot work at all.

For my part, I am influenced by the fact that s. 35 appears in Part 2 of the
 Act under the heading "Provision against third-party risks arising out of the
 use of motor vehicles". Section 36 (1) specifies the form of policy of insurance
 which is required and provides that it must be

"a policy which . . . (b) insures such person, persons or classes of persons D
 as may be specified in the policy in respect of any liability which may be
 incurred by him or them in respect of the death of or bodily injury to any
 person caused by or arising out of the use of the vehicle on a road . . ."

It is something for the protection of third parties. Approached in that way,
 it seems to me that the word "use" there is, as counsel for the respondent E
 suggests, really equivalent to "have the use of a motor vehicle on a road".
 Indeed, the definition which counsel for the appellant suggested, and which, I
 think, was that "use" means to have the advantage of a vehicle as a means of
 transport including for any period or time between journeys, itself suggests
 availability. In other words, it is really equivalent to what counsel for the
 respondent suggests by the expression "have the use of".

In the present case, although this car could not be driven, there is nothing F
 to suggest that it could not be moved. As I pointed out in argument, for all
 we know it was on the top of a hill and a little boy could release the brake and
 the car could go careering down the hill. In the absence, at any rate, of a
 finding that it was immovable as, for instance, that the wheels were removed
 or something of that sort, I cannot bring myself to think that this car was not G
 fairly and squarely within the words which I have used, "have the use of a
 motor vehicle on the road". Counsel for the respondent further contended
 that, even if the car was completely immobilised, an offence would be committed,
 but for my part I find it unnecessary in the present case to go so far. Here was
 a car which could be moved, albeit not driven and, in those circumstances I
 think that the owner had the use of it on a road within the meaning of s. 35 (1). H
 I come to the conclusion that the justices were right and I would dismiss this
 appeal.

CASSELS, J.: I agree.

EDMUND DAVIES, J.: I also agree.

Appeal dismissed.

Solicitors: *Amery-Parkes & Co.* (for the appellant); *Speechly, Mumford &
 Soames*, agents for *Town clerk*, South Shields (for the respondent).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

A **MORRIS MOTORS, LTD. v. LILLEY (trading as G. & L. MOTORS).**

[CHANCERY DIVISION (Wynn-Parry, J.), November 10, 1959.]

Sale of Goods—Motor car—“New” car—When a car ceases to be new.

Injunction—Sale of goods—Motor car—Injunction at instance of manufacturers against retail purchaser re-selling car as new.

B The plaintiffs were manufacturers of motor cars which were marketed to the public exclusively through authorised distributors over various areas, and authorised dealers in each such area; distributors and dealers became authorised on appointment after selection and approval by the plaintiffs.

C The plaintiffs supplied new unregistered cars from their factory to authorised distributors who in turn supplied those cars still unregistered to authorised dealers in the area who sold retail to the public. On a retail sale, the purchaser was given a warranty which entitled him to a certain amount of service for twelve months including exchange, repair or replacement in case of defect appearing in some parts, but the warranty related only to

D “any new vehicle”, only “the first owner-user” was entitled to the benefit of the warranty, and no claim could be made in respect of “any second-hand vehicle or part thereof”. On Aug. 24, 1959, authorised distributors sold a car, recently delivered to them by the plaintiffs, the car then being new and unregistered, to an authorised dealer. On Sept. 5, 1959, a sale of the car by the dealer to L. was completed, L. taking delivery of the car at the dealer’s premises. The car had then been registered and had been

E fitted with registered number plates. On the same day L. sold the car to the defendant, a motor dealer (not authorised by or in contractual relationship with the plaintiffs). The defendant advertised the car in a newspaper under the heading “New Cars”. On Sept. 14, 1959, the car was exhibited for sale at the defendant’s premises with a notice on the windscreen, which read: “Immediate delivery—new”. On inquiry why the car was registered,

F the defendant’s representative said that it was “brand new” and had to be registered to get it there for sale, and that it had been registered three days earlier. On Sept. 19, 1959, the defendant sold the car to a purchaser. The car had only been driven about one hundred and thirty miles between leaving the factory and being delivered to the ultimate purchaser. The plaintiffs contended that the car when sold by the defendant was not a new car and claimed an injunction to restrain the defendant from advertising, offering

G for sale or selling any car, not being a new car of the plaintiffs’ manufacture, as and for a new motor car of the plaintiffs’ manufacture.

H **Held:** the car ceased to be new when it was sold by retail sale (whether by an authorised dealer or an authorised distributor), registered with the local authority, had number plates put on it, and had been driven away by the purchaser, L.; and, since the defendant’s representation that the car was new was likely to damage the plaintiffs, as it amounted to a representation that the defendant was an authorised dealer, an injunction would be granted.

[As to implied conditions and warranties, see 29 HALSBURY’S LAWS (2nd Edn.) 63-66, 69-71, paras. 72, 73, 77-81; and for cases on the subject, see 39 DIGEST 438-449, 462-465, 676-764, 887-903.]

I **Motion.**

The plaintiffs, Morris Motors, Ltd., claimed an injunction to restrain the defendant, Leslie Wellstead Lilley (trading as G. & L. Motors) whether acting by himself or by his servants or agents or otherwise from advertising, offering for sale or selling any motor car not being a new motor car of the plaintiffs’ manufacture as a new motor car of the plaintiffs’ manufacture and from falsely representing that any motor car of the plaintiffs’ manufacture was new when it was to the defendant’s knowledge not new. The facts appear in the judgment.

K. E. Shelley, Q.C., and C. F. Mayson for the plaintiffs.
F. E. Skone James for the defendant.

WYNN-PARRY, J.: The plaintiffs manufactured a car, a Morris Minor 1,000, which subsequently became registered under the registration mark 710 GKT. The plaintiffs supplied this car unregistered to appointed distributors, namely, John C. Beadle, Ltd., on Aug. 20, 1959.

The scheme under which the plaintiffs operate is that they appoint various firms as distributors over various areas. In the first place they supply new unregistered cars to those distributors from their factory. The distributors are entitled to supply those cars still unregistered and completely new to authorised dealers. Those are the dealers who again are chosen or approved by the plaintiffs. When a car is sold either by a distributor or by a dealer, a warranty, which it is true is in limitation of the common law liability, is given; but at the same time there is an undertaking to supply a certain amount of service to the new vehicle. The form of warranty, a copy of which is exhibited in this case, contains these, among other, provisions:

“The goods supplied by or for Morris Motors, Ltd. (hereinafter called ‘the company’) are supplied with the following express warranty which excludes all warranties, conditions, and liabilities whatsoever implied by common law, statute, or otherwise. 1. For the purpose of this warranty the term ‘goods’ means and includes any new vehicle . . . 2. For a period of twelve months from the date on which goods are delivered to the first owner-user thereof the company will exchange or repair any part which needs replacing or repair by reason of defective material or workmanship.”

It is to be observed that the obligation is reserved to “the first owner-user”. Under cl. 5 it is said:

“No claim for exchange or repair under the terms of this warranty may be made in respect of: . . . (f) Any second-hand vehicle or part thereof.”

That document represents the plaintiffs’ usual terms of business. It is a scheme which they are entitled to set up, and it may be said that, while they limit their common law liability, they do hold themselves out as willing to replace parts and provide through their distributors a certain amount of service, in their own interests, of the car. That, to my mind, represents something which the plaintiffs are entitled to say is of some value to their customers, and it is something, therefore, which the customers are entitled to expect if they buy what can properly be described as a new car.

In this case the distributors sold the car to dealers, Broadwalk Engineering, on Aug. 24, 1959, and on Sept. 1, 1959, the dealers sold the car retail to a Mrs. Lightstone. On Sept. 5, 1959, Mr. Lightstone, the husband of Mrs. Lightstone who had bought the car retail, took delivery of it at the business premises of the dealers, Broadwalk Engineering. There appears to have been some deposit paid, because on that occasion he paid the balance by bankers’ order. He then drove the car away. It appears to me that at that point there was a completed sale and purchase of the car. I may add that in order to comply with the law the car had been registered with the Kent County Council, the ordinary log book had been obtained and number plates had been placed on the car.

On the same day, Sept. 5, 1959, Mr. Lightstone phoned the defendant, who was a motor dealer having premises at Staines Road, Sunbury-on-Thames, consisting, as I understand it, of a shed and a space of ground on which he exhibited cars for sale, and asked him if he would be interested to buy the car in question, stating that he would have to pay £10 over the list price. The car was then delivered to the defendant by a driver of a company called Varsity Motors, with which Mr. Lightstone was connected. It was in due course delivered and it was paid for by a cheque which covered the extra £10.

- A It is perfectly clear that the defendant knew that the car was not being sold by any authorised dealer or distributor, but that it involved the sale of a car which had been registered. In the issue of the "Middlesex Chronicle" dated Sept. 11, 1959, under the heading "G. & L. Motors", the defendant advertised under the heading "New Cars" this car as a "Morris Minor 1,000 Clarendon grey, four-door de luxe." The car was eventually sold to a purchaser, a Hillman
- B car which had done 11,000 miles being taken in part exchange.

The plaintiffs caused two investigators to go to the defendant's premises to inquire into the matter. They saw the car before it had been sold. It had a brown cardboard notice with the words "Immediate delivery—new" attached to the windscreen. They inquired why the car was registered. The representative of the defendant replied:

- C "It is brand new, but we have to register it to get it up here for sale. It is straight from the factory and was registered three days ago. We had to buy over list price to get it. Actually, £10 was paid over list price."

On those short facts the question arises whether, as the plaintiffs complain, the car, when it was eventually sold to a Mr. Berryman, was a new car or not.

- D Counsel for the defendant has contended that the car was for all purposes a new car because it had only been driven to the defendant's premises for the purpose of enabling the defendant to effect the sale which he did to Mr. Berryman; but I am unable to accept that argument. There was, as I have said, a completed sale and purchase on Sept. 5, 1959, to Mr. Lightstone. What, in my
- E opinion, was being dealt with after that completed sale was a car which (to use the words in the notice of motion) "was not a new car". I was invited to say that the mere fact that by process of calculation the car had only been driven approximately one hundred and thirty miles between leaving the factory at Cowley and its delivery to Mr. Berryman did not rob it of the characteristic of being a new car. It seems to me that that is a wholly unsafe test to make.
- F It is perfectly clear from the plaintiffs' documents that they regard and hold out to their distributors and to the public that a car ceases to be a new car once it is sold retail. That appears to me to be the only safe course to take. Once a car becomes the subject-matter of a sale of purchase, once it is registered with the local county council, once the number plates have been affixed and it has been driven out of the distributors or the dealer's premises, that car, in my judgment, ceases to be a new car.

- G It was alleged that, on a motion such as this, no injury could be shown to the plaintiffs' goodwill. It is not necessary, for the purposes of such a motion as this, as I understand the law, to show actual injury; it is sufficient to show that injury is likely to occur. Under this form of trading, I can well see the greatest likelihood of injury occurring. First of all, there is the obvious representation by the defendant that he is an authorised dealer, because he says
- H the car is brand new. If a car is brand new it carries with it the obligation on the plaintiffs under their warranty to service that car. Not only that; they in their wisdom have made a careful selection of firms throughout the country whom they are willing to appoint as either distributors or dealers, and it may well be very injurious to their goodwill if somebody who fulfils neither of those capacities is allowed to hold himself out in effect as being a distributor or a
- I dealer.

I therefore prefer to take as the simple test of when a car is new simply this: that it remains new even when it leaves the manufacturer's hands, until it is made the subject of a retail sale by a distributor or dealer, it is registered with the local county council, number plates are put on it and it is driven away by the purchaser. Once one leaves that test, there is no certainty.

For those reasons I propose to grant the injunction that is asked in the notice of motion.

[By consent, the motion was treated as the trial of the action, the injunction was made perpetual, no order was made as to damages but the defendant was ordered to pay the plaintiffs' taxed costs.]

Injunction granted.

Solicitors: *Osmond, Bard & Westbrook* (for the plaintiffs); *Lucien Fior* (for the defendant).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

Re COHEN (deceased).

NATIONAL PROVINCIAL BANK, LTD. v. KATZ AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), October 13, 14, 1959.]

Administration of Estates—Gift cum onere—Real property mortgaged—Specific devise of part—Rest of mortgaged property forming part of residuary estate—Liability of devisee or residuary estate for mortgage moneys—Administration of Estates Act, 1925 (15 Geo. 5 c. 23), s. 35.

Administration of Estates—Devise—Abatement—Sale of certain properties specifically devised to meet liabilities of estate—Whether liabilities should be borne rateably by all specific devisees—Value for purposes of abatement.

The testator, who died on Apr. 30, 1948, gave his residuary estate by will to his wife. The residue included six freehold properties. His widow made her will on Aug. 3, 1948, and died on Aug. 18, 1948. She made specific devises of the six freehold properties. Some of these properties were charged, with other properties, on mortgage to the plaintiffs, who were also executors and trustees of both wills. Owing to the insufficiency of other assets of the testator's estate the six properties specifically devised by the testatrix would have to abate in order to discharge liabilities of the testator's estate and four of them were sold for the purpose of discharging these liabilities. Owing to the insufficiency or absence of any residuary estate of the testatrix all six properties devised by her would have to contribute to the payment of liabilities of her estate. In fact one of the six properties was sold by the plaintiffs to meet her debts, etc. The sixth property had been sold by the plaintiffs for reasons unconnected with the discharge of liabilities of the testator's or testatrix' estates.

Held: (i) as the mortgaged properties were the subject of a specific devise, there was sufficient evidence of contrary intention to take them out of the provisions of s. 35 of the Administration of Estates Act, 1925; and the sums secured by the mortgages ought to have been wholly discharged out of the testator's residuary estate.

Re Biss ([1956] 1 All E.R. 89) followed.

(ii) the specific devisees under the testatrix' will ought to bear equally and rateably among themselves the burden of the debts which were paid out of the proceeds of sale of some of the properties specifically devised.

Principle stated by KNIGHT-BRUCE, V.-C., in *Tombs v. Roch* ((1846), 2 Coll. at p. 502) applied.

(iii) the abatements should be computed on the basis of values of the properties for the purposes of probate of the testator's will or of the testatrix' will, as the case might require, but not on the basis of the prices at which the properties were sold.

Fielding v. Preston ((1857), 1 De G. & J. 438) and *Re John* ([1932] All E.R. Rep. 556) applied.

- A** [As to the distribution of burden between properties comprised in a single charge, see 16 HALSBURY'S LAWS (3rd Edn.) 351, para. 674; and for cases on the subject, see 23 DIGEST (Repl.) 542, 543, 6058-6062.

As to the date of valuation of property specifically devised where it is rateably liable for payment of debts, see 16 HALSBURY'S LAWS (3rd Edn.) 348, para. 671, text and note (q).

- B** As to the doctrine of marshalling, see 14 HALSBURY'S LAWS (3rd Edn.) 611, para. 1128, and as to marshalling between beneficiaries, see *ibid.*, p. 614, para. 1132; and for cases on the subject, see 23 DIGEST (Repl.) 534-536, 5993-6016.

For the Administration of Estates Act, 1925, s. 35, see 9 HALSBURY'S STATUTES (2nd Edn.) 739.]

- C** Cases referred to:

Aldrich v. Cooper, (1803), 8 Ves. 382; 23 Digest (Repl.) 539, 6042.

Biss, Re, Heasman v. Biss, [1956] 1 All E.R. 89; [1956] Ch. 243; [1956] 2 W.L.R. 94; 23 Digest (Repl.) 542, 6060.

Cole, Re, Westminster Bank, Ltd. v. Moore, [1958] 3 All E.R. 102; [1958] Ch. 877; 122 J.P. 433; [1958] 3 W.L.R. 447; 3rd Digest Supp.

- D** *Fielding v. Preston*, (1857), 1 De G. & J. 438; 29 L.T.O.S. 337; 44 E.R. 793; 23 Digest (Repl.) 531, 5974.

John, Re, Jones v. John, [1932] All E.R. Rep. 556; [1933] Ch. 370; 102 L.J.Ch. 72; 148 L.T. 450; 23 Digest (Repl.) 543, 6063.

Smith, Re, Hannington v. True, Giles v. True, (1886), 33 Ch.D. 195; 55 L.J.Ch. 914; 55 L.T. 549; 23 Digest (Repl.) 501, 5662.

- E** *Sudeley (Lord) v. A.-G.*, [1897] A.C. 11; 66 L.J.Q.B. 21; 75 L.T. 398; 61 J.P. 420; 23 Digest (Repl.) 474, 5445.

Tombs v. Roch, (1846), 2 Coll. 490; 7 L.T.O.S. 428; 63 E.R. 828; sub nom. *Toombs v. Roch*, 15 L.J.Ch. 308; 23 Digest (Repl.) 530, 5958.

Adjourned Summons.

- F** By his will dated June 21, 1944, Max Cohen (herein called "the testator") appointed the plaintiffs, National Provincial Bank, Ltd., and his wife, Rebecca Cohen, to be the executors and trustees of his will and gave his residuary estate to his wife. He died on Apr. 30, 1948. By her will, made on Aug. 3, 1948, Rebecca Cohen (herein called "the testatrix") appointed the plaintiffs to be the executors and trustees of her will. She died on Aug. 18, 1948. Her will included the following specific devises, among others, of freehold properties, which were part of the testator's residuary estate and which were subsequently realised as stated below:

G (1) 3, Cavendish Place, Brighton, devised to Lily Rosen. The probate value of this property at the testator's death was £6,750. It was sold in August, 1953, and realised £4,850.

H (2) 252, Kingsland Road, London, E.2, devised to Maurice Rosen. This property was destroyed by enemy action in 1940. Its probate value at the dates of the deaths of the testator and testatrix was £1,000. It was sold in February, 1954, and realised £1,150.

(3) 41, Brunswick Terrace, Hove, devised to Edith Katz. The probate value of this property at the death of the testator was £2,350. It was sold in September, 1953, for £2,800.

I (4) 198, Portland Road, Hove, devised to Edith Katz. The probate value of this property at the testator's death was £2,250. It was sold in August, 1948, and realised £1,800.

(5) 61, Holders Hill Avenue, Hendon, devised to Lily Rosen. The probate value of this property at the testator's death was £680. It was sold in August, 1953, and realised £1,100.

(6) 37, Hampton Place, Brighton, devised to Pamela Katz. The probate value of this property at the deaths of the testator and testatrix was £1,200. It was sold in March, 1956, and realised £750.

The plaintiffs were mortgagees of the properties comprised in (1), (3) and (5) ante by virtue of mortgages made by the testator in 1939 and 1940. The mortgages were charged not only on those properties but also on certain other properties which formed part of the residue of his estate. Owing to deficiency of assets resort had to be made to the freehold properties, which the testatrix had specifically devised, in order that liabilities of the testator's estate should be met. Nothing would be available for residuary legatees under the testatrix' will. The four properties specifically devised by the testatrix and numbered (1), (3), (4) and (5) ante were sold, as previously mentioned, for the purpose of raising money to discharge the liabilities of the testator's estate. The specific devises of those properties by the testatrix were treated as having wholly failed. The testatrix' specific devises of the properties numbered (2) and (6) ante were treated as having taken effect. It was recognised that all devises previously mentioned had to abate by reason of deficiency of assets.

By originating summons dated Mar. 26, 1957, the plaintiffs asked for the determination, among other questions, of the following questions:—(2) whether the properties specifically devised to Lily Rosen and Edith Katz were liable to bear proportionate parts of the mortgages or whether they should be discharged out of the residuary estate of the testator; (5) whether the plaintiffs were entitled at their discretion to sell all or any of the six specifically devised properties for the purpose of discharging the liabilities of the estate of the testator or whether such liabilities ought to be treated as charged on such properties rateably (a) in proportion to the sums at which they were valued for probate or (b) in proportion to the sums for which they were respectively sold or (c) in some other and what proportions; and (6) whether for the purposes of abatement the values of the properties specifically devised by the will of the testatrix ought to be ascertained by reference to (a) the amounts at which they were valued for probate or (b) the amount for which they were respectively sold or how otherwise such values should be ascertained.

It was contended by the defendant, Lily Rosen, that all six properties previously mentioned ought to have contributed rateably to satisfy the liabilities of the testator's estate in proportion either to the amounts for which they were respectively valued for probate or to amounts for which they were respectively sold. It was also contended on behalf of defendants that the amount of abatement should be calculated on the sums for which the properties were actually sold and not on the sums at which they were valued for probate.

Michael Albery, Q.C., and *B. S. Tatham* for the plaintiffs, National Provincial Bank, Ltd.

R. O. Wilberforce, Q.C., and *A. R. Campbell* for the defendant, Lily Rosen.

M. Bröwne for the defendant, Stanley Cohen.

J. Mitchell for the defendant, Harry Cohen.

The remaining five defendants were not represented.

DANCKWERTS, J.: I have to decide questions which arise on the construction of the will of Mr. Max Cohen, who died on Apr. 30, 1948. The matter has been before the courts and before three judges already, and I am the fourth to deal with the construction and administration of this estate. [His LORDSHIP, having decided the first question turned to question (2) of the summons:] I have now to decide a question which arises in connexion with s. 35 of the Administration of Estates Act, 1925, which shortly says that where a mortgage is charged on property or properties those properties should bear the burden of the mortgage unless a contrary intention is shown in the will.

In the present case the mortgages to the bank were charged not only on three of the properties specifically devised to Mrs. Katz and Mrs. Rosen, but also on other properties which formed part of the residue. The question is whether the properties specifically devised to Mrs. Lily Rosen and Mrs. Edith Katz are liable

A to bear proportionate parts of the mortgages, or whether they should be discharged out of the residuary estate of the testator.

This matter is subject to an express decision in extremely similar circumstances by HARMAN, J., in *Re Biss, Heasman v. Biss* (1), in which he held that a contrary intention was shown. On the other hand, HARMAN, J.'s decision has been doubted, although not overruled, in a dissenting judgment of the Master of the Rolls in *Re Cole, Westminster Bank, Ltd. v. Moore* (2). It appears that probably all the relevant authorities were not cited to HARMAN, J., and particularly *Re Smith, Hannington v. True, Giles v. True* (3). In those circumstances, I am bound to apply the decision of HARMAN, J., to the present case and to decide that as the two houses were given to the two ladies by specific bequest as opposed to a residuary devise, there is evidence of a contrary intention sufficient to take the case out of the provisions of s. 35 of the Administration of Estates Act, 1925, and if this produces any other result the matter must be dealt with by the Court of Appeal.

C [HIS LORDSHIP then heard argument on the other questions and continued:] Question 5 of the summons is really a question which ought to be divided into two. The question is:

D "Whether the plaintiffs as executors and trustees of the said will of the testator were entitled at their discretion to sell all or any of the following properties [and then are set out six properties which formed part of the residuary estate of the testator] (. . . each of which was specifically devised by the said will of the testator) for the purpose of discharging the liabilities of the estate of the testator . . ."

E It appears from an affidavit sworn on behalf of the plaintiffs that, by reason of the insufficiency of the other assets, it became necessary to dispose of the debts by selling some of these properties. [HIS LORDSHIP referred to the facts regarding the clauses of the six properties and the sale of four of them and the use of the proceeds of sale to pay the debts of the testator and continued:] I have read the first half of the question. There is no doubt whatever that the executors were entitled, in the course of administration, to sell any of those properties the proceeds of sale of which were required for the payment of the testator's debts. There is, however, another quite distinct question. This question is whether the properties having been sold in this way, the beneficiaries under the testatrix' will (4) have lost all right to receive anything from the proceeds of sale, or whether some equitable right arises? The plaintiffs seem to have taken the view that the beneficiaries in the properties sold lost all their rights, and the question is whether that was a correct view.

G The second half of the question is: " . . . or whether such liabilities ought to be treated as charged upon such respective properties rateably . . .", and then there is a question of value (question 6) which remains to be considered later.

H It would obviously be very hard on the persons whose properties were given to them by the testatrix' will if the effect of some of the properties being sold by the plaintiffs was to deprive them of all rights, whilst leaving the other two properties available to the beneficiaries to whom they were bequeathed. There is another matter which arises and which slightly complicates the matter, and that is that by reason of the insufficiency or absence of any residuary estate of the testatrix all these properties will have to contribute to her debts and will have to abate. The four properties (5) which were sold by the plaintiffs, the executors of the testator, were sold in 1953, and the other two properties were sold in 1954 and 1956.

(1) [1956] 1 All E.R. 89; [1956] Ch. 243.

(2) [1958] 3 All E.R. 102; [1958] Ch. 877.

(3) (1886), 33 Ch.D. 195.

(4) Rebecca, the wife of the testator and his residuary legatee, died on Aug. 18, 1948, having devised the properties specifically to various beneficiaries (see p. 741, letter G, ante). The bank was executor and trustee of both wills.

(5) These four properties did not include No. 252, Kingsland Road or No. 37, Hampton Place (see p. 741, letters G to I, ante).

No. 252, Kingsland Road, London, apparently was not sold to pay debts of any sort, but it was merely sold at the time for the benefit of Mr. Maurice Rosen and because the property was in bad repair. The remaining property which was sold in 1956 was apparently sold for the purpose of paying the debts of the testatrix. A

In the events which have happened some of the beneficiaries may be deprived of any benefit under the testatrix' will unless there is some adjustment out of the funds which are available so that the burden falls equally on all the persons who stood and stand to benefit not only under the testator's will, but also under the testatrix' will on exactly the same footing, and it certainly seems hard that some should lose everything while the others should get a reduced amount under the testatrix' will. It seems to me this is a case in which the principles of equity ought to be applied. The matter is complicated by the fact that the plaintiffs were executors both of the testator's will and of the testatrix' will. There is also this observation to be made, that at the time when the properties were sold the individual properties were actually regarded as part of the estate of the testatrix contrary to the principle which was stated in the well-known case of *Lord Sudeley v. A.-G.* (6) which was decided by the House of Lords. Strictly speaking, the testatrix had no definite interest in any of the properties which she attempted to dispose of by her will, and a very curious, novel and unusual position arises for that reason. As I have said, this is a case in which equity ought to try to do justice by equality, and I can find authority which will justify me in applying that rule. B C D

Counsel for the first defendant has called my attention to *Tombs v. Roch* (7). The facts were not the same as the facts in this case, but KNIGHT-BRUCE, V.-C., came to the conclusion in that case that the amount necessary to complete the payment of the specialty debts must be contributed rateably by the specific legatees and devisees. After saying (8) that this was a question of "... contribution, which, if it differs from marshalling, does so in species rather than generically, in form rather than in nature", the learned judge went on to say (9): E

"I should thus express myself had *Aldrich v. Cooper* (10) not existed; but I may add that, cautious and measured as was the language in which, generally, and in that case especially, LORD ELDON spoke, he would not in my judgment have used the words 'they shall not disappoint another person, who the testator intended should be satisfied', which are in p. 396 of the report, or in the next page, 'as strong an inclination of the testator', and 'that denotation of intention', had he taken a different view. It is equally unnecessary, I think, to refer to what LORD HARDWICKE (in 1751) is reported as saying: 'The court will order it so that everybody may have satisfaction, and the whole intention complied with'." F G

There is a note in 14 HALSBURY'S LAWS OF ENGLAND (3rd Edn.) p. 611, note (g) which seems to me to support the same principle. I am referring to the authority which is quoted in the note rather than to the article in the volume. H In note (g) it is said:

"*Aldrich v. Cooper* (11) per LORD ELDON, L.C. ('A person having two funds shall not by his election disappoint the party having only one fund; and equity, to satisfy both, will throw him, who has two funds, upon that which can be affected by him only, to the intent that the only fund to which the other has access may remain clear to him')." I

That, of course, is not this case.

The next passage, which is a quotation from the book written by the famous American jurist, PROFESSOR STORY, is in these terms:

"In the sense of a court of equity, the marshalling of assets is such an arrangement of the different funds under administration as shall enable all

(6) [1897] A.C. 11. (7) (1846), 2 Coll. 490. (8) (1846), 2 Coll. at p. 499.
(9) (1846), 2 Coll. at p. 502. (10) (1803), 8 Ves. 382. (11) (1803), 8 Ves. at p. 395.

A the parties having equities thereon to receive their due proportion, notwithstanding any intervening interests, liens, or other claims of particular persons to prior satisfaction out of a portion of those funds' (STORY'S EQUITY JURISPRUDENCE, s. 558).''

B Therefore, as it seems to me, the principle which ought to apply in the present case is clearly recognised both by LORD HARDWICKE and by PROFESSOR STORY, and it is supported by LORD ELDON and by KNIGHT-BRUCE, V.-C.; the principle is that equity will attempt to do justice among all the beneficiaries on an equal footing. Consequently, it seems to me that in the present case the beneficiaries ought to bear the burden of the debts which were paid out of the proceeds of sale of some only of the properties equally and rateably among them and in the same way they will have to abate rateably for the purpose of claiming under the estate of Rebecca.

C [HIS LORDSHIP heard argument on question (6) and continued:] I have dealt with question (5), and question (6) is really a similar question of contribution (12) as between the specific devisees under the testatrix' will, and the question of contribution for payment of the debts of the testatrix.

D The authorities, namely, *Fielding v. Preston* (13) and *Re John, Jones v. John* (14), seem to be inclined one way so far as the question of contribution for the purpose of paying debts is concerned. The answer seems to be that the probate value, the value of the property to the testator, must be taken. Consequently for the purpose of paying debts, both in the case of the estate of the testator and in the case of the estate of the testatrix, the contribution must be on the basis of the probate value.

E These properties were sold for certain sums, and the question which arises is whether the gift should abate for the purpose of the funds which the beneficiaries receive in the form of cash according to the probate values of the properties in question, or whether they should abate having regard to the sums at which the properties were, in fact, sold. That is not covered by any authority, but if contribution is on the basis of the probate value abatement should be on the basis of the probate value; otherwise very odd results would occur. Accordingly, I answer question (6) in the same way—the values should be ascertained by reference to the probate values.

Declarations accordingly.

Solicitors: *Haslewoods*, agents for *Bosley & Co.*, Brighton (for the plaintiffs); *A. Bieber & Bieber* (for the defendants, Lily Rosen and Harry Cohen); *Gilbert Samuel & Co.* (for the defendant, Stanley Cohen).

[Reported by E. COCKBURN MILLAR, *Barrister-at-Law.*]

(12) The terms of question (6) are set out at p. 742, letter E, ante.

(13) (1857), 1 De G. & J. 438.

(14) [1932] All E.R. Rep. 556; [1933] Ch. 370.

Re H. (an infant).

[CHANCERY DIVISION (Roxburgh, J.), November 5, 1959.]

Infant—Guardianship of Infants Acts—Joint guardianship—Benefit to infant the sole determining factor in deciding whether joint guardian should be appointed—Order not to be made for collateral purpose—Appeal from magistrates' order—Guardianship of Infants Act, 1925 (15 & 16 Geo. 5 c. 45), s. 4 (2).

The mother of an infant died immediately after she had obtained a separation order against the father and had been awarded the custody of the infant, who was then about ten and a half years old. The infant had been living with the mother and an elder sister who was over twenty-one years old. After the mother's death the elder sister applied, under s. 4 (2)* of the Guardianship of Infants Act, 1925, to be appointed guardian of the infant to act jointly with the father. The application was opposed by the father. It was common ground that the elder sister and the father were not on speaking terms. The justices made an order appointing the elder sister a joint guardian, and stated, as one of their reasons: "We made the order for joint guardianship to enable [the elder sister] to proceed with an application for custody." On an appeal by the father,

Held: (i) on an application under s. 4 (2) of the Guardianship of Infants Act, 1925, the sole question for the court was whether the appointment of a guardian to act jointly with the father would be for the benefit of the infant, and it was not right for the justices to act from a collateral motive, namely, that the appointment of the elder sister as a joint guardian would enable her to apply later for the custody of the infant.

(ii) it would not be for the benefit of the infant to have as joint guardians persons who were not on speaking terms, and the justices' order would be discharged.

Appeal allowed.

[For the Guardianship of Infants Act, 1925, s. 4 (2), see 12 HALSBURY'S STATUTES (2nd Edn.) 956.]

Appeal.

This was an appeal, by originating notice of motion under R.S.C., Ord. 55A, r. 6, by the father of an infant from an order made by justices on July 30, 1959, under s. 4 (2) of the Guardianship of Infants Act, 1925. The infant's mother died on June 25, 1959, on which date she had obtained a separation order against the father and had been awarded the custody of the infant, who was born on Nov. 13, 1948. By the order of July 30, the justices granted an application by the infant's elder sister to be appointed to act as guardian of the infant jointly with the father. The case was heard in camera but was adjourned into open court for judgment.

B. J. H. Clouston for the appellant, the father.

R. D. Lymbery for the respondent, the elder sister of the infant.

ROXBURGH, J.: I have adjourned this matter into court because it involves some important considerations of law and procedure. On June 25, 1959, the mother of the infant, a girl who was then about ten and a half years of age, applied for a separation order on the ground of cruelty against her husband, the father of the infant, and she succeeded but tragically died on the same day. The custody of the infant had been given to the mother on the same occasion.

Justices do excellent work in these cases for no remuneration, and I would not have brought this matter into the public eye except that so few cases are reported about these matters because they are mainly dealt with in camera.

* The subsection is printed at p. 747, letter C, post.

- A Sometimes, however—and I think this is one of the cases—justices have gone astray, largely, though not wholly, because they have not been properly informed on certain matters of practice and procedure. It may be for the general benefit of justices that the way to deal with such a case as this should be generally known. The situation here was undoubtedly difficult because, at the time of the mother's death, there were living with her at her house her elder daughter,
- B who is now twenty-one years of age, and a son. Therefore, the infant was in the actual care and control of her elder sister and her brother on the death of the mother. There is no doubt that the elder sister was in a state of animosity towards her father and was generally concerned about what was to happen to the infant. At that time somebody applied an ingenious, but, in my view, a misdirected, mind to a form of procedure which is novel and irregular and not to be encouraged.
- C

Section 4 (2) of the Guardianship of Infants Act, 1925, provides:

- “ On the death of the mother of an infant, the father, if surviving, shall, subject to the provisions of this Act, be guardian of the infant, either alone or jointly with any guardian appointed by the mother. When no guardian has been appointed by the mother or if the guardian or guardians appointed
- D by the mother is or are dead or refuses or refuse to act, the court may if it thinks fit appoint a guardian to act jointly with the father.”

- What does that subsection mean? The question which the court is to determine is, not whether the appointment of a joint guardian may be some convenient step towards some result which cannot be otherwise obtained, but whether
- E it is desirable to appoint a joint guardian. That seems to be quite obvious. If it is not desirable to appoint a joint guardian, it cannot be right to appoint a guardian for some collateral purpose, if that collateral purpose can lawfully be obtained by other means. Consequently what do the words “if it thinks fit”, in s. 4 (2), mean? They must mean “if the court thinks that such a course will be for the benefit of the infant.” If the court below had given, or suggested,
- F any single ground on which it could be for the benefit of the infant to appoint a joint guardian, as distinct from some other purpose, and if the court had not plainly indicated that in fact it had acted from a collateral motive, I should have been very slow to interfere, if, indeed, I could have interfered, which is a matter on which I do not propose, in this case, to express a final opinion.

- On July 30, 1959, the elder sister applied under s. 4 (2) to have herself appointed
- G as joint guardian with the father. I will read some of the undisputed facts, but first I wish to say that they are not, in my view, in any way derogatory to the elder sister. She is a young woman, and is only doing what other young women do. But the question is: Could it possibly have been to the benefit of the infant that the elder sister should, in view of her relationship with the father, be appointed a joint guardian with him of the infant. The elder sister
- H said that she was twenty-one years old, that the infant was born on Nov. 13, 1948, and that there was no suggestion at the time when the mother obtained her order that the father had been cruel to the infant. She also said:

- “ I have been courting eighteen months. My fiancé is twenty-four. He has had his name down nearly five years for a council house, and, when it comes up we are proposing to get married . . . My father and I do not see eye to eye. He had cause to complain about the late hours I was keeping at nights. Well, I was twenty-one.”
- I

As I have already said, that is not the point. Nobody is entitled to complain of the late hours that she was keeping. The question is: Is she a good joint guardian with the father in respect of the infant? That is the point. The elder sister also said that the father had on one occasion been unkind to her, and then she added: “ My father and I are on the worst possible terms.”

The application was for the appointment of a joint guardian, not of a several

or separate guardian. To my mind it is a fantastic proposition that it could be to the benefit of the infant to appoint a joint guardian who was "on the worst possible terms" with the already existing guardian. Such a thing is against common sense. Counsel, who conducted the case very temperately and fairly, could not suggest how it could be for the benefit of any infant that persons on such terms should be joint guardians of the infant. In fact, it is reasonably certain that the justices never thought for one moment that it was for the benefit of the infant that the elder sister should be appointed joint guardian. What was in their minds is plainly revealed from the reasons which they have given. They said:

"Having heard the evidence of the father and of the sister of the infant, and having considered the background in this case, we were satisfied that the father was not a suitable person to be the sole guardian."

Pausing there, that might be quite right as a step to consider whether it was wise to have a proposed joint guardian with the father. But that step they never took. They went on to say:

"The daughter impressed us as a level-headed young woman, obviously very fond of her younger sister. We made the order for joint guardianship to enable the daughter to proceed with an application for custody."

That is the one thing which justices are not entitled to do when the application is for the appointment of a joint guardian. If there were more than one applicant and the justices were in doubt as to who should be selected, it would not be wrong to consider the possibility that one of the applicants might some day, in some other proceedings, be given the custody; but to direct their minds wholly to that question, when this was no step towards the application for custody (an application which had not yet been started), and not to consider whether this appointment was desirable per se seems an application of discretion on wrong and unjustifiable principles.

The point about that is that, under the Guardianship of Infants Acts, 1886 and 1925, the elder sister could not apply for the custody of the infant unless she had previously been appointed a joint guardian (1). I am quite satisfied that the justices, although they have not said so, were not aware that there was an alternative procedure available (2) because it was not brought to their attention. I am not saying that, in the circumstances of this case, an application to the Chancery Division to make this child a ward of court would succeed. If I said that, I should be committing the very offence with which I am charging the justices. It seems to me that, instead of considering the matter before them, they were considering what view they would take of some matter that was not before them. That is exactly what I would be doing if I discussed the question what would happen if an application were made in this Division. I must not be taken to be advising that any such application should be made. That is not the point. But the procedure is readily available if the circumstances justified it, about which I am saying absolutely nothing. There is, however, nothing, and there was never anything, to prevent the elder sister seeking to make the infant a ward of court without being appointed a joint guardian. Therefore, it cannot be right for any bench of magistrates to try to use s. 4 (2) of the Act of 1925 as a step in devising procedure to give themselves jurisdiction to deal with custody. In the case of an application by a person in the position

(1) By s. 79 (1) of the Children and Young Persons Act, 1932: "The power of the court under s. 6 of the Guardianship of Infants Act, 1925, to make orders regarding matters in difference between persons acting as joint guardians of an infant shall, where one of the said persons is the mother or father of the infant, include power—(a) to make such orders regarding the custody of the infant . . . as, having regard to the welfare of the infant, the court may think fit . . ."

(2) See the Law Reform (Miscellaneous Provisions) Act, 1949, s. 9; 28 HALSBURY'S STATUTES (2nd Edn.) 777.

- A** of the elder sister, I do not see any reason why, now that legal aid is available in a proper case for bringing proceedings of this kind in the High Court, it should not be done; but it is not often, though it could sometimes happen, that a person in the position of the elder sister would be the person who ought to make such an application. I am not saying anything about the present case. I am merely saying that such cases would be very rare.
- B** What I have said about the justices' approach being the wrong approach to the problem before them is plainly confirmed by one other matter to which I must refer. In their reasons for making the order, they went on to say: "The arrangements the father proposed making for custody seemed to us to be far from satisfactory". What has that got to do with this case? This was not a summons for custody. The father had not asked for custody and he had not taken out a summons for custody. He had it in law, but he had not applied to have it in fact, and I do not know why the justices should deal with it. But if they were going to deal with it, they should confine themselves to the evidence, and the next sentence, in their reasons, seems to me wholly wrong because they say: "The infant was to live with an aunt she could not remember ever seeing". As they never saw the infant in the case, where do they get that from?
- D** The infant gave no evidence and there is not the slightest record in the notes with which they have supplied me of any such thing being said. I cannot find any justification for it. Then the justices went on to say: "The father's relationship with his elder daughter was so bad that they were not on speaking terms..." That, of course, was common ground. Looking forward for a moment, how can one know how joint guardians would operate if they are not on speaking terms? It is difficult to appreciate how joint guardians, who are not on speaking terms, can function, and I have not been able to think of any satisfactory method by which they can do it. The justices continued:
- "... and it seemed to us doubtful whether he would be any more successful in bringing up his younger daughter, the infant, now approaching adolescence."
- F** I do not think the prospect of the infant being brought up in a successful manner would be improved by her education being conducted from the age of eleven to the age of twenty-one by two persons, one being her father and the other being her elder sister, who are not on speaking terms. The appeal will be allowed and the order discharged.

Appeal allowed.

Solicitors: *Hancock & Willis*, agents for *German & Soar*, Nottingham (for the appellant); *Church, Adams, Tatham & Co.*, agents for *Healey & Smith*, Nottingham (for the respondent).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

IMPERIAL CHEMICAL INDUSTRIES, LTD. v. CARO (INSPECTOR OF TAXES).

[CHANCERY DIVISION (Wynn-Parry, J.), October 28, 29, November 11, 1959.]

Income Tax—Double taxation—Relief—Company acquiring foreign shares—Shares constituting new source or addition to source of income—Case V assessment of dividends—Based on initial year's income in that and ensuing year—Claim for allowance of foreign tax in initial year against both assessments—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), s. 347, Sch. 16, para. 13—Double Taxation Relief (Taxes on Income) (Australia) Order, 1947 (S.R. & O. 1947 No. 806), Schedule, art. XII (1).

The taxpayer company owned shares in an Australian company and in 1952 it subscribed for 1,805,468 more ordinary £A1 shares, which constituted either a new source or an addition to a source of income within the meaning of the Income Tax Act, 1952, s. 134. It first received dividends on the newly acquired shares in 1953-54. It was assessed to United Kingdom income tax in respect of dividends from the shares for 1954-55 on the basis of the actual dividends in that year and for 1955-56 on the basis of the dividends in the preceding year in accordance with the Income Tax Act, 1952, s. 132 (1), s. 133 (1), i.e., for each of the two years on the dividends in 1954-55. The amount of the Australian tax which was allowable by way of credit (for purposes of income tax) under the Income Tax Act, 1952, s. 347 and Sch. 16, para. 13, and the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947, schedule, art. XII (1) was £49,212. The taxpayer company claimed that this sum should be allowed in relation to both tax of the fiscal year 1954-55 and tax of the fiscal year 1955-56.

Held: the Australian tax payable in respect of the income from the shares could be used once only as a credit against the United Kingdom income tax payable in respect of the same income and not separately for each of the two years of assessment.

Appeal dismissed.

[As to double taxation relief, see 20 HALSBURY'S LAWS (3rd Edn.) 456-458, paras. 857-859; and for cases on the subject, see 28 DIGEST (Repl.) 305-308, 1335-1350.]

For the Income Tax Act, 1952, s. 347 and Sch. 16, para. 13, see 31 HALSBURY'S STATUTES (2nd Edn.) 333, 542.

For a summary of the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947, schedule, art. XII (1), see 11 HALSBURY'S STATUTORY INSTRUMENTS 104, 105.]

Case Stated.

The taxpayer company appealed to the Special Commissioners of Income Tax against an objection to its claim for an allowance by way of credit against income tax for the years of assessment 1954-55 and 1955-56 for foreign tax under the Income Tax Act, 1952, Sch. 16, para. 13, in respect of income from dividends received from an Australian company. The company, a United Kingdom public company, had shares in overseas companies, including Imperial Chemical Industries of Australia and New Zealand, Ltd., which was incorporated and controlled in Australia. It received dividends from the Australian company which constituted income arising from a possession out of the United Kingdom. The dividends were assessed to United Kingdom income tax under Case V of Sch. D to the Income Tax Act, 1952, s. 123 (1), and also formed part of the profits of the company assessed to the United Kingdom profits tax. They therefore constituted income derived from a source in Australia on which Australian tax was payable, and the Australian tax was allowable as a credit against any United Kingdom tax payable in respect of that income by virtue of the Income

- A** Tax Act, 1952, s. 347, Sch. 16, and art. XII (1) of the schedule to the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947 (S.R. & O. 1947 No. 806).

In 1952 the company held 5,158,481 fully paid ordinary shares in the Australian company. In that year it subscribed for a further 1,805,468 ordinary £A1 shares. This new holding constituted either a new source or an addition

- B** to a source of income within the meaning of s. 134 of the Income Tax Act, 1952, and dividends on it were first payable in the year ending on Apr. 5, 1954. Under s. 133 (1) (b) of the Income Tax Act, 1952, the Case V assessment in respect of the dividends fell to be computed for 1954-55 on the actual income for that year, and for 1955-56 on the income arising in the year preceding the year of assessment (s. 132 (1)), no notice having been given under s. 133 (1) (c). For each
- C** year, therefore, the assessment was computed on the dividends payable in the year ending Apr. 5, 1955.

The dividends paid on the company's new holding in the Australian company during the year ending on Apr. 5, 1955, were £A51,343 (£40,911 sterling), in September, 1954, and £A66,012 (£52,600 sterling) in March, 1955, totalling £A117,355 or £93,511 sterling. Australian tax in respect of which credit could be

- D** given under art. XII (1) of the schedule to the order amounted to £64,836, and consisted of £16,307 charged directly on the dividends of £93,511 for the Australian fiscal year to June 30, 1956, and £48,529 not charged directly or by deduction, being the appropriate proportion of Australian tax paid by the Australian company provided for in the Income Tax Act, 1952, Sch. 16, para. 9. The United Kingdom profits tax attributable to these dividends payable in the

- E** year ending on Apr. 5, 1955, was £6,835 (£40,911 grossed at 6s. 10d. to £62,143 at eleven per cent.; see para. 7 (2) of Sch. 16 to the Act of 1952) for the chargeable accounting period ending Dec. 31, 1954 (the September dividend) and £8,789 (£52,600 grossed at 6s. 10d. to £79,897 at eleven per cent.) for the chargeable accounting periods ending on Oct. 31, 1955 (ten months) and Dec. 31, 1955 (two months) (the March dividend), total £15,624. This was the credit against the

- F** profits tax required to be given first under the Income Tax Act, 1952, Sch. 16, para. 2. The sum in respect of the dividends required to be included in the Case V assessment of the taxpayer company was £142,040, comprising £93,511 plus £48,529, the amount of Australian tax not charged directly or by deduction (under the Income Tax Act, 1952, Sch. 16, para. 8 (3) (b)). For the year of assessment 1954-55 United Kingdom income tax at 9s. in the £ on £142,000

- G** amounted to £63,918 and for the year of assessment 1955-56 at 8s. 6d. in the £ it amounted to £60,367. If credit for Australian tax did not fall to be given in one of these two years of assessment, pursuant to the contention of the Crown, the Crown conceded that a deduction of the Australian tax less the amount credited against the profits tax would be allowed from the sum assessed in that year, whether or not it could be claimed as of right.

- H** In a supplemental Case Stated on an order of the High Court made on Dec. 10, 1958, when the case first came before it, it was found that the dividends paid on the new holding during the year ending on Apr. 5, 1956, were £A63,191 (£50,352 sterling) in September, 1955, and £A99,301 (£79,124 sterling) in March, 1956, totalling £A162,492 (£129,476 sterling). The Australian income tax and social

- I** services contribution in respect of which credit could be given under art. XII (1) of the schedule to the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947, amounted to £93,286, comprising £24,837 charged directly on the dividends, and £68,449 not charged directly or by deduction, being the appropriate proportion of the Australian tax paid by the Australian company provided for in the Income Tax Act, 1952, Sch. 16, para. 9. Under s. 17 of the Income Tax and Social Services Contribution Assessment Act, 1936-56, the Australian tax was levied and paid for a financial year beginning on July 1 yearly on the taxable income derived during the year of income by any person whether a

resident or a non-resident. In the case of a company such as the taxpayer company which had not adopted an accounting period ending on a date other than June 30, "the year of income" meant the financial year next preceding the year of tax. "The year of tax" meant the financial year for which income tax was levied (s. 6 of the Act). A

The Australian tax of £24,837 was levied for the year ending June 30, 1957, on the taxable income of the taxpayer company derived during the year ending June 30, 1956, such taxable income consisting of the dividends of £129,476. The United Kingdom profits tax attributable to these dividends was £8,467 (£76,971 at eleven per cent.) for the chargeable accounting periods ending on Oct. 31, 1955 (ten months), and Dec. 31, 1955 (two months), and £16,329 (£120,954 at 13.5 per cent.) for the chargeable accounting periods ending Mar. 31, 1956 (three months), and Dec. 31, 1956 (nine months), total £24,796. B
C

The taxpayer company claimed credit in respect of the Australian taxes, so far as not allowed against the profits tax, against United Kingdom income tax for both the years of assessment 1954-55 and 1955-56. The Crown objected to this claim but was prepared to allow the balance of credit remaining, after the allowance of credit against the profits tax against United Kingdom income tax for 1954-55 or 1955-56, or for both years up to the limit of £49,212 total, at the option of the company. D

The taxpayer company contended as follows: (i) that, income tax being an annual tax, it was proper to consider each of the years of assessment 1954-55 and 1955-56 separately for the purpose of claims under the Income Tax Act, 1952, Sch. 16, para. 13; (ii) that on a proper construction of Sch. 16 and of art. XII (1) of the order, the taxpayer company was entitled to claim in respect of the income tax assessments for each of the years 1954-55 and 1955-56 that a sum of £64,836 Australian tax was payable directly or by deduction or under arrangements to which para. 9 of the schedule applied, in respect of income derived from sources in Australia and assessed to income tax in each of those years; (iii) that, on a proper construction of these provisions, the taxpayer was entitled to a credit against United Kingdom income tax payable in respect of that income for each of the years 1954-55 and 1955-56; (iv) that the construction of Sch. 16 for which the company contended was consistent with the language of the schedule and was the only construction which gave relief in respect of foreign tax for each year of assessment during which a foreign source of income was possessed and taxed both in the United Kingdom and in Australia; (v) that a consideration of the scheme of the schedule showed the intention of the legislature to grant relief for every year of assessment in which income was taxed both in this country and elsewhere; and (vi) that after deducting £15,624 of the £64,836, required to be given against the profits tax under Sch. 16, para. 2, a sum of £49,212 should be allowed as a credit against United Kingdom income tax in each of the years 1954-55 and 1955-56. E
F
G

The Crown contended: (i) that, on a proper construction of Sch. 16 and of art. XII (1) of the order, the total sum allowable as a credit to the company was £64,836, that being the Australian tax payable whether directly or by deduction or under arrangements to which Sch. 16, para. 9, applied, in respect of the income derived from sources in Australia; (ii) that £15,624 of the sum of £64,836 being first applied in accordance with the provisions of Sch. 16, para. 2, in reducing the profits tax payable, a balance of £49,212 only remained and was applicable to the reduction of any United Kingdom income tax charged in respect of that income; and (iii) that United Kingdom income tax being chargeable in respect of that income for both the years of assessment 1954-55 and 1955-56, the balance of £49,212 was applicable to the reduction of the income tax so chargeable, i.e., either that for the year of assessment 1954-55 or that for the year of assessment 1955-56 or partly the tax for one year and partly that for the other. H
I

The commissioners rejected the contention of the company, which they held

- A was not reconcilable with the provisions of Sch. 16 and in particular para. 2. As they construed the paragraph, and in particular sub-para. (2), in determining the amount of the credit against United Kingdom income tax, the question was what was the Australian tax payable whether directly or by deduction in respect of the income, i.e., in the particular case the dividends payable to the company on its holding of 1,805,468 ordinary £A1 shares in the year ended Apr. 5, 1955.
- B The answer being by common consent £64,836, that sum was the credit to be applied first in reducing any profits tax chargeable in respect of the income, viz., £15,624, and to the extent that it could not be so applied, viz., £49,212, in reducing the income tax chargeable in respect of the sum. If that were right, £49,212 represented the maximum credit which the company could claim against the United Kingdom income tax assessments, and, as the Crown conceded, as United Kingdom income tax was chargeable in respect of the relevant income from the dividends for both 1954-55 and 1955-56, the company could elect to claim that sum for either of those years or partly for one and partly for the other. The claim of the company for an allowance by way of credit for Australian tax for 1954-55 and 1955-56 was limited to £49,212 after deducting the sum of £15,624 properly given against the profits tax. They dismissed the
- D appeal. The company appealed to the High Court.

Heyworth Talbot, Q.C., and P. Shelbourne for the company.

H. B. Magnus, Q.C., and A. S. Orr for the Crown.

Cur. adv. vult.

- Nov. 11. WYNN-PARRY, J., read the following judgment: On the
- E view which I have formed I can express my judgment in a very few words. The first step which I am directed to take under art. XII (1) of the schedule to the Double Taxation Relief (Taxes on Income) (Australia) Order, 1947 (S.R. & O. 1947 No. 806) (to which I will refer as "the order") is to ascertain whether or not there was any "income derived from sources in Australia". The answer to that question is "yes". From Imperial Chemical Industries of Australia and
- F New Zealand, Ltd., Imperial Chemical Industries, Ltd. (to which I will refer as "the company") received two dividends, which are the only dividends in question; namely, £40,911 paid in September, 1954, and £52,600 paid in March, 1955, totalling £93,511, and both therefore received in the fiscal year ending Apr. 5, 1955.

- G The next step which I have to take under the above article is to ascertain what Australian tax was payable directly or indirectly by way of deduction in respect of those dividends. The answer to that is clear. £64,836 was so payable. Having found that figure I have now, in my view, found the figure which is to be, quoting the relevant words of art. XII (1),

"allowed as a credit against any United Kingdom tax payable in respect of that income."

- H It was argued on behalf of the company that the word "any" raised an ambiguity. I am unable to discover any ambiguity. The direction is to turn from the agreement to the relevant United Kingdom tax legislation and discover whether there is any United Kingdom income tax payable in respect of that income. There is. Therefore, the £64,836 has to be set against that United
- I Kingdom tax. Under the Income Tax Act, 1952, it is common ground that this credit has first to be set against the liability of the company to United Kingdom profits tax attributable to the dividends in question payable in the year ending Apr. 5, 1955 (see the Income Tax Act, 1952, Sch. 16, para. 2). This total was £15,624.

There is thus left a credit balance of £49,212 to be set against United Kingdom income tax. This is a case in which Case V of Sch. D is applicable. Under the operation of the rules applicable to that Case, the company is assessable to tax in respect of the dividends in question, in respect both of the year 1954-55 and

of the year 1955-56. It is therefore argued that this credit balance is available to be set off against the United Kingdom income tax payable in respect of each of these years. I am unable to accept this argument. A

It was urged that the contrary view failed to give effect to what was described as the manifest intention of the two governments to prevent double taxation. Be that or not as it may, I cannot, by reference to the English taxing statute and a consideration of its effect, create a greater sum of Australian tax than is made the subject of the operation of art. XII of the agreement. That sum is, as I have said, £64,836, and it is that sum, and only that sum, and only that sum once, which can be used as a credit against the United Kingdom tax payable in respect of the income in respect of which the Australian tax is payable. B

With all respect to the elaborate, interesting and attractive argument of Mr. Heyworth Talbot, that reasoning appears to me to dispose of the case. The appeal will therefore be dismissed with costs. C

Appeal dismissed.

Solicitors: *J. W. Ridsdale* (for the company); *Solicitor of Inland Revenue.*

[Reported by F. A. AMIES, Esq., Barrister-at-Law.] D

HILL (otherwise PETCHEY) v. HILL.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Collingwood, J.), November 4, 5, 1958, July 27, 28, October 2, 1959.] E

Nullity—Jurisdiction—Marriage celebrated in England—Parties domiciled in Scotland—Petitioner resident in England—Petition on ground of respondent's impotence.

The English courts have jurisdiction to entertain a suit for nullity where the marriage was celebrated in England, not only where the marriage is void but also where it is voidable on the ground of impotence. F

Observations of SIR CRESSWELL CRESSWELL in *Simonin v. Mallac* ((1860), 2 Sw. & Tr. at p. 75) and of PILCHER, J., in *Hutter v. Hutter (otherwise Perry)* ([1944] 2 All E.R. 368) applied; *Addison (otherwise McAllister) v. Addison* ([1955] N.I. 1) followed; *Casey v. Casey* ([1949] 2 All E.R. 110) distinguished. G

[**Editorial Note.** Wilful refusal to consummate a marriage is a fundamentally different cause for nullity of marriage from that of impotence; and the general proposition that the English courts have jurisdiction in a nullity suit if the marriage was celebrated in England does not apply where the ground for nullity is wilful refusal to consummate the marriage, by reason of the decision of the Court of Appeal in *Casey v. Casey* ([1949] 2 All E.R. 110) (see p. 766, letters B and C, post). H

As to jurisdiction of English courts in case of voidable marriages celebrated in England, see 7 HALSBURY'S LAWS (3rd Edn.) 109, para. 195, note (c); and for cases on the subject, see 11 DIGEST (Repl.) 478, 1065-1067.

As to approbation of a marriage which is sought to be annulled, see 12 HALSBURY'S LAWS (3rd Edn.) 231, para. 432, note (u); and for cases on the subject, see 27 DIGEST (Repl.) 271, 2171 and DIGEST Supp. I

Cases referred to:

Addison (otherwise McAllister) v. Addison, [1955] N.I. 1; 3rd Digest Supp.

Baxter v. Baxter, [1947] 2 All E.R. 886; [1948] A.C. 274; [1948] L.J.R. 479; 27 Digest (Repl.) 280, 2253.

Casey v. Casey, [1949] 2 All E.R. 110; [1949] P. 420; [1949] L.J.R. 1642; 11 Digest (Repl.) 479, 1076.

- A** *Cooper v. Crane*, [1891] P. 369; 61 L.J.P. 35; 27 Digest (Repl.) 36, 137.
Dalrymple v. Dalrymple, (1811), 2 Hag. Con. 54; 161 E.R. 665; *on appeal* (1814), 2 Hag. Con. 137 n.; 22 Digest (Repl.) 618, 7112.
De Reneville v. De Reneville, [1948] 1 All E.R. 56; [1948] P. 100; [1948] L.J.R. 1761; 11 Digest (Repl.) 479, 1075.
Dickinson v. Dickinson (otherwise *Phillips*), [1913] P. 198; sub nom. *D. v. D.* (otherwise *P.*), 82 L.J.P. 121; 27 Digest (Repl.) 276, 2209.
- B** *Easterbrook v. Easterbrook* (otherwise *Jervis*), [1944] 1 All E.R. 90; [1944] P. 10; 113 L.J.P. 17; 170 L.T. 26; 11 Digest (Repl.) 480, 1077.
Greenstreet (falsely called *Cumyns*) v. *Cumyns*, (1812), 2 Hag. Con. 332; 161 E.R. 761; 27 Digest (Repl.) 270, 2163.
Harthan v. Harthan, [1948] 2 All E.R. 639; [1949] P. 115; [1949] L.J.R. 115; 27 Digest (Repl.) 272, 2178.
- C** *Hutter v. Hutter* (otherwise *Perry*), [1944] 2 All E.R. 368; [1944] P. 95; 113 L.J.P. 78; 171 L.T. 241; 11 Digest (Repl.) 480, 1078.
Inverclyde (otherwise *Tripp*) v. *Inverclyde*, [1931] P. 29; 100 L.J.P. 16; 144 L.T. 212; 95 J.P. 73; 11 Digest (Repl.) 478, 1070.
Le Mesurier v. Le Mesurier, [1895] A.C. 517; 64 L.J.P.C. 97; 72 L.T. 873; 11 Digest (Repl.) 468, 1011.
- D** *Lewis* (falsely called *Hayward*) v. *Hayward*, (1866), 35 L.J.P. & M. 105; *revsg.* S.C. sub nom. *L—* (falsely called *H—*) v. *H—*, (1865), 4 Sw. & Tr. 115; *subsequent proceedings*, sub nom. *L. (falsely called H.) v. H.*, (1866), L.R. 1 P. & D. 293; 27 Digest (Repl.) 277, 2223.
Linke (otherwise *Van Aerde*) v. *Van Aerde*, (1894), 10 T.L.R. 426; 11 Digest (Repl.) 478, 1066.
- E** *Ramsay-Fairfax* (otherwise *Scott-Gibson*) v. *Ramsay-Fairfax*, [1955] 2 All E.R. 709; [1956] P. 115; [1955] 3 W.L.R. 188, 849; *on appeal*, [1955] 3 All E.R. 695; [1956] P. 126; 3rd Digest Supp.
Salvesen (or *von Lorang*) v. *Austrian Property Administrator*, [1927] All E.R. Rep. 78; [1927] A.C. 641; 96 L.J.P.C. 105; 137 L.T. 571; 11 Digest (Repl.) 478, 1069.
- F** *Simonin v. Mallac*, (1860), 2 Sw. & Tr. 67; 29 L.J.P.M. & A. 97; 2 L.T. 327; 164 E.R. 917; 11 Digest (Repl.) 478, 1065.
Sottomayer v. De Barros, (1877), 2 P.D. 81; *on appeal*, 3 P.D. 1; 47 L.J.P. 23; 37 L.T. 415; 11 Digest (Repl.) 460, 945; *re-hearing*, (1879), 5 P.D. 94; 49 L.J.P. 1; 41 L.T. 281; 11 Digest (Repl.) 461, 946.
- G** *Tindall v. Tindall*, [1953] 1 All E.R. 139; [1953] P. 63; [1953] 2 W.L.R. 158; 3rd Digest Supp.
White (otherwise *Bennett*) v. *White*, [1937] 1 All E.R. 708; [1937] P. 111; 106 L.J.P. 49; 156 L.T. 422; 11 Digest (Repl.) 478, 1073.

Petition.

- H** In this suit the petitioner, Blanche Ethel Hill, sought a decree of nullity on the ground that the husband was at the time of the ceremony of marriage and had ever since been incapable of consummating the same. The parties went through a ceremony of marriage in Middlesex in 1950. It was alleged in the petition that the respondent was domiciled in Scotland but that the court had jurisdiction to hear and determine the petition by reason of the fact that the ceremony of marriage took place in England. The suit was heard undefended by COLLINGWOOD, J., on Nov. 4, 5, 1958, and was then adjourned. His LORDSHIP requested the attendance of the Queen's Proctor for legal argument.

J. Stirling, Q.C., and *A. B. Hollis* for the petitioner.

Colin Duncan for the Queen's Proctor.

Cur. adv. vult.

Oct. 2. COLLINGWOOD, J., read the following judgment: In this suit the petitioner asks that her marriage be declared null and void on the ground of the respondent's incapacity to consummate it. The ceremony of

marriage was performed on July 15, 1950, at the parish church in Hornsey, A
Middlesex, and thereafter the parties lived together at 21, Connaught Road,
Stroud Green. The respondent, who is Scottish, was employed in England at the
time of the marriage ceremony. After the parties separated he returned to
Scotland, and lives in West Lothian. The petition alleges that he is domiciled
in Scotland, and I am satisfied that this is so. It is unnecessary to go into the
details of the evidence relating to the grounds on which the petition is founded. B
The respondent has not entered an appearance and the suit is undefended, and
having heard the petitioner's evidence and that of the medical examiner I am
satisfied that the respondent, was at the date of the ceremony and thereafter
incapable of consummating the marriage.

Two questions, however, remain to be decided. The first is whether the
petitioner has approbated the marriage which she now seeks to reprobate. C
The parties separated on Sept. 7, 1951, when the husband left the matrimonial
home as the result of an order of that date made by the magistrates' court at
Highgate, when the court adjudged that the respondent had treated the petitioner
with persistent cruelty and ordered that the petitioner should no longer be bound
to cohabit with him. The court also ordered the respondent to pay 40s. weekly
by way of maintenance, and payments were made pursuant to that order until D
June, 1957, when the respondent left the Royal Air Force, which he had joined in
1953.

Despite the existence of the non-cohabitation clause, the petitioner allowed the
respondent to stay with her in the matrimonial home on some four occasions
during his week-end leaves from the Royal Air Force. Attempts at intercourse
were made during these visits but they were abortive—the last visit being at E
Whitsun, 1955. In January, 1956, the petitioner had an interview with an officer
of the Royal Air Force and discussed her matrimonial affairs with him, and as a
result of this conversation she went to the Mary Ward Settlement and obtained
further legal advice. She says that it was not until this visit in 1956 that she
knew anything whatever about nullity proceedings or her legal rights in the
matter, and I accept her evidence on this matter. I think it is clear from the F
decision of the Court of Appeal in *Tindall v. Tindall* (1), that to raise an estoppel
on the ground of approbation it is necessary that the petitioner should have
knowledge both of the facts and the law as to nullity—that is, that she has a
remedy, and what that remedy is. On the evidence in the present case, therefore,
I am satisfied that there has been no approbation.

The second question is as to the jurisdiction of this court. As I have stated, G
the respondent is resident and domiciled in Scotland. The petitioner is resident
in England, and the sole ground on which it is submitted that this court has
jurisdiction to hear and determine the petition is that the ceremony of marriage
took place in England. The problem is difficult. It is not covered by direct
authority and it is the subject of a divergence of opinion in the text-books, and
as the case was undefended I availed myself of the provisions of s. 10 of the H
Matrimonial Causes Act, 1950 (2), and directed that all necessary papers should
be sent to the Queen's Proctor, who duly instructed counsel to appear and argue
the matter. Counsel for the Queen's Proctor unreservedly supported the con-
tention of counsel for the petitioner, and I wish to express my indebtedness to
both for the great assistance they have given me.

It is accepted by counsel for the petitioner that the fact that the petitioner I
alone is resident in England is not sufficient to found jurisdiction in this court,
but it is submitted on the petitioner's behalf—and counsel for the Queen's
Proctor supported that submission—that the law on this question is correctly
stated in *RAYDEN ON DIVORCE* (3), where it says:

“The court has jurisdiction to entertain a suit for nullity where the

(1) [1953] 1 All E.R. 139; [1953] P. 63.

(2) 29 HALSBURY'S STATUTES (2nd Edn.) 398.

(3) 7th Edn. at p. 51.

- A marriage was celebrated in England, where the marriage is void ipso jure, and also where it is voidable only: for the court does not draw a distinction, for jurisdictional purposes, between void and voidable marriages."

It is necessary to go back to the Matrimonial Causes Act, 1857, by s. 6 of which Act the jurisdiction then vested in or exercisable by any ecclesiastical court over matrimonial causes, including suits of nullity, was transferred to a new court of

- B record, "The Court for Divorce and Matrimonial Causes". By s. 22 of this same Act it was provided that in all suits and proceedings *other than* proceedings to dissolve any marriage,

- C "the said court shall proceed and act and give relief on principles and rules which in the opinion of the said court shall be as nearly as may be conformable to the principles and rules on which the ecclesiastical courts have heretofore acted and given relief . . ."

This section was repealed by the Supreme Court of Judicature (Consolidation) Act, 1925, but was in effect re-enacted by s. 32 of that Act (4) which provides that:

- D "... where no special provision is contained in this Act or in rules of court with reference thereto, any such jurisdiction shall be exercised as nearly as may be in the same manner as that in which it might have been exercised by the court to which it formerly appertained."

As was held by PILCHER, J., in *Hutter v. Hutter* (otherwise *Perry*) (5):

- E "In substance, therefore, it is still the duty of this court in all matrimonial suits, including suits for nullity but excluding suits for dissolution, to proceed and act and give relief on principles and rules which shall conform as closely as possible to the principles and rules acted upon by the ecclesiastical courts."

- F In 1860, shortly after the Matrimonial Causes Act came into force, *Simonin v. Mallac* (6) was heard before the full court consisting of the Judge Ordinary (SIR CRESSWELL CRESSWELL), CHANNELL, B., and KEATING, J. In that case, two French subjects, then domiciled in that country, came over to England and were married by licence according to the law of England, but without the observance of certain formalities and consents required by the law of France in respect of the marriage of its own subjects, irrespective of the place where celebrated. They then returned to France, where the man refused to celebrate the marriage according to French law, nor was the marriage consummated. The woman instituted a suit for nullity in the French courts, and obtained a decree. She subsequently came to reside in England and petitioned for a decree of nullity here. The first question considered was whether the court had any jurisdiction, and this is the only part of the judgment which is material in this connexion. The court held that it had jurisdiction, based on the *lex loci contractus*. The Judge Ordinary, in the course of his judgment, said (7):

- H "This question therefore depends upon the first proposition, that the parties, by professing to enter into a contract in England, mutually gave to each other the right to have the force and effect of that contract determined by an English tribunal . . . There is nothing contrary to natural justice in calling upon him [the respondent] to have the validity or invalidity of a supposed contract ascertained and determined by the tribunal of the country where it was entered into by him: for, according to LORD STOWELL (8) in *Dalrymple v. Dalrymple* (9) it is an indisputable rule of law, as exercised in all civilised countries, that a man who contracts in a country engages for

(4) 5 HALSBURY'S STATUTES (2nd Edn.) 361.

(5) [1944] 2 All E.R. at p. 370; [1944] P. at p. 99.

(6) (1860), 2 Sw. & Tr. 67.

(7) (1860), 2 Sw. & Tr. at p. 75.

(8) Then SIR WILLIAM SCOTT.

(9) (1811), 2 Hag. Con. at p. 61.

a competent knowledge of the law of contracts in that country. If he rashly presumes to contract without such knowledge, he must take the inconveniences resulting from such ignorance upon himself, and not attempt to throw them upon the other party."

It is to be observed that in coming to the conclusion that the court had jurisdiction to hear the suit, the Judge Ordinary made no suggestion that there was any distinction for this purpose between void and voidable marriages.

In *Sottomayer v. De Barros* (10), two Portuguese subjects, domiciled in Portugal, went through a marriage ceremony in England where they were then residing. They were first cousins and by the law of Portugal such a marriage between Portuguese subjects was prohibited. They subsequently returned to Portugal where they continued to reside. PHILLIMORE, J., held that the court was not bound to recognise the incapacities affixed by the law of the domicile of the parties, and refused to grant a decree of nullity to the petitioner. The Court of Appeal (11) reversed this decision, but the importance of the case for the present purpose is that neither in the court of first instance nor in the Court of Appeal, before JAMES, BAGGALLAY and COTTON, L.JJ., was the jurisdiction of the court questioned, nor was it suggested that the decision on the point of jurisdiction in *Simonin v. Mallac* (12) was wrong. The Queen's Proctor was represented at both hearings, and the case was subsequently re-heard before SIR JAMES HANNEN, P. (13), when again jurisdiction was assumed.

In *Cooper v. Crane* (14), the petitioner asked for a decree on the ground of coercion. The respondent was resident in the United States of America, and apparently domiciled in one of the states thereof. It was not suggested that he was domiciled in England, and the only ground for jurisdiction which appears is the fact that the marriage was celebrated here.

Linke (otherwise Van Aerde) v. Van Aerde (15), was a petition on the ground of bigamy. The parties were foreigners, and were assumed to be of foreign domicile. GORELL BARNES, J., said (16):

"The marriage contract was entered into here, and on that ground this court is asked to deal with it."

He then referred to *Simonin v. Mallac* (12), and *Sottomayer v. De Barros* (10), and decided that he had jurisdiction to hear the case. Again it is to be observed that the learned judge, so far as the report shows, attached no significance to the fact that the claim was that the marriage was void, as affecting his jurisdiction.

This distinction, for the purposes of jurisdiction, between void and voidable marriages, appears for the first time in *Inverclyde (otherwise Tripp) v. Inverclyde* (17). This was a petition on the ground of the respondent's impotence. The petitioner alleged that the parties were domiciled in Scotland, that she was resident in England, where the marriage ceremony had taken place, and that the respondent was resident both in England and in Scotland. The respondent entered an appearance under protest on the ground that the court had no jurisdiction. BATESON, J., held that a decree in a nullity suit on the grounds of impotence, being a decree affecting status of the parties, was a judgment in rem just as a decree in a divorce suit is a judgment in rem; therefore the only court competent to pronounce it was the court of the domicile. The judge said (18):

"The marriage being voidable and not void and the decree affecting and involving an alteration of status and being a judgment in rem binding on all the world, there can be no jurisdiction in this court unless the parties are domiciled in this country. It seems to me that if the principle is sound that in a suit for dissolution of marriage in divorce jurisdiction depends on domicile

(10) (1877), 2 P.D. 81.

(11) (1877), 3 P.D. 1.

(12) (1860), 2 Sw. & Tr. 67.

(13) (1879), 5 P.D. 94.

(14) [1891] P. 369.

(15) (1894), 10 T.L.R. 426.

(16) (1894), 10 T.L.R. at p. 426.

(17) [1931] P. 29.

(18) [1931] P. at p. 41.

A it must equally so depend in a suit for dissolution of marriage on the ground of impotence. To call it a suit for nullity does not alter its essential and real character of a suit for dissolution."

B Thirteen years later, in *Easterbrook v. Easterbrook* (otherwise *Jervis*) (19), HODSON, J., refused to follow this decision. It was a petition for nullity on the ground of the respondent's wilful refusal to consummate. The parties went through a ceremony of marriage in a register office in England, and thereafter the petitioner, a soldier serving with the Canadian forces, and the respondent cohabited together in this country. The petition, which was undefended, alleged that the petitioner was domiciled in Canada and that the respondent was domiciled in England. There was no protest to the jurisdiction. It was submitted by counsel for the petitioner that the court had the same jurisdiction in nullity suits as was vested in the ecclesiastical courts, and that that was so whether the marriage was void or voidable. It was pointed out that *Inverclyde v. Inverclyde* (20) was the first reported case in which it had been held that the husband's domicile was the exclusive test of jurisdiction, and that the decision in that case rested on an obiter dictum of LORD PHILLIMORE in *Salvesen (or von Lorang) v. Austrian Property Administrator* (21).

D In his judgment, HODSON, J., said (22):

E " . . . the petitioner is domiciled in Canada and the respondent is domiciled in England. Both parties at all material times were resident in England, and the ceremony of marriage, which is not called into question, was celebrated in England . . . This is an undefended case in which I have only heard argument on behalf of the petitioner. My attention has been drawn to a number of authorities dealing with the difficult question of jurisdiction. I have, in particular, been referred to *Salvesen (or von Lorang) v. Austrian Property Administrator* (21), *Inverclyde (otherwise Tripp) v. Inverclyde* (20) and the recent case, *White (otherwise Bennett) v. White* (23) which was decided, after argument, by BUCKNILL, J. As in *White's case* (23), so in this case, there had been no appearance and no protest to the jurisdiction, and I myself am unable, with all respect to BATESON, J., to see the distinction, for the purpose of jurisdiction, which appears to have been drawn in the *Inverclyde case* (20), between voidable and void marriages. There is in my judgment, on the facts which I have stated, jurisdiction in this case, as in *White's case* (23), to pronounce a decree of nullity, on the grounds set out in the petition."

G In the same year, in *Hutter v. Hutter* (otherwise *Perry*) (24), PILCHER, J., also declined to follow *Inverclyde v. Inverclyde* (20). In that case the petitioner, a soldier in the United States Army, sought a decree of nullity on the ground that the ceremony of marriage had never been consummated owing to the wilful refusal of the respondent. The petitioner was, according to the report, domiciled in the United States of America, and was on military service in this country when the petition was filed. After the ceremony of marriage the respondent continued to live at the home of her parents in England where she was visited by the petitioner. After hearing arguments by counsel for the petitioner and by the Attorney-General for the King's Proctor, PILCHER, J., held that he had jurisdiction to hear the suit. In the course of his judgment the learned judge, after referring to *Simonin v. Mallac* (25), said (26):

"The wife, who had come to live in this country, sought a decree of nullity here. The marriage, which she had contracted in this country, was

(19) [1944] 1 All E.R. 90; [1944] P. 10.

(20) [1931] P. 29.

(21) [1927] All E.R. Rep. 78; [1927] A.C. 641.

(22) [1944] 1 All E.R. at p. 90; [1944] P. at p. 11.

(23) [1937] 1 All E.R. 708; [1937] P. 111.

(24) [1944] 2 All E.R. 368; [1944] P. 95.

(25) (1860), 2 Sw. & Tr. 67.

(26) [1944] 2 All E.R. at p. 371; [1944] P. at p. 102.

perfectly good under English law, and the court entertained the suit but dismissed the wife's petition. I refer to this case only because it decided, amongst other things, that the wife having entered into a contract of marriage in this country was subject to the jurisdiction of the competent court in this country in respect of her personal status resulting from the marriage so contracted. It is, moreover, to be observed that, under French law the marriage in this case appears to have been merely voidable and not void. So far as I am aware the proposition that this court has jurisdiction to inquire into and pronounce upon the validity of every marriage contracted in accordance with English law in this country has never been questioned."

That is, of course, until *Inverclyde v. Inverclyde* (27). Later, the learned judge went on to say (28):

"It would seem, therefore, that both on principle and on authority there is good ground for saying that in suits for nullity the mere residence of the parties in this country is sufficient to found the jurisdiction of the court to pronounce upon the validity of a marriage celebrated in England. If this were not so it would mean that the competent court for matrimonial suits in this country renounced jurisdiction in matters which were within its own peculiar competence, namely, questions relating to the validity of a marriage contracted in England by persons who, . . . if foreigners, must be taken to have subjected themselves to such laws."

He concludes his judgment with these words (29):

"In my opinion, there is no justification either on principle or on authority for the drawing of such a distinction [that is to say, the distinction drawn in *Inverclyde v. Inverclyde* (27) for the purposes of jurisdiction between void and voidable marriages]. Inasmuch as practical questions of status are involved in the declaration of any court which pronounces upon the validity of a marriage the court of the domicile of the parties has no doubt a peculiar competence to adjudicate in such suits. The authorities to which I have referred make it clear, however, that the courts of this country have not regarded the court of the domicile of the parties as having exclusive competence to pronounce upon the validity of a marriage, more particularly where such marriage has, as in this case now before me, been celebrated in this country. I accordingly hold that this court has jurisdiction to entertain the present suit and pronounce a decree nisi of nullity."

As I read this judgment, PILCHER, J., in referring to the fact of residence of the parties in this country as founding jurisdiction in the court to pronounce on the validity of a marriage celebrated in England, was not intending to detract from the previous proposition, that the court has jurisdiction to pronounce on the validity of every marriage contracted in accordance with English law in this country. He was basing the jurisdiction on each of these separately, though in fact they were found in conjunction in the case before him.

The decision in *Inverclyde v. Inverclyde* (27), however, was considered, and to some extent restored, in *Casey v. Casey* (30). There a soldier domiciled and normally resident in one of the provinces of Canada (which province is not stated) married an Englishwoman in England. There were short periods of cohabitation, both in England and Canada, after which the wife returned to England and brought a suit for nullity on the ground of the respondent's wilful refusal to consummate the marriage. It was admitted in the petition that at the time when it was filed both parties were domiciled in Canada. The husband

(27) [1931] P. 29.

(28) [1944] 2 All E.R. at p. 372; [1944] P. at p. 103.

(29) [1944] 2 All E.R. at p. 374; [1944] P. at p. 108.

(30) [1949] 2 All E.R. 110; [1949] P. 420.

- A did not enter an appearance and took no part in the proceedings. The commissioner (31) found that the husband had wilfully refused to consummate the marriage, but held that the court had no jurisdiction to grant a decree, on the ground that the case was governed by *De Reneville v. De Reneville* (32). The wife appealed. The Court of Appeal held that there was no jurisdiction. BUCKNILL, L.J., based his judgment on two considerations, first that the balance of hardship lay in the respondent's favour, and secondly that a petition to annul
- B a voidable marriage was really indistinguishable from a petition for dissolution.

He said (33):

- C "I find, therefore, no clear decision on the point as to the jurisdiction in nullity cases on the ground of wilful refusal to consummate it where the marriage has been celebrated in England, but the respondent husband is domiciled and resident abroad. It is well established that in a case where the petition is for the dissolution of a marriage the court has no jurisdiction to grant a decree on the ground that the marriage took place in England if the domicile of the husband, and, therefore, of the wife, is abroad at the time of the institution of the suit. Such jurisdiction is based exclusively on
- D domicile as decided by the Privy Council in *Le Mesurier v. Le Mesurier* (34), and approved by the House of Lords in *Salvesen's* case (35). Why, then, should there be a distinction, on the ground of the place of celebration of marriage, between a petition for dissolution of a valid marriage and a petition to annul a marriage on the ground of wilful refusal to consummate it? I can see no valid reason for such a distinction."

- E Later, BUCKNILL, L.J., said (36):

- F "My opinion in favour of dismissing this appeal is based partly on the balance of hardship to the parties, but mainly on the analogy of the rule that the court of the domicile of the husband is the sole court in dissolving a valid marriage. It seems to me reasonable that a similar rule should be applied in principle to a marriage which is merely voidable on the ground of wilful refusal to consummate it. There may be an exception to the rule in the case of a voidable marriage where both parties are resident in the country where the petition is filed, but I do not see the necessity of making an exception on the ground that the marriage has been celebrated in the country where jurisdiction is invoked."

- G SOMERVELL, L.J., clearly rejected the basis of the decision in *Inverclyde v. Inverclyde* (37), that is, that a petition to annul a voidable marriage was equated to a petition for divorce, but he was of opinion that in the circumstances of that case the fact of the celebration of the marriage in England did not afford jurisdiction there.

COHEN, L.J., concurred with the judgment of BUCKNILL, L.J.

- H The final stage is reached in *Ramsay-Fairfax (otherwise Scott-Gibson) v. Ramsay-Fairfax* (38). This was a wife's petition for nullity on the grounds of the husband's incapacity, or alternatively wilful refusal, to consummate the marriage. The marriage was celebrated in Egypt, under the provisions of the Foreign Marriage Act, 1892, the husband being, at all material times, an officer serving in Her Majesty's Forces. At the time of the presentation of the petition both
- I parties were resident in England. The husband appeared under protest, alleging that he was domiciled in Scotland, and denying that the court had jurisdiction. At the hearing of this issue, WILLMER, J., held on the facts that the husband was at all material times domiciled in Scotland, and the question, therefore, arose

(31) His Honour JUDGE EARENGEY. (32) [1948] 1 All E.R. 56; [1948] P. 100.

(33) [1949] 2 All E.R. at p. 115; [1949] P. at p. 428. (34) [1895] A.C. 517.

(35) [1927] All E.R. Rep. 78; [1927] A.C. 641.

(36) [1949] 2 All E.R. at p. 117; [1949] P. at p. 431. (37) [1931] P. 29.

(38) [1955] 2 All E.R. 709; [1956] P. 115.

whether the court had jurisdiction on the basis of the residence of both parties in England. A

WILLMER, J., held that the court had jurisdiction. He pointed out that both in *De Reneville v. De Reneville* (39) and in *Casey v. Casey* (40) the Court of Appeal expressly left open the question whether the court should exercise jurisdiction over a voidable marriage in a case where both parties were resident in England, and went on to say (41) that the decisions at first instance were conflicting, B namely, *Inverclyde v. Inverclyde* (42), where BATESON, J.,

“drew a distinction between proceedings for nullity in cases where the marriage is void ab initio and those where the marriage is merely voidable (as in the present case), and held that in the latter case nothing short of domicile would suffice to found jurisdiction to entertain the suit.” C

On the other hand, there were the decisions of HODSON, J., in *Easterbrook v. Easterbrook* (43), and of PILCHER, J., in *Hutter v. Hutter* (44), and the learned judge said (45):

“After careful consideration I do not feel able to do other than follow the decision of PILCHER, J., in *Hutter v. Hutter* (44), a case which has twice been considered and discussed by the Court of Appeal without adverse comment.” D

Against this decision the husband appealed. DENNING, L.J., gave the first judgment and after stating the facts, he said (46):

“The jurisdiction in cases of nullity is, in my judgment, entirely different from the jurisdiction in cases of divorce. In cases of divorce, ever since *Le Mesurier v. Le Mesurier* (47), the only courts which have had jurisdiction to decree a dissolution of a marriage are the courts of the domicile; but the jurisdiction of our courts in nullity cases is different, dating from 1857, when s. 22 of the Matrimonial Causes Act, 1857, enacted: . . .” E

Then he quotes the section to which I referred at the beginning of this judgment DENNING, L.J., goes on (46):

“That section shows plainly that the jurisdiction in nullity suits depends on the principles and rules which were observed in the ecclesiastical courts before 1857. It is true that the grounds of nullity have since been extended, nevertheless, in my opinion, all suits for nullity, whether under the original grounds (e.g. incapacity) or on the new grounds (e.g. wilful refusal) are to be governed by the principles and rules which were observed in the old ecclesiastical courts. F

“It is clear that the ecclesiastical courts based their jurisdiction in cases of nullity on residence, not on domicile. If the defendant to a petition was resident within the local jurisdiction of the court, then the court had jurisdiction to determine it. So here in this case. At the issuing of the petition the husband and wife were both resident in this country, and that is sufficient to give the court jurisdiction to decide the case. So much seems to me plain on the interpretation of the statutes. In addition, in *Baxter v. Baxter* (48) in the House of Lords, LORD JOWITT, L.C., said (49) that s. 22 manifestly applied to suits for nullity on the ground of incapacity. It must also apply to suits on the new ground of wilful refusal. G

“That is a sufficient ground for the determination of this case, but, as there has been much difference of opinion on this matter, I must say a word about *Inverclyde (otherwise Tripp) v. Inverclyde* (42). In that case BATESON, J., H

(39) [1948] 1 All E.R. 56; [1948] P. 100. (40) [1949] 2 All E.R. 110; [1949] P. 420.

(41) [1955] 2 All E.R. at p. 713; [1956] P. at p. 118. (42) [1931] P. 29.

(43) [1944] 1 All E.R. 90; [1944] P. 10. (44) [1944] 2 All E.R. 368; [1944] P. 95.

(45) [1955] 2 All E.R. at p. 718; [1956] P. at p. 125.

(46) [1955] 3 All E.R. at p. 696; [1956] P. at p. 131.

(47) [1895] A.C. 517.

(48) [1947] 2 All E.R. 886; [1948] A.C. 274.

(49) [1947] 2 All E.R. at p. 889; [1948] A.C. at p. 285. I

A held that, in a case of nullity on the ground of impotence, the only court which had jurisdiction was the court of the domicile. The basis of his reasoning was that a case of nullity, whether for impotence or for wilful refusal, was much more like a suit for divorce than anything else; that it should be equated, so to speak, with a suit for dissolution and be governed solely by the law of the domicile, and that the only courts which should have jurisdiction should be the courts of the domicile. He said, in a sentence (50): 'To call it a suit for nullity does not alter its essential and real character of a suit for dissolution.'

C "I differ from this view. Looking at the ground of wilful refusal from a legalistic standpoint, and treating marriage as a contract, the remedy of nullity does look like a remedy of divorce or dissolution, because it depends on events which occur subsequently to the marriage. But, looking at it from a sensible standpoint, and having regard to the true ends of marriage, one of the principal aims of which is the procreation of children, it seems to me that the remedy falls more truly within the category of nullity. No one can call a marriage a real marriage when it has not been consummated, and this is the same, no matter whether the want of consummation is due to incapacity or to wilful refusal. Let the theologians dispute as they will, so far as the lawyers are concerned, Parliament has made it plain that wilful refusal and incapacity stand together as grounds of nullity and not for dissolution: and being grounds of nullity, they fall within the old ecclesiastical practice, in which the jurisdiction of the courts is founded on residence and not on domicile."

E Then, after referring to the argument which had been advanced by learned counsel, DENNING, L.J., continued (51):

F "In two cases in 1944, *Easterbrook v. Easterbrook* (otherwise *Jervis*) (52), before HODSON, J., and *Hutter v. Hutter* (otherwise *Perry*) (53), before PILCHER, J., it was held that the English courts had jurisdiction in nullity cases where both parties were resident here. In the first of these cases, a Canadian soldier married an Englishwoman here, and it was held that, although he was domiciled in Canada, nevertheless the courts here had jurisdiction to determine his claim for nullity. Any other view would be most unfortunate. It would be absurd that a Canadian soldier married to an Englishwoman should have to go to the courts of Canada to get his remedy (or, conversely, that his wife should) when they were both resident here. In the second case, a United States soldier married an Englishwoman here. It was again held that the courts in this country had jurisdiction, even though the soldier was domiciled in one of the states of America. It is far too late in the day to say that those two cases were wrongly decided, considering that many decrees must have been given on the self-same footing and that many people have regulated their affairs on the basis of them. It would be very wrong to suggest now that those decisions were bad and that the people who have acted on them have been guilty of bigamy. I am clearly of opinion that those two cases were rightly decided and should be upheld, but that *Inverclyde v. Inverclyde* (54) was wrongly decided and should be overruled.

I "It may be that the courts of the domicile also have jurisdiction in these nullity cases. So do (55) the courts of the place where the marriage was celebrated. But the courts where both parties reside certainly have jurisdiction. I find myself in agreement with WILLMER, J., and would dismiss the appeal."

(50) [1931] P. at p. 42. (51) [1955] 3 All E.R. at p. 697; [1956] P. at p. 133.

(52) [1944] 1 All E.R. 90; [1944] P. 10. (53) [1944] 2 All E.R. 368; [1944] P. 95.

(54) [1931] P. 29.

(55) The word "may" appears instead of "do" at [1956] P. at p. 134.

HODSON, L.J., said (56):

"The question in this case is whether the court has jurisdiction to entertain a petition for nullity where the parties are resident in this country. The field of jurisdiction in nullity cases is a very wide one. Many cases have been discussed by learned judges and learned professors, and it is not always easy to see whether in a given case the decision can be justified or, if it can be justified, the precise ground on which it ought to be supported. In this case I have no doubt that the decision of the learned judge was right for the reasons which he gave.

"I agree also with the reasoning of PILCHER, J., in *Hutter v. Hutter* (57), who, I think, put this class of case on the right footing, basing his judgment on the ecclesiastical jurisdiction and the way in which that jurisdiction was exercised."

MORRIS, L.J., said (58) that he was of the same opinion.

DR. CHESHIRE, in PRIVATE INTERNATIONAL LAW (59), suggests that DENNING, L.J., was perhaps "misled" into saying what he did (56), by the decision in Northern Ireland in *Addison (otherwise McAllister) v. Addison* (60). In that case the facts were: the ceremony of marriage was celebrated in Northern Ireland where the petitioner was domiciled and resident. The respondent was a serving soldier domiciled in England. After the respondent was demobilised the parties lived in England for a very short time, after which they separated and the petitioner returned to Northern Ireland, while the respondent continued to live in England. The petitioner presented a petition to the High Court in Northern Ireland seeking annulment of the marriage on the ground of the respondent's impotence, or alternatively on the ground of his wilful refusal to consummate the marriage.

LORD MACDERMOTT, C.J., found as a fact that at all material times the respondent was incapable of consummating the marriage by reason of impotence and held inter alia (i) that the residence of the petitioner within the jurisdiction was not of itself sufficient to confer jurisdiction on the court. In this he followed *De Reneville v. De Reneville* (61). (ii) That in the exercise of the jurisdiction to annul a marriage there is no ground for distinguishing between a void marriage and a voidable marriage—and as the courts of England and Ireland have long exercised jurisdiction to annul void marriages celebrated within the jurisdiction, irrespective of the domicile or residence of the parties, there was power in the court to pronounce a decree of nullity in the present case on the ground that the marriage was celebrated in Northern Ireland. The lord chief justice after a careful consideration of *Inverclyde v. Inverclyde* (62) and *Casey v. Casey* (63) felt unable to follow them. It is to be noted that s. 13 of the Matrimonial Causes and Marriage Law (Ireland) Amendment Act, 1870, makes the same provision as to conformity with the principles and rules on which the ecclesiastical courts acted as in s. 22 of the Matrimonial Causes Act, 1857.

The decision in *Casey v. Casey* (63) is, of course, binding on this court. But it was submitted by counsel for the petitioner, and by counsel for the Queen's Proctor, that the overruling of *Inverclyde v. Inverclyde* (62) in *Ramsay-Fairfax v. Ramsay-Fairfax* (64) necessitates a careful review of the grounds on which *Casey v. Casey* (63) was decided, and that the decision in that case should be confined strictly to the facts which were before the court. In my opinion this submission is correct. In *Casey v. Casey* (63) the ground of the petition was wilful

(56) [1955] 3 All E.R. at p. 698; [1956] P. at p. 134.

(57) [1944] 2 All E.R. 368; [1944] P. 95.

(58) [1955] 3 All E.R. at p. 698; [1956] P. at p. 135.

(59) 5th Edn. at p. 348, note 5.

(61) [1948] 1 All E.R. 56; [1948] P. 100.

(63) [1949] 2 All E.R. 110; [1949] P. 420.

(64) [1955] 3 All E.R. 695; [1956] P. 126.

(60) [1955] N.I. 1.

(62) [1931] P. 29.

A refusal. At the conclusion of the leading judgment BUCKNILL, L.J., after saying that he based his opinion mainly on the analogy of the rule that the court of the domicile of the husband is the sole court with jurisdiction to dissolve a valid marriage, added (65):

B "It seems to me reasonable that a similar rule should be applied in principle to a marriage which is merely voidable on the ground of wilful refusal to consummate it."

Incidentally, the headnote (66) appears to extend this by the insertion of the letters "e.g." before the words "on the ground of wilful refusal."

C In a case of wilful refusal a valid marriage is a condition precedent to the cause of complaint—the duty to consummate depends on the existence of a valid marriage. Where, however, as in the present case, the ground of the petition is impotence, the cause of complaint is that the respondent was, at the time of the ceremony and has ever since been incapable of consummating it. This was the matter dealt with by the ecclesiastical courts, who knew nothing of wilful refusal as of itself affording a ground for relief. The impotence recognised by the ecclesiastical courts as a ground for annulment had to exist at the time of the marriage ceremony, and in proof of this an essential element in the contract was held to have been missing. Thus in *Greenstreet (falsely called Cumyns) v. Cumyns* (67), SIR WILLIAM SCOTT said that a marriage was impeachable if there was incapacity on the part of the man (or woman) to perform the duties of marriage—
D "a capacity to perform which is necessary to render it valid." In *Dickinson v. Dickinson (otherwise Phillips)* (68) SIR SAMUEL EVANS, P., said (69):
E

"It has always been held that the contract of marriage implies the ability to consummate it."

F And the form of the decree in such a suit was to declare the marriage "esse et fuisse nullum". The ecclesiastical courts having no power to dissolve, this was the only form of declaration open to them, irrespective of the question whether the marriage ceremony itself was unexceptionable as to form, and without any distinction between void and voidable marriages. In *Lewis (falsely called Hayward) v. Hayward* (70), the House of Lords held (71) that the proper order in a wife's suit for nullity on the ground of impotence was: "... it is declared that the said marriage was null and void ab initio" (72). Further, the fundamental difference between impotence and wilful refusal to consummate was emphasised by LORD MERRIMAN, P., in *Harthan v. Harthan* (73), where both causes were pleaded in the alternative. LORD MERRIMAN, P., said (74):
G

H "Much of the difficulty in this case has been caused by the mutually inconsistent character of these allegations ..."

The result of the authorities appears, therefore, to be: (i) The jurisdiction in suits for nullity depends on the practice of the ecclesiastical courts. (ii) Though a petition to annul a voidable marriage is, in some respects, analogous to one for dissolution, the attempt to equate them in *Inverclyde v. Inverclyde* (75) has been
I held to have been erroneous. (iii) In *Ramsay-Fairfax v. Ramsay-Fairfax* (76) not only was *Inverclyde v. Inverclyde* (75) overruled, but the Court of Appeal

(65) [1949] 2 All E.R. at p. 117; [1949] P. at p. 431.

(66) [1949] P. 420.

(67) (1812), 2 Hag. Con. 332. (68) [1913] P. 198.

(69) [1913] P. at p. 205.

(70) (1866), 35 L.J.P. & M. 105.

(71) (1866), 35 L.J.P. & M. at p. 109.

(72) See *Hooper (otherwise Harrison) v. Hooper* ([1959] 2 All E.R. 575), where STEVENSON, J., granted a declaration of nullity (and not a decree).

(73) [1948] 2 All E.R. 639; [1949] P. 115.

(74) [1948] 2 All E.R. at p. 640.

(75) [1931] P. 29.

(76) [1955] 3 All E.R. 695; [1956] P. 126.

expressly approved of the decisions in *Easterbrook v. Easterbrook* (77) and *Hutter v. Hutter* (78), and as regards the latter case expressly approved the reasoning of PILCHER, J. (iv) From 1860 onwards there is a long line of cases in which the courts have exercised jurisdiction in nullity cases on the ground of the celebration of the marriage in England. While it is true that, with the exception of *Simonin v. Mallac* (79), the cases appear to be concerned with void marriages, it is equally clear that the distinction between void and voidable had no significance in the ecclesiastical courts so far as jurisdiction was concerned. (v) The general proposition that apart from any other consideration, the court has jurisdiction because the marriage was celebrated in England (a proposition accepted by LORD MACDERMOTT in *Addison v. Addison* (80) in regard to a marriage in Northern Ireland) is limited, so far as this court is concerned, by the decision in *Casey v. Casey* (81). That is to say, it does not apply where the cause is wilful refusal to consummate. But so far as the fundamentally different cause of impotence is concerned, there is nothing in the authorities which precludes the court from assuming jurisdiction where the marriage was celebrated in this country. I therefore hold that the court has jurisdiction and grant a decree accordingly.

Decree granted.

Solicitors: *Montagu's and Cox & Cardale* (for the petitioner); *Treasury Solicitor* (for the Queen's Proctor).

[Reported by A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

(77) [1944] 1 All E.R. 90; [1944] P. 10.

(78) [1944] 2 All E.R. 368; [1944] P. 95.

(79) (1860), 2 Sw. & Tr. 67.

(80) [1955] N.I. 1.

(81) [1949] 2 All E.R. 110; [1949] P. 420.

A Re MORITZ (deceased). MIDLAND BANK EXECUTOR AND TRUSTEE CO., LTD. v. FORBES AND OTHERS.

[CHANCERY DIVISION (Wynn-Parry, J.), November 3, 1959.]

Discovery—Production of documents—Exhibit—Trustee applying for directions whether to institute action against two respondent beneficiaries—Whether the two beneficiaries entitled to production and inspection of exhibits to affidavits in support of summons—Exhibits relating to evidence supporting action.

The trustee of an estate issued an originating summons for the determination of a question whether the trustee should institute proceedings against two of the beneficiaries, who were the eighth and ninth defendants to the summons. In support of the summons, the trustee filed an affidavit, to which were exhibited documents dealing with allegations made in the affidavit against the eighth and ninth defendants. The eighth and ninth defendants were refused copies of the exhibits and they applied to the court for an order that the trustee's solicitors supply copies to them.

Held: the eighth and ninth defendants were not entitled to copies of the exhibits, which related to a question, viz., the question whether the trustee should start proceedings against them, on which they were not entitled to be heard.

Re Kay's Settlement ([1939] 1 All E.R. 245) and *Re Hinchliffe* ([1895] 1 Ch. 117) distinguished.

[As to proceedings in chambers in the Chancery Division for directions whether executors or trustees should take or defend proceedings, see 30 HALSBURY'S LAWS (3rd Edn.) 313, para. 572, note (r); and see further, particularly as to a trustee's position regarding indemnity for costs of proceedings that he has brought or defended, 33 HALSBURY'S LAWS (2nd Edn.) 273, 274, paras. 484, 485; and for cases on the subject, see 43 DIGEST. 823, 2670-2673, and 825-827, 2699-2714.]

Cases referred to:

Hinchliffe, Re, [1895] 1 Ch. 117; 64 L.J.Ch. 76; 71 L.T. 532; 18 Digest (Repl.) 76, 606.

Kay's Settlement, Re, Broadbent v. Macnab, [1939] 1 All E.R. 245; [1939] Ch. 329; 108 L.J.Ch. 156; 160 L.T. 172; 40 Digest (Repl.) 530, 404.

Procedure Summons.

Two defendants, Ralph Gosler and Hilda Gosler, who were the eighth and ninth defendants respectively to an originating summons issued by the plaintiff, applied for an order that the plaintiff's solicitors supply copies of exhibits to the affidavits filed in support of the plaintiff's summons. The originating summons asked for directions whether the plaintiff as executor of the testator's will should institute and prosecute an action against the said defendants for certain alternative claims, and asked for an order that the plaintiff might be indemnified out of the testator's estate against costs of any such action.

A. J. Balcombe for the applicants, the eighth and ninth defendants in the originating summons.

J. L. Knox for the respondent, the plaintiff in the originating summons.

WYNN-PARRY, J.: This is a summons issued by two of the defendants to the originating summons, the eighth and ninth defendants, for an order on the plaintiff's solicitors to supply copies of exhibits forming part of the evidence in the case. The originating summons was taken out by the Midland Bank Executor and Trustee Co., Ltd., as plaintiff against nine defendants, to resolve a number of disputes which have arisen in the administration of the estate of the deceased, Martin Rudolph Moritz. Among other things the plaintiff bank asks in the originating summons for directions whether proceedings, which I need not particularise, should be brought by it against the eighth and

ninth defendants. In support of that application, an affidavit has been sworn on behalf of the plaintiff bank in which allegations have been made against the eighth and ninth defendants. In support of those allegations a volume of exhibits has been filed. A

The application of the eighth and ninth defendants is that at this stage they ought to be furnished with copies of those exhibits in order, as they say, to be put in a position to argue before the court whether or not the plaintiff bank should be allowed to bring the proceedings against them. It has been the practice of this court, without exception, over a great many years, that where, in such a case as this, application is made by a trustee for directions from the court whether proceedings should be brought against the defendants or not, those defendants are not entitled to be heard on that application. The court acts on such evidence as is placed before it and it expresses itself one way or the other. B
C

My attention, however, was drawn to *Re Kay's Settlement, Broadbent v. Macnab* (1), a decision of SIMONDS, J., where the court decided in limine that proceedings should not be brought; but that was a case in which it appears quite clearly on the facts that there was no dispute whatsoever as to the evidence in question. It turned on the right view to be taken of a voluntary settlement and the court was armed on the face of it with all the evidence required to decide the question once and for all. SIMONDS, J., decided that the action should not proceed. That appears to me quite a different case from the present case. D

My attention was also drawn to *Re Hinchliffe* (2), in which the Court of Appeal laid down as a general rule that if a document is made an exhibit to an affidavit, any person who has the right to take copies of the affidavit has a similar right in the case of the exhibits also. With that proposition one could not properly quarrel, but that does not deal in the least with the practice in chambers in this Division. As I understand it, the practice in this Division is that where a trustee finds that he is compelled to ask for the directions of the court whether or not proceedings should be taken and that it is proper and necessary to join the parties against whom the proposed relief is sought, those parties should not be present in chambers when the matter is debated, and they should not be furnished with the evidence on which the court is asked to act. The court in these circumstances is asked by the trustee to say whether, in view of the circumstances put before it, the action should or should not proceed, and, if it should proceed, how far it should be continued. Very frequently the leave to proceed is limited, e.g., up to discovery, but it would seem to me to be a quite unjustified inroad on what I conceive to be a very useful practice if I were to allow this application and to allow the two defendants to have all the evidence on which the trustees are asking the court for its directions. I know of no precedent for it, and, in my view, it is completely against the established practice. E
F
G

In regard to the final incidence of the costs of such proceedings, it was pressed on me that the eighth and ninth defendants stand substantially to lose if I hold against them, because they are interested in one-third of the estate. That appears to me to be a matter which can be adequately dealt with by the court, either when the originating summons comes before it, or, indeed, if an action is brought, when the action is heard. On the facts which have been opened to me, I do not feel justified in interfering with the practice which, in my own experience has been followed for many years, and, therefore, I refuse this application. H
I

Application refused.

Solicitors: *Kingsford, Dorman & Co.*, agents for *Dawe & Co.*, Kingston-on-Thames (for the applicants); *Wild, Collins & Crosse* (for the respondent).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

A THE WORKING MEN'S CLUB AND INSTITUTE UNION, LTD.
v. SWANSEA CORPORATION.

[COURT OF APPEAL (Morris, Romer and Willmer, L.J.J.), October 22, 23, 26, 27, November 11, 1959.]

B Rates—Limitation of rates chargeable—Union of working men's clubs—Main objects—Finding by quarter sessions what main objects were—Business of general advisers—Conclusiveness—Not concerned with the advancement of social welfare—Objects including to carry on the business of publishers, traders, manufacturers, etc.—Whether established or conducted for profit—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 & 5 Eliz. 2 c. 9), s. 8 (1) (a).

C The objects of the Working Men's Club and Institute Union, Ltd., included: "To carry on the business of general advisers, teachers of the doctrine of association for social or ameliorative purposes, publishers, stationers and booksellers, general traders, agents and manufacturers, both wholesale and retail, of any article which may assist the development of clubs or their members." It was found by quarter sessions that the union had one main object, which was the carrying on of the activity of giving advice and guidance to its member clubs numbering 3,420. The union was registered under the Industrial and Provident Societies Acts, 1893 to 1954, and in accordance with the requirements of those Acts its rules contained a rule providing for the application of any profits the union might make which was so framed that the profits could not be distributed to members. In fact the union had made a loss for two years. The union's application for partial relief from rates in respect of a convalescent home which it occupied under s. 8 (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, was rejected by the rating authority. On appeal,

F Held: the union was not entitled to the relief claimed for the following reasons—

(i) the union was not established or conducted for profit within the meaning of s. 8 (1) (a), because its object of carrying on business as publishers, etc., was incidental and ancillary to the preceding objects and any profit which it might make was not a distributable or divisible profit, which was the kind of profit covered by the subsection;

G Dictum of LORD DENNING in *National Deposit Friendly Society Trustees v. Skegness U.D.C.* ([1958] 2 All E.R. at p. 612) and *Guinness Trust (London Fund) v. West Ham Corpn.* ([1959] 1 All E.R. 482) applied.

(ii) the union was not otherwise concerned with the advancement of social welfare since—

H (a) what was its main object could not be deduced from a construction of the specified objects, of which acting as advisers and as teachers were distinct objects either or both of which might be the main objects, but was a question of fact determined finally by quarter sessions on evidence of activities at the date of the proceedings and not earlier (including oral evidence that was not before the Court of Appeal) and failing misdirection was not open to review even by way of inference under s. 25 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925 (*Chivers & Sons, Ltd. v. Cambridge County Council*, [1957] 1 All E.R. 882 followed); and

I (b) the single main object of acting as general advisers was directed to the interests of members and had not the attributes of altruism and public benefit which were an essential element in the advancement of social welfare (*National Deposit Friendly Society Trustees v. Skegness U.D.C.*, [1958] 2 All E.R. 601 applied).

Decision of the DIVISIONAL COURT ([1958] 3 All E.R. 414) reversed.

[For the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8 (1), A see 35 HALSBURY'S STATUTES (2nd Edn.) 394.]

Cases referred to:

Bailey v. Potteries Electric Traction Co., Ltd., [1931] 1 K.B. 385; 100 L.J.K.B. 1; 143 L.T. 650; *affd.* [1931] All E.R. Rep. 63; [1931] A.C. 151; 100 L.J.K.B. 153; 144 L.T. 410; 95 J.P. 64; Digest Supp.

Chivers & Sons, Ltd. v. Cambridge County Council; National Institute of Agricultural Botany Trustees v. Cambridge County Council, [1957] 1 All E.R. 882; [1957] 2 Q.B. 68; 121 J.P. 284; [1957] 2 W.L.R. 646; 3rd Digest Supp.

Guinness Trust (London Fund) v. West Ham Corpn., [1959] 1 All E.R. 482; 123 J.P. 231; [1959] 1 W.L.R. 233.

Hickton v. Hodgson, (1913), 110 L.T. 380; 78 J.P. 93; 33 Digest 453, 1656.

National Deposit Friendly Society Trustees v. Skegness U.D.C., [1958] 2 All E.R. 601; [1959] A.C. 293; 122 J.P. 399; [1958] 3 W.L.R. 172; 3rd Digest Supp.

Royal College of Surgeons of England v. National Provincial Bank, Ltd., [1952] 1 All E.R. 984; [1952] A.C. 631; 3rd Digest Supp.

Appeal.

The Working Men's Club and Institute Union, Ltd., appealed to quarter sessions for the county borough of Swansea against the general rate for the borough made by the rating authority on Mar. 8, 1956, in respect of a hereditament comprising a convalescent home and lodge at Langland Bay, occupied by the union. The grounds of appeal were that the hereditament was one to which s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, applied and was occupied for the purposes of an organisation, the union, which was not established or conducted for profit and whose main objects were charitable or were otherwise concerned with the advancement of education and/or social welfare; and that the amount shown in the rate in respect of the hereditament was in excess of the amount properly due and should be reduced as required by s. 8 (2) of the Act. The rate charged on the hereditament was £1,524, as compared with £305 6s. 8d. charged in the previous year. On Dec. 18, 1956, the deputy recorder for the county borough (RODERIC BOWEN, Esq., Q.C.) dismissed the appeal, holding that the union, though not established or conducted for profit, was not an organisation whose main objects were otherwise concerned with the advancement of education or social welfare within the section. On Oct. 17, 1958, the Queen's Bench Divisional Court (LORD PARKER, C.J., and STREATFIELD, J., CASSELS, J., dissenting) allowed the union's appeal against the deputy recorder's judgment ([1958] 3 All E.R. 414). The rating authority appealed to the Court of Appeal.

G. D. Squibb, Q.C., and *B. M. Rees* for the rating authority.

J. T. Molony, Q.C., *J. Malcolm Milne* and *A. D. Walder* for the union.

Cur. adv. vult.

Nov. 11. The following judgments were read.

MORRIS, L.J.: In July, 1956, the Working Men's Club and Institute Union, Ltd., appealed to quarter sessions for the county borough of Swansea against the rate charged in respect of a convalescent home at Langland Bay which it owned and occupied. It claimed that s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, applied to the property and that in consequence the amount of rates chargeable should be reduced. There was a hearing before the learned deputy recorder on Nov. 12 and 13, 1956, and the evidence of several witnesses was heard and the contents of documents were examined. Judgment was given on Dec. 19, 1956, when the appeal was dismissed. The deputy recorder held that the Working Men's Club and Institute Union, Ltd., which I will call "the union", was not established for profit nor conducted for

A profit. He held that the union had only one main object, which was the carrying on of the first of several activities in which the union was engaged. That activity was described in the Case Stated as follows:

B “The first activity consists in giving advice and guidance to members of the organisation, that is to say the 3,420 clubs which are within the organisation; advice on legal matters, advice on administrative matters; guidance as to how members should conduct their clubs, so that they are carried on according to the law and give the best possible service to their members. The organisation sees that the member clubs are fully acquainted with their rights and with their duties in relation to the usual social activities associated with clubs of this kind.”

C The deputy recorder held that the main object of the union as found was not charitable and was not otherwise concerned with the advancement of education or of social welfare. Consequently, he held that s. 8 (1) (a) of the Act did not apply to the convalescent home. On the application of the union a Case was stated. In the Case Stated certain facts as proved or admitted were recorded, and the question for the opinion of the court was whether on the facts as stated D the deputy recorder came to a correct decision in point of law. The Divisional Court, by a majority (CASSELS, J., dissenting), reversed the decision of the deputy recorder and allowed the union's appeal in respect of the rate. Appeal is now brought to this court. I need not repeat or recite the facts set out in the Case Stated.

Rule 2 of the current rules of the union is in these terms:

E “Objects. The objects of the union are: To carry on the business of general advisers, teachers of the doctrine of association for social or ameliorative purposes, publishers, stationers and booksellers, general traders, agents and manufacturers, both wholesale and retail, of any article which may assist the development of clubs or their members. To provide and maintain F convalescent homes, or other institutions for the benefit of the members or wives or children or dependants of the members of clubs which are members of the union. The union shall have full power to do all things necessary, expedient, or considered by it desirable for the welfare and protection or assistance of, or helpful in any manner to its members, and for the accomplishment of all objects specified in its rules.”

G The view of the Lord Chief Justice and of STREATFIELD, J., in the Divisional Court was that, on a reading of that rule, it could be seen that the union had one main object, namely, as the Lord Chief Justice expressed it, to carry on the business of general advisers and teachers of the doctrine of association for social or ameliorative purposes, or, as STREATFIELD, J., expressed it, “to carry on the business of general advisers”—comma—“teachers of the doctrine of association for social or ameliorative purposes”, and that that object was for H the advancement of social welfare.

I The union was incorporated in 1889, but prior to incorporation there was in existence the organisation which was called the Working Men's Club and Institute Union, which had been founded in 1862. The majority view in the Divisional Court was that, though the union was only incorporated in 1889, there was no reason why regard should not be paid to the objects of the organisation both after incorporation and prior thereto, and that from 1862 onwards the main object of the organisation, both the original object and the still persisting object, has been, not to benefit such clubs as became members, but to encourage working men to band together to form clubs and to encourage working men to form further clubs, and that the giving of assistance to clubs when formed or which have been formed is only incidental to such main object. It was held that such main object was concerned with the advancement of social welfare. CASSELS, J., held that the union served the most useful purpose of giving advice and help

to the member clubs and exercised some control over those clubs, but that the main object of the organisation, though social in character and directed towards providing pleasure and comfort for the members of the member clubs, was not concerned with the advancement of social welfare. All members of the Divisional Court agreed that the union was not established or conducted for profit.

The first submission made by counsel for the rating authority was that the union is established for profit. He pointed to the circumstance that it is registered under the provisions of the Industrial and Provident Societies Acts, 1893 to 1954. It is, he submitted, a society which is registered because it is a society for carrying on the "businesses" specified in or authorised by its rules and pursuant to statute its rules are required to contain provisions in respect of many matters including the mode of application of profits; he submitted that the union is or may be supported, not only by the fees paid by member clubs, but by any profits arising from the sale of books or publications or club requisites, and that the circumstance that these sales in fact resulted in losses rather than profits is immaterial.

The mere fact that an organisation makes profits or may make profits does not show that it is "established or conducted for profit". Had the union made any profits from any selling activity, such profits would not have been distributed to member clubs. Rule 27 provides for the method of application of profits. The making of any profits would have been merely incidental and subsidiary to the achieving of the main object of the union. The deputy recorder found that there was no profit motive. In my judgment, the words used by LORD DENNING in *National Deposit Friendly Society Trustees v. Skegness U.D.C.* (1) are applicable. LORD DENNING said (2):

"But the fact that the society has made profits does not mean that it is 'conducted for profit', which I take to mean 'conducted for the purpose of making profit'. Many charitable bodies, such as colleges and religious foundations, have large funds which they invest at interest in stocks and shares, or purchase land which they let at a profit. Yet they are not established or conducted for profit. The reason is because their objects are to advance education or religion, as the case may be. The investing of funds is not one of their objects properly so called, but only a means of achieving those objects."

Following the guidance there given, I consider, in agreement with the Divisional Court, that the union was not established or conducted for profit. See also *Guinness Trust (London Fund) v. West Ham Corpn.* (3).

The second and main submission made by counsel for the rating authority was that the union cannot claim that s. 8 of the Act of 1955 applies because it is not an organisation

"whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare."

The objects of the union are set out in r. 2, which I have read. Those objects are numerous and diverse. In considering the applicability of s. 8 it becomes necessary to ascertain which are the "main objects". In my judgment this cannot be discovered merely by reading r. 2 or by construing r. 2. It was legitimate therefore to consider the way in which the union has conducted its affairs. It may be that an organisation will have numerous declared objects which over many years will remain its objects, but that in one period one or more of such objects will be the main ones while in another period other objects will be the main ones.

What, then, were the main objects of the union? The deputy recorder heard much evidence and was directed to the conclusion that the union has

(1) [1958] 2 All E.R. 601; [1959] A.C. 293.

(2) [1958] 2 All E.R. at p. 612; [1959] A.C. at p. 319. (3) [1959] 1 All E.R. 482.

A only one main object. That main object is the carrying on of the activity of giving advice and guidance to members. That object appears to correspond with or to reflect the practical application of the first of the declared objects in r. 2, viz.: To carry on the business of general advisers. Those words may, however, be so wide and general as to be ambiguous. The main object as found by the deputy recorder is to give advice on legal matters and on administrative matters to the 3,420 clubs which are members of the union and to give guidance as to how they should conduct their clubs so that they may be fully acquainted with their rights and with their duties in relation to their usual social activities.

B It seems to me that there is no warrant for departing from the conclusion reached and recorded by the deputy recorder. I do not consider that we are entitled, in view of the facts recorded in the Case Stated, to say that the main object of the union is to encourage working men to band together to form clubs and only incidentally to assist clubs which have been formed. The Lord Chief Justice said (4):

D "From the very beginning the object here has not been to benefit the members; the main object has not been to benefit such clubs as become members, but to encourage the working men to band together to form clubs, and then, incidentally, to assist those clubs which are formed and which do become members and, if only by example, to encourage the working men to form further clubs."

E He considered that that original object still persisted. I find myself, with diffidence and with every respect, differing from this view, for the reason that I consider that this view is contrary to the findings of the deputy recorder and because in my judgment the objects of the union which must be regarded as the main objects cannot be ascertained merely by studying r. 2. The founders of the body that came into existence in 1862 were doubtless inspired by the laudable purpose of encouraging working men to band together to form clubs. But, at the time of the hearings before the deputy recorder, the union, which had been in existence since 1889, had 3,420 members. The members of the union consist of such clubs as are admitted to the union in manner provided by the rules. The clubs are social working men's clubs and none are proprietary clubs. It was not suggested that the member clubs could claim the relief granted in s. 8. The member clubs have themselves a total membership of approximately 2,000,000. The union has many declared objects as recorded in its rules. For the purposes of s. 8 (1) (a) it is, however, necessary to ascertain the main object or objects.

G The deputy recorder considered all the oral evidence and the documentary evidence in order to decide that which he could not otherwise decide, i.e., which of the declared objects is the main object or which are the main objects. He knew of the ideals which in the year 1862 inspired the Rev. Henry Solly, a man

H "keenly conscious of the low level of working-class life, keen and eager to raise its habit and character, who saw in the establishment of working men's clubs an instrument to his purpose."

I While conscious of the ideals of the founders, the deputy recorder came to the conclusion that for many years past the object of the organisation has been to help its members. I cannot see that the deputy recorder erred in his approach, and his decision was clear as to what is the main object of the union. I see no occasion or necessity to draw any inference of fact in this case (see the Supreme Court of Judicature (Consolidation) Act, 1925, and *Chivers & Sons, Ltd. v. Cambridge County Council* (5)); nor do I see any reason to send the case back to the deputy recorder or for acceding to any application, if made, so to do.

On an acceptance of the conclusion of the deputy recorder as to what is the main object of the union, it seems to me that such main object is not within

s. 8 (1) (a). In effect the main object of the union is to assist its members by advising and guiding them. Commendable as this object is, it is not, in my judgment, within s. 8 (1) (a). The main object of the union is to benefit and assist its own members. Even if it can be said that there is as a consequence the object of assisting the members of the member clubs, even so the elements of altruism or public benefit are lacking. A

It is doubtless true that the result of achieving the main object of giving advice and guidance to member clubs is that the interests and the social pleasures of the members of the member clubs are cared for and promoted. But this does not reflect any specific humanitarian or altruistic purpose. It only shows the reason why the member clubs wish to enjoy the benefits for which they pay when they become subscribing members of the union. The speeches delivered in the House of Lords in *National Deposit Friendly Society Trustees v. Skegness U.D.C.* (6) point irresistibly to the conclusion that that object which has been found to be the sole main object of the union is not one which is concerned with the advancement of social welfare within the meaning of s. 8 (1) (a). I would therefore allow the appeal. B

ROMER, L.J.: I agree. The first question for consideration in this appeal is whether it can properly be said that in the relevant rating year (1956-57) the respondent union was, in the words of s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, "established or conducted for profit". Counsel for the rating authority contended before us that it was. I understood him to submit that the union was "established" rather than "conducted" for profit, on the ground that, as the union's trading account had shown a loss, there was a difficulty in adopting the view that it was "conducted for profit". For myself I rather doubt the validity of this distinction, as I should imagine that a commercial concern is being conducted for profit in the sense of being conducted with a view to making profit even though its business is for any given period carried on at a loss. Be that as it may, I am quite satisfied that at no relevant time was the union either established or conducted for profit, and on this question I respectfully adopt the reasoning and conclusions of the Lord Chief Justice as expressed in his judgment in the Divisional Court (7). In my opinion the "profit" referred to in s. 8 (1) (a) is distributable or divisible profit and not merely taxable profit. The reference in r. 2 of the union's rules to "publishers, stationers and booksellers, general traders, agents and manufacturers, both wholesale and retail" (whatever that may have been intended to mean) is quite insufficient, in my opinion, to indicate that the union was established with a profit motive in any relevant sense. Obviously some income or profit would or might accrue to the union in various ways, and the destination of this is provided for by r. 27—a rule which in fact had to be included in the union's constitution by reason of the Industrial and Provident Societies Act, 1893, Sch. 2, para. 10; but it is clear that under the "Application of profits", as prescribed by that rule, none of the profit of the union could find its way into the pockets of the members. It appears to me that the union's profit falls within the language of *PEARCE, L.J., in Guinness Trust (London Fund) v. West Ham Corpn.* (8), where he said (9): C

"The making of profit by the ratepayers, the trust, was part of the machinery by which it achieved charitable purposes. The making of that profit, which could never be distributed, was not the object or purpose of the trust. It was the means for the expansion of the sphere of the charity; it was not an end in itself. Though deliberate, it was incidental and subsidiary to the purpose of the trust." D

The union is not a charity, but save in that respect I think that *PEARCE, L.J.'s*

(6) [1958] 2 All E.R. 601; [1959] A.C. 293.

(7) [1958] 3 All E.R. at p. 418.

(8) [1959] 1 All E.R. 482.

(9) [1959] 1 All E.R. at p. 492.

A words precisely apply. Accordingly, I agree with the deputy recorder and with the Divisional Court that the union is not excluded from s. 8 on the ground that it is "established or conducted for profit".

The question next arises whether the main object of the union in the year 1956-57 was "concerned with the advancement of social welfare". In the Divisional Court the Lord Chief Justice and STREATFIELD, J., differing from the deputy recorder, held that it was; CASSELS, J., on the other hand agreed with the deputy recorder that it was not. The majority of the court reached their conclusion, as it seems to me, in the following way. They read r. 2 as formulating the one main object, viz., to carry on the business of general advisers and teachers of the doctrine of association for social or ameliorative purposes. That object, in their view, was unambiguous and came within the description of "social welfare". Accordingly, they were doubtful whether it was permissible to proceed further with an inquiry as to the union's actual activities. On the assumption, however, that this was legitimate, they held on the documentary evidence that the original object of the union in the 1860's was the philanthropic purpose of encouraging the promotion of working men's clubs, that that purpose constituted social welfare, and that it still subsisted as the main object, to which the assistance of clubs already formed was no more than incidental.

It is not without diffidence, I need hardly say, that I am for my part unable to accept the conclusion of the majority of the Divisional Court on this question or the process of reasoning which led them to it. On the construction of r. 2, I would be disposed to agree (as also, I understood, would counsel for the rating authority) that, if the rule disclosed as its main object the carrying on of "the business of general advisers and teachers of the doctrine of association for social or ameliorative purposes", then that object could properly be described as "social welfare". There are, however, to my mind two objections to this solution of the problem. The first objection is that one cannot tell, merely by construction, which of the various activities described in r. 2 was its main object in the relevant rating year. The second objection is that the reading of the first two and a half lines of r. 2 so as to produce the one object already mentioned can only be achieved, in my opinion, by disregarding the comma after the word "advisers" and substituting the word "and" in its place. I see no sufficient warrant for this substitution, and, having regard to the comma which does in fact appear, it seems reasonably clear to me, as a question of construction, that the first two and a half lines of r. 2 comprise two objects and not one, viz., to carry on the business of general advisers and to teach the doctrine of association for social or ameliorative purposes.

In addition to these two objects, r. 2 proceeds to specify others as well—publishers, stationers and booksellers, and so on. Now it may very well be a fair, though not inevitable, assumption that the two objects, or one or other of them, stated in the first two and a half lines of r. 2 were or was contemplated as being the union's main objects. It by no means follows, however, that either of them was the main object in the year in which the union claimed relief under s. 8. Nor, as I think, is one assisted in the quest for what that object was by inquiring what the purposes of the union were when it was first established. The activities of an organisation may change with the passage of time and the changes may well affect the operation of the section. This was pointed out by LORD DENNING in his speech in *National Deposit Friendly Society Trustees v. Skegness U.D.C.* (10), where he said (11):

"... in order to ascertain the 'main objects' of an organisation, you are entitled, I think, to look not only at its rules but also to consider the way in which it has conducted its affairs. If you should find, for instance, that a scientific institute—which was formed primarily for the promotion

(10) [1958] 2 All E.R. 601; [1959] A.C. 293.

(11) [1958] 2 All E.R. at p. 612; [1959] A.C. at p. 320.

of science—has been so conducted that the advancement of the interests of its members has become one of its main purposes—as distinct from being merely subsidiary to the advancement of education—then it would cease to qualify for the benefits of the section: see *Royal College of Surgeons of England v. National Provincial Bank, Ltd.* (12), per LORD REID (13).”

Two things seem clear. The first is that the only relevant time for ascertaining what are the main objects of an organisation is when it claims relief under the section. The second is that, where the organisation has, under its constitution, several objects, the question what were its main objects at the relevant time is entirely a question of fact. In the present case that question was decided by the deputy recorder after hearing and considering a body of oral and documentary evidence. His decision was that in 1956-57 the union had only one main object, namely, the carrying on of the first activity referred to in para. 8 (a) of the Case. That activity has been described by my Lord in his judgment and I do not repeat it; but it is quite different from the union's main object as found by the majority decision in the Divisional Court. In my judgment, that finding of fact was binding on the Divisional Court and is equally binding on us. (Compare *Chivers & Sons, Ltd. v. Cambridge County Council* (14)). It follows that in so far as the union's main object as found by the Divisional Court is irreconcilable (as in fact it is) with the deputy recorder's finding it must be rejected. Both counsel for the union invited us to review and overrule the deputy recorder's finding, but there are two decisive reasons why we should not do so. The first is that we have no power to overrule the finding, and the second is that only a part of the evidence (viz., the documentary evidence) on which the finding was based is before us.

The only question left, then, is whether the main object of the union as found by the deputy recorder comes within the description of “social welfare”, and I am amply satisfied that (for the reasons which the deputy recorder gave) it does not. The truth is that the organisation's activities at the relevant time were (and probably still are) far removed from what they used to be. The union is mainly concerned now with protecting and improving the interests of its member clubs rather than with the altruistic motive of encouraging and helping (as formerly) working men to form new clubs. I was attracted by, and accept, the way in which counsel for the rating authority presented the position in his reply. He said, in effect, that the union now is a club of clubs and is quite different from the position which existed in early days, when the promoters or organisers were philanthropists. Then, he said, it was an outward-looking concern and it is now an inward-looking one—and that is not social welfare. I agree that the appeal must be allowed.

WILLMER, L.J. (read by **MORRIS, L.J.**): The questions which arise on this appeal are: (1) Is the respondent union an organisation which is not established or conducted for profit? (2) Is it an organisation whose main objects are concerned with the advancement of social welfare? As to the first point, the learned deputy recorder and all the members of the Divisional Court were unanimously in favour of the union. Like my brethren, I take the same view, and it would therefore be a work of supererogation to set out the arguments at length. I can state my reasons quite briefly.

Clearly the mere fact that the union receives an income from its substantial investments is not enough to show that it is established or conducted for profit. Having regard to the decision of the House of Lords in *National Deposit Friendly Society Trustees v. Skegness U.D.C.* (15), the contrary has not been argued. But reliance has been placed on certain trading activities carried on by the

(12) [1952] 1 All E.R. 984; [1952] A.C. 631.

(13) [1952] 1 All E.R. at p. 999; [1952] A.C. at p. 661.

(14) [1957] 1 All E.R. 882; [1957] 2 Q.B. 68.

(15) [1958] 2 All E.R. 601; [1959] A.C. 293.

A union. These are in accordance with the objects declared in r. 2 of the union's rules, which include carrying on

“the business of...publishers, stationers and booksellers, general traders, agents and manufacturers, both wholesale and retail, of any article which may assist the development of clubs or their members.”

B We were also referred to r. 27, which deals specifically with the application of profits, indicating, it was contended, an intention that profits shall be made. Reliance was further placed on the fact of the union being registered under the provisions of the Industrial and Provident Societies Acts as a further indication that it was established for profit. It appears, however, that the so-called trading activities amount to no more than the sale to member clubs of equipment

C designed to assist in the running of the clubs, such as stationery, account books, sports equipment and the like. The learned deputy recorder found that this is merely part of, that is ancillary to, what he regarded as the main activity of the union, namely, the giving of advice and guidance to the member clubs, more particularly in relation to how the clubs should be conducted; and he further found that these trading activities are not conducted with a profit

D motive. In reaching that conclusion the learned deputy recorder had the advantage, denied to the Divisional Court and to this court, of hearing evidence from witnesses holding positions of authority in the union. That circumstance alone would in my judgment render it impossible for us to say that he arrived at a wrong conclusion. But, quite apart from what the effect of the evidence may have been, it seems to me that the learned deputy recorder's conclusion is

E in accordance with the objects declared in r. 2, the true construction of which, to my mind, indicates quite clearly that the trading activities were intended to be ancillary to the objects previously specified. Further support for this view is to be gained from the significant fact that r. 27 makes no provision for the distribution of profits, and severely limits the objects to which they can be applied. Lastly, it is not, I think, without significance that for the only two

F years for which figures are available, namely, 1954 and 1955, the accounts show that the trading activities have in fact been conducted at a substantial loss—a fact which, so far as it goes, tends to support the view that they are not carried on for the purpose of making a profit. In all the circumstances, I am satisfied that the learned deputy recorder came to a correct conclusion when he decided that the union was not an organisation established or conducted for profit.

G I pass, therefore, to the second and much more serious question, whether it is an organisation whose main objects are concerned with the advancement of social welfare. The learned deputy recorder held that it was not, but on this point the majority of the Divisional Court took the opposite view. I think it is vitally important to approach this question with a correct appreciation of the functions of the Divisional Court and of this court. Neither the Divisional

H Court nor this court is the judge of fact. The matter comes before us, and came before the Divisional Court, on a Case stated by the learned deputy recorder, and as I see it our sole function, as was that of the Divisional Court, is to answer the question posed in sub-para. 16 of the Case, viz., whether on the preceding statement of facts the learned deputy recorder came to a correct decision in

I point of law, and, if not, what should be done in the premises. As has been already stated, the learned deputy recorder heard a considerable volume of oral evidence. We know nothing of what was said in the course of that evidence. The only evidence that is before us consists of certain documents that were exhibited to the Case. It was for the learned deputy recorder to find the facts sufficiently to enable the court to answer the question which was posed. This is exactly what the learned deputy recorder has at least purported to do. As I read the Case, para. 3, sub-paras. 1 to 14 are intended to set out the facts as he found them, and sub-para. 15 is intended to set out the contentions of the parties and the learned deputy recorder's conclusions of law thereon.

It is true that this is a proceeding to which s. 25 of the Supreme Court of Judicature (Consolidation) Act, 1925, applies. That section provides as follows: A

"(1) Every Case Stated by a court of quarter sessions otherwise than under the Crown Cases Act, 1848, or the Quarter Sessions Act, 1849, for the consideration of the High Court shall be deemed to be an appeal, and shall be heard and determined accordingly.

"(2) On the hearing of an appeal from a court of quarter sessions the appellate court may draw any inference of fact which might have been drawn in the court of quarter sessions, and may give any judgment or make any order which ought to have been given or made by that court, or may remit the order, and in criminal matters the conviction with the order, and the Case Stated on it, with the opinion or direction of the appellate court, for re-hearing and determination by the court of quarter sessions, or may remit the case for re-statement."

Those words were considered by this court in *Chivers & Sons, Ltd. v. Cambridge County Council* (16) where it was contended that under the section the court had power to draw inferences of fact different from those drawn by quarter sessions. It was held, however, that only if quarter sessions had been shown to have misdirected itself so as to disable the conclusion which it had reached could the High Court (including the Court of Appeal) draw any inference of fact necessary to reach the proper conclusion by virtue of s. 25. In the course of delivering the judgment of the court, the learned Master of the Rolls cited with approval what was said by AVORY, J., in *Hickton v. Hodgson* (17) in relation to the corresponding section of the Act of 1894, as follows (18):

"I do not at all accept the contention that the provision that this court may draw any necessary inference entitles this court to reverse the findings of the quarter sessions upon questions of fact. I think that it only means that upon the facts which are either proved or admitted the court may draw any inference necessary to enable it to determine the question of law which arises upon it . . ."

This view was expressly followed and adopted by SCRUTTON, L.J., in *Bailey v. Potteries Electric Traction Co., Ltd.* (19), where the learned lord justice, after quoting the words of AVORY, J., went on (20):

"The court can set aside a finding of fact on the ground that there is no evidence on which such a finding can be made, or on the ground that the tribunal has proceeded on a wrong principle of law in the consideration or exclusion of evidence. It cannot alter a finding of fact found below except on these grounds . . ."

In the present case there can be no doubt that, in searching for the objects of the union, one must begin with r. 2, where the objects are set out. The proper construction of the rule is, of course, a question of law for the court. But the rule sets out a number of objects, and under s. 8 (1) (a) of the Act we are only concerned with the main objects. Which of the many objects set out are main objects is a question of fact properly to be determined on the evidence, including evidence as to the actual activities in practice of the organisation concerned. Here the learned deputy recorder heard a great deal of oral evidence, as well as having a certain amount of documentary evidence placed before him, and on that evidence arrived at his finding of fact that the union had one main object, viz., the carrying on of the advisory activities more fully set out in sub-para. 8 (a) of the Case. We are not in a position to say that there was no evidence on which such a finding could be made. Nor has it been argued before us that the learned deputy recorder misdirected himself. What we are in effect invited to do is

(16) [1957] 1 All E.R. 882; [1957] 2 Q.B. 68.

(17) (1913), 78 J.P. 93.

(18) (1913), 78 J.P. at p. 95. (19) [1931] 1 K.B. 385. (20) [1931] 1 K.B. at p. 481.

- A to say that he came to a wrong decision on the facts, and that he ought to have found (to quote my note of the submission made by counsel for the union) "that the real main object of the union was to better the lot of the working classes, materially and morally, by fostering the growth and sound conduct of member clubs". It seems to me that, if we were to accept this invitation, we should be going behind the learned deputy recorder's finding of fact, which is
- B the very thing that, on the authorities, we are enjoined not to do. This alone would in my judgment be a sufficient reason for rejecting the argument addressed to us by counsel for the union.

If the finding of the learned deputy recorder as to the main object of the union stands, it was agreed by all the members of the Divisional Court that that sole main object would not be one concerned with the advancement of social welfare,

C so as to bring the union within s. 8. I am of the same view, and the contrary has not been strenuously argued. The majority of the Divisional Court, however, refused to accept the learned deputy recorder's finding as to the main object of the union, and founded their judgments on the view that the main object, in the words of the learned Lord Chief Justice (21):

- D " . . . has not been to benefit such clubs as become members, but to encourage the working men to band together to form clubs, and then, incidentally, to assist those clubs which are formed and which do become members and, if only by example, to encourage the working men to form further clubs."

- E In reaching this conclusion both the learned Lord Chief Justice and STREATFIELD, J., based themselves on the early history of the union, as more particularly set out in the small red booklet (exhibit 5). It may well be that in the early days of the union the objects which it pursued contained a substantial element of altruism and solicitude for the welfare of working men generally, so as to justify the view that at any rate at that time its main objects were concerned with the advancement of social welfare. Be that as it may, I find it impossible to accept the
- F conclusion of the majority of the Divisional Court, for two reasons: first, because, as already stated, I do not think it was open to the Divisional Court, any more than it is open to us, to disregard the finding of fact by the learned deputy recorder as to the one main object of the union; secondly, because I think that the reasoning of the majority was in any event fallacious. We are concerned in this case, as appears from the original notice of appeal to quarter sessions, with the
- G rate made by the rating authority on Mar. 8, 1956. The question to be determined, pursuant to that notice of appeal, was whether the union was entitled to relief under the section in 1956, having regard to what were then its main objects. For the purpose of deciding this question it is in my judgment permissible to look only to the objects as stated in 1956, i.e., in the print of the rules of 1956 before us, and to pay regard to the evidence given with regard to the actual activities of
- H the union in 1956. The fact, if it be the fact, that sixty years ago or more different or additional objects may have been pursued appears to me to be quite immaterial, and to allow them to be taken into consideration in ascertaining what are now the union's main objects is to set a dangerous precedent. Numerous examples come to mind of organisations and institutions carrying on activities today, whose main objects may be quite different now from those with which they were founded, in some cases centuries ago.

- I I venture further to criticise that part of the judgment of the learned Lord Chief Justice where he says (22) that, on a reading of r. 2:

"one arrives at one main object, namely, to carry on the business of general advisers and teachers of the doctrine of association for social or ameliorative purposes."

With the greatest respect, it appears to me that that construction of the rule

does violence to the language used, and can only be arrived at by ignoring the comma which appears in the rule after the word "advisers" and inserting an "and" which is not there. The activities carried on by the union in pursuit of their object of carrying on "the business of general advisers" are set out in detail by the learned deputy recorder in sub-para. 8 (a) of the Case. In brief, those activities involve advice and guidance to the member clubs, mainly in relation to how they should conduct their clubs. This is something quite different from acting as "teachers of the doctrine of association for social or ameliorative purposes". In fact, so little does the union appear to pursue the latter object today that the learned deputy recorder does not even mention this amongst the numerous activities now carried on, as set out in sub-para. 8 of the Case.

In these circumstances, even if it were open to the Divisional Court—which I do not think it was—to disregard the finding of the learned deputy recorder as set out in sub-para. 12 of the Case, and to substitute their own finding as to what is the main object of the union, I should not be prepared, on the material which is before us, and which was before them, to assent to the conclusion at which the majority arrived. But in my judgment there is no ground for interfering with the learned deputy recorder's findings of fact, and on those findings I think he came to a correct decision in point of law. I, therefore, agree that the appeal should be allowed.

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Kenneth Brown, Baker, Baker*, agents for *T. B. Bowen*, Swansea (for the rating authority); *Morgan, Lloyd & Evans*, agents for *Edward T. Davies & Sons*, Pontyclun, Glamorganshire (for the union).

[Reported by F. A. AMES, Esq., Barrister-at-Law.]

PRACTICE NOTE.

PROBATE, DIVORCE AND ADMIRALTY DIVISION.

Divorce—Custody—Reference to welfare officer.

When both parties to custody proceedings are agreed that a reference to the welfare officer will be of assistance to the judge, application by consent may be made by either party to the registrar of the day, who, on being satisfied that there is sufficient information for the welfare officer about the points at issue in the affidavits, if any, or other documents, may refer the matter to the welfare officer for his investigation before the proceedings come before the judge.

COMPTON MILLER,
Registrar.

Nov. 19, 1959.

A

HOURY v. COMMISSIONER OF INCOME TAX.

[PRIVY COUNCIL (Viscount Simonds, Lord Radcliffe and Lord Keith of Avonholm), October 21, 22, November 12, 1959.]

B

Privy Council—Eastern Africa—Income tax—Undistributed income—Direction that percentage of company's undistributed income be deemed to have been distributed among shareholders—Shareholders including two infants holding under a settlement—Whether sums deemed to have been received by infants to be treated as part of settlor's income—East African Income Tax (Management) Act, 1952 (No. 8 of 1952), s. 22 (1), s. 24 (1).

C

The appellant held 251 shares, his wife forty-nine shares and his two infant sons one hundred shares each in the C. company which was registered in Tanganyika and whose share capital was Shs. 500,000, divided into five hundred shares of Shs. 1,000 each. By the East African Income Tax (Management) Act, 1952, s. 22 (1)*, the undistributed portion of the total income of certain companies (of which the C. company was one), subject to a limit of sixty per cent. of such income, was deemed to have been distributed as dividend among the shareholders of the company, if the Commissioner of Income Tax made an order to that effect, and the proportionate share of each shareholder was then to be included in his own total income. Section 24 (1)* of the Act required that any income which, by virtue of a settlement, was paid to or for the benefit of a child of the maker of that settlement during the infancy of the child should be treated as the

D

E

income of the settlor for the purposes of the Act and not as the income of any other person. The shareholdings of the appellant's two infant sons had been transferred into their names by their father, the transfer constituting a "settlement" within the meaning of s. 24. In 1954 the Commissioner of Income Tax made an order under s. 22 of the Act that sixty per cent. of the C. company's income for the periods ending Dec. 31, 1950, and Dec. 31, 1951, respectively, should be deemed to have been distributed among its shareholders, with the result that certain sums were deemed to have been distributed to the appellant's two infant sons in respect of each of the two years. Assessments were then made on the appellant on the basis that, under s. 24, these sums were to be treated as part of his income.

F

G

Held: the appellant had been wrongly assessed in these sums, because the notional distribution effected under s. 22 of the Act to the appellant's sons could not be a "payment" for the purposes of s. 24 so as to be attributed to the appellant.

Appeal allowed.

H

[**Editorial Note.** Sections 22 and 24 of the East African Income Tax (Management) Act, 1952, are analogous to s. 392 and s. 245 respectively of the Income Tax Act, 1952.

As to the power of the Special Commissioners to make directions as to the undistributed profits of a company, see 20 HALSBURY'S LAWS (3rd Edn.) 551, para. 1073; as to short period dispositions, see *ibid.*, 571, para. 1114; and for cases on the subject, see 28 DIGEST (Repl.) 369-374, 1614-1632, 284-291, 1256-1278.

I

For the Income Tax Act, 1952, s. 245 and s. 392, see 31 HALSBURY'S STATUTES (2nd Edn.) 232, 373.]

Appeal.

Appeal by George N. Houry, Q.C., from an order of the Court of Appeal for Eastern Africa (O'CONNOR, P., FORBES, J.A., and MACDUFF, J.), dated Apr. 2, 1958, dismissing an appeal by the appellant from a judgment of the High Court

* For the relevant portions of s. 22 and s. 24, see p. 783, letters H and B, post.

of Tanganyika (LOWE, J.), dated Nov. 12, 1956, which had dismissed the appellant's appeals against two additional assessments to income tax made by the respondent on him, namely, T. 1234 in the sum of Shs. 104,304 for the year of income 1951 and 3718 in the sum of Shs. 72,900 for the year of income 1952. The facts are set out in the judgment of the Board, at letter G, *infra*.

R. E. Borneman, Q.C., P. J. Brennan and M. Heald for the appellant.

F. N. Bucher, Q.C., and R. A. Watson for the respondent.

LORD RADCLIFFE: The East African Income Tax (Management) Act, 1952, which it will be convenient to refer to as the Income Tax Act, contains two sections, s. 22 and s. 24, the effect of each of which is to attribute to a person income as paid to or received by him despite the fact that no such income has actually been paid or received. Each section has its analogue in the taxing code of the United Kingdom; their purpose is by a fiction to place in the hands of a taxpayer income which, though not his in the eyes of the law, is thought to be fairly attributable to him in the measurement of his taxable capacity. By the first, s. 22, the undistributed portion of the total income of certain companies, subject to a limit of sixty per cent. of such income, is deemed to have been distributed as dividend among the shareholders of the company, if the Commissioner of Income Tax makes an order to that effect, and the proportionate share of each shareholder is then to be included in his own total income. The second, s. 24, requires that any income which, by virtue of a settlement, is paid to or for the benefit of a child of the maker of that settlement during the infancy of the child shall be treated as the income of the settlor for the purposes of the Act and not as the income of any other person.

The short question raised by this appeal is whether the dividend which is deemed to have been paid under s. 22, when an order affecting the company comes into operation, is to be reckoned as a payment of income to or for the benefit of a child shareholder when the computation of a settlor's income is made for the purposes of s. 24. Another way of putting the question is to ask whether the notional payment that is effected under s. 22 amounts to a "payment" for all the purposes of the different sections of the Act, or at least of s. 24; or whether the fiction that it sets up is for the purposes of s. 22 alone and is confined in its operation to that s. 22 and the resulting assessment.

The facts on which this question arises are simple. The company involved is called Coastal Freights & Co., Ltd., and is registered in Tanganyika. Its share capital is Shs. 500,000, divided into five hundred shares of Shs. 1,000 each. The appellant holds 251 of these, his wife forty-nine and his two infant sons one hundred each. Their holdings were transferred into their names by their father, the transfer constituting a "settlement" within the meaning of s. 24 of the Income Tax Act. On Nov. 17, 1954, the respondent made an order under s. 22 that sixty per cent. of the company's income for the periods ending Dec. 31, 1950, and Dec. 31, 1951 respectively, should be deemed to have been distributed among its shareholders, with the result that each child was deemed to have received Shs. 44,162 in respect of the first year and Shs. 33,568 in respect of the second. Assessments were then made on the appellant on the basis that, under s. 24, these sums were to be treated as part of his income. The actual assessments involved were in the sums of Shs. 104,304 for the year of income 1951 and Shs. 72,900 for the year of income 1952, the difference being due to the sums attributable to him in respect of his own shareholding. No challenge is made to the assessments so far as they relate to these last sums. The appellant appealed against the assessments so far as they related to the "dividends" on the children's shares. The course that the case has taken hitherto is that the respondent refused to amend the assessment; on appeal, the High Court of Tanganyika (LOWE, J.) confirmed them; and on Apr. 2, 1958, the Court of Appeal for Eastern Africa (O'CONNOR, P., FORBES, J.A., and MACDUFF, J.)

A dismissed his appeal from the High Court. It is now for their Lordships to express their opinion on the issue involved.

The words of s. 24 (1) that are to be construed run as follows:

B “Where, by virtue or in consequence of any settlement to which this section applies and during the life of the settlor, any income is paid to or for the benefit of a child of the settlor in any year of income, the income shall be treated for all the purposes of this Act as the income of the settlor for that year and not as the income of any other person.”

C With regard to the ambit of these words it is, of course, apparent that, in the present case, no income has in fact been paid to or for the benefit of a child. No payment has been made at all. All that has happened is that a fictitious payment of dividend has been brought about by the operation of the order made under s. 22. Unless, therefore, the effect of such an order is to impose on the meaning of the word “paid” in s. 24 an interpretation which includes sums deemed to have been paid by virtue and for the purposes of another section of the Act, these notional dividends attributed to the children are not within the charge of s. 24 and cannot be treated as the income of the father.

D In the High Court, a solution of the difficulty was found by reference to the special provisions of s. 24 (2) (a). This construction of the subsection was not adopted by the Court of Appeal and was not relied on in argument before the Board. Their Lordships do not, therefore, refer to it further except to say that they would not find it maintainable. The point of view that commended itself to the Court of Appeal, on the other hand, was in substance that, since E the order under s. 22 had the effect of bringing about a notional payment of dividend and attribution of income to the children for the purposes of the Act, that statutory fiction of a payment having taken place ought to be carried through and applied in any other part or section of the Act in which a payment to the children was referred to. The argument is stated cogently and persuasively in the judgment of FORBES, J.A., who delivered the opinion of the court. In F effect, it treats the provision in s. 22 which requires the assumption of a fictitious payment in order to impose the charge created by that section as if it set up an interpretation of the general meaning of the word “paid” throughout the body of the Act.

G Their Lordships do not think that s. 22 can be treated in this way or that the Income Tax Act is so constructed as to allow the assumption of s. 22 to be imported into the operation of s. 24. The two sections are independent charging provisions and the charges which they impose are mutually exclusive. If the relevant words of s. 22 (1) are set out it will be seen that they run as follows:

H “the undistributed portion of sixty per cent. of such total income of the company for that period shall be deemed to have been distributed as dividends amongst the shareholders . . . and thereupon the proportionate share thereof of each shareholder shall be included in the total income of such shareholder for the purposes of this Act.”

I It is not merely that there is to be a notional payment of dividend; it is also that each shareholder's share of the dividend is to be included in his total income for the purposes of the Act. The dividend then must go into the total income of the child who owns the shares and for the purpose of taxation it is to be treated as his income. Such an enactment would be blankly inconsistent with the enactment contained in s. 24 that whatever is paid to or for the benefit of a child is to be treated for all the purposes of the Act as the income of the father and not as the income of any other person if “paid” in this section were to include what is deemed to be paid by the earlier section. It appears to their Lordships to be the unavoidable conclusion that, in construing s. 24, the income “paid” within the meaning of that section and as such attributed to the father

cannot include income deemed to be distributed by virtue of s. 22 and as such attributed to the child. A

It is natural to look to the other provisions of the respective sections to see if they throw any light on the meaning to be given to the word "paid" in s. 24. So far as they go, they favour a construction of that word that does not extend it beyond actual payments that have reached the child or its trustee. Subsection (4) of s. 24, for instance, gives a settlor who has paid tax on the income attributed to him a right to recover the amount of the tax from the "trustee or other person to whom the income is payable" under the settlement. There is nothing surprising in this right of recoupment so long as it does not extend beyond cases where an actual payment of income has been made. It would be a very surprising thing on the other hand to find provision for this right to be asserted against a trustee or beneficiary who had never had any money at all in his hands and, for all that appears, might never at any time receive any distribution on his shares except the fictional one introduced by s. 22. Again, s. 22 (4), which gives a shareholder the right to require the company to pay his tax to the commissioner, where no actual distribution has taken place, operates only when "the proportionate share of any shareholder . . . in the undistributed profits . . . has been included in his total income". This is not just a piece of machinery; some such right as this is an important part of any scheme which taxes persons in respect of income which they have never had and may have no power to obtain. Yet it is impossible to find any acceptable explanation of the manner in which this subsection could be made to work if the respondent's argument is right, since (a) the proportionate share would not have been included in the total income of the child, but of the father, and (b) the child is, but the father is not, the shareholder in the company. D E

It is fair to recognise that the appellant's argument is itself capable of producing anomalies in the relation between the charges imposed by the two sections. But the effect of them is only to drive home the point which has appeared from the considerations adduced above, that the two sections cannot be read as part of a co-ordinated scheme in which the provisions of one reflect on and adopt the provisions of the other. They do not in fact harmonise as they stand; if they are to be harmonised it must be by new enactment of the legislature in which the various complications of their inter-relation can be foreseen and specifically provided for. F

For these reasons, their Lordships will humbly advise Her Majesty that the appeal should be allowed; that the order of the Court of Appeal for Eastern Africa dated Apr. 2, 1958, and the order of the High Court of Tanganyika dated Nov. 12, 1956, be set aside and that the respondent be ordered to pay the appellant's costs of those two hearings; and that the assessments T. 1234 and 3718 which are under appeal should be remitted to the respondent with directions to amend them in accordance with their Lordships' opinion here expressed. The respondent must pay the costs of the appellant of this appeal. G H

Appeal allowed.

Solicitors: *Field, Roscoe & Co.* (for the appellant); *Charles Russell & Co.* (for the respondent).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

A

Re DOUGLAS'S WILL TRUSTS.
LLOYDS BANK, LTD. v. NELSON AND OTHERS.

[COURT OF APPEAL (Lord Evershed, M.R., Sellers and Harman, L.J.J.),
November 9, 1959.]

B

Will—Survivor—Gift subject to life interest to three persons “or the survivors or survivor of them”.

C

A testator who died on Jan. 26, 1937, directed his trustees to pay the income from his residuary estate to his widow during her life provided she so long remained his widow, and from and after her death or second marriage he gave his residuary estate “to my sisters Jane . . . Elizabeth . . . and Sarah . . . or the survivors or survivor of them”. The testator's three sisters all survived him, but died in the lifetime of his widow who had not re-married. On the question who was entitled to the testator's residuary estate subject to the widow's interest (it being accepted that the words of survivorship related to the date of distribution, viz., the date of the death or re-marriage of the widow),

D

Held: subject to the interest of the testator's widow under his will, the residuary estate passed as on the testator's intestacy, because the words “survivors or survivor of them” were merely expository of the previous words so as to make the gift to the sisters dependent on surviving the widow.

Cripps v. Wolcott ((1819), 4 Madd. 11) applied.

Browne v. Lord Kenyon ((1818), 3 Madd. 410) distinguished.

Penny v. Railways Comr. ([1900] A.C. 628) considered

E

Decision of VAISEY, J. ([1959] 2 All E.R. 620) affirmed.

Per CURIAM: if the residuary estate had been given initially to the testator's three sisters in equal shares (not, as in fact it was, to them as joint tenants), it would have been necessary to apply the rule, with the consequence that the words “or the survivors or survivor of them” (referring in this instance to the period of distribution) would operate as a divesting provision (see p. 788, letter A, post).

F

[**Editorial Note.** The consequence of the hypothesis posed in the per curiam stated above would be that on the death of all three sisters before the testator's widow the divesting provisions would fail and the three sisters' estates would have been entitled (cf. the rule quoted at p. 787, letter G, post).

G

As to the meaning of “survivors”, see 34 HALSBURY'S LAWS (2nd Edn.) 279-283, paras. 330-333; and for cases on the subject, see 44 DIGEST 1187, 1188, 10,267-10,277.]

Cases referred to:

Browne v. Kenyon (Lord), (1818), 3 Madd. 410; 56 E.R. 556; 44 Digest 1066, 9190.

H

Cripps v. Wolcott, (1819), 4 Madd. 11; 56 E.R. 613; 44 Digest 1187, 10,267.

Harrison v. Foreman, (1800), 5 Ves. 207; 31 E.R. 549; 44 Digest 1198, 10,375.

Penny v. Railways Comr., [1900] A.C. 628; 69 L.J.P.C. 113; 83 L.T. 182; 44 Digest 1163, 10,080.

Sturgess v. Pearson, (1819), 4 Madd. 411; 56 E.R. 757; 44 Digest 1066, 9191.

Appeal.

I

This was an appeal by the first and second defendants, the personal representatives of the last to die of the testator's three sisters, from a decision of VAISEY, J., dated May 27, 1959, and reported [1959] 2 All E.R. 620. By his originating summons dated Sept. 26, 1958, the sole trustee of the testator's estate asked for the determination, among others, of the question: whether the trusts of the will of the testator relating to his residuary estate operated, after the death or second marriage of the widow, in favour of some one or more of his sisters or whether the testator was partially intestate. VAISEY, J., held that the gift to the sisters failed and that there was a partial intestacy.

B. S. Tatham for the first and second defendants, the personal representatives of the last to die of the testator's three sisters. A

Oliver Lodge for the remaining defendants, interested on intestacy.

P. S. A. Rossdale for the plaintiff, the trustee.

LORD EVERSHERD, M.R.: The testator in this case, Mr. James Wightman Douglas, who died in 1937, included in his will, dated four years earlier, the following provision: B

"I direct my trustees to pay the income from my estate to my said wife Gertrude Douglas for her use during her life provided she so long remain my widow And from and after her decease or second marriage whichever shall first happen then I give my estate and effects to my sisters Jane Catherine Douglas Elizabeth Grace Douglas and Sarah Scott Douglas or the survivors or survivor of them." C

The two sisters first mentioned died in or before 1940; but the surviving sister, Sarah Scott Douglas, died in 1957. The testator's widow still lives and has not re-married.

Questions arose after the death of Sarah Scott Douglas of the rights of the persons, whoever they might be, entitled to the estate, subject to the interest of the testator's widow, and those matters, together with some others which are not relevant to this appeal, came before VAISEY, J. (1). The appellants are the personal representatives of Sarah Scott Douglas (who were the first and second defendants) and it is their case, and was their case before VAISEY, J., that in the circumstances, subject again to the widow's interest, the property is now vested in fee simple in them. D E

If I had to express a view of the meaning of the testator's directions without reference to any authorities I might have concluded that since Sarah Scott Douglas is the survivor of the three the argument on her behalf, or on behalf of her estate, is well founded; but the solution to the problem is, to say the least, considerably affected by decisions, more than one of them, of SIR JOHN LEACH, V.-C., reported in Mr. HENRY MADDOCK'S REPORTS. The first of those decisions which bears on the matter is that of *Cripps v. Wolcott* (2). That was in fact a case where there was a gift, subject to a life interest, in favour of named persons in equal shares, and the survivor or survivors of them to share and share alike. It was the view of SIR JOHN LEACH that in such a context, and in the absence of some countervailing effect elsewhere in the will, the survivorship which is mentioned must relate to the period of distribution. The result has become known as "the rule in *Cripps v. Wolcott*" and is stated as a rule, thus, in *HAWKINS ON WILLS* (3rd Edn.), at p. 310: F G

"In bequests of personal estate, words of survivorship are prima facie to be referred to the period of payment or distribution, and not to the death of the testator." H

In light of that rule VAISEY, J., held that the words here "or the survivors or survivor of them" were related to the period of distribution, viz., the death of Mrs. Douglas, the widow, or her re-marriage. From that part of the learned judge's decision counsel for the first and second defendants has not appealed; he accepts it. I, therefore, say no more on that topic. But he has contended further that the effect of the provision—and I will just read the substance of it again, "I give my estate to my sisters A, B and C or the survivors or survivor of them"—is that it contains two independent gifts: first, an absolute gift to the three sisters A, B and C as joint tenants; and then, secondly, a divesting provision which would operate provided, but provided only, that at any rate one sister survived the period of distribution so as to divest the previous gift and confer a substituted gift to the survivors or survivor. VAISEY, J., rejected I

A that view of the case, and I will say at once that, in my judgment, on the proper construction of this will I agree with VAISEY, J.

The proposition for which counsel for the first and second defendants has contended is founded on another so-called rule enshrined in another case decided by SIR JOHN LEACH, viz., *Browne v. Lord Kenyon* (3). In that case the gift in question was:

B “from and after the death of the survivor of them the said Elizabeth Chetwode and Mrs. Davison, upon further trust . . . to pay the principal sum of £1,000 to my cousin, Sir John Chetwode, Bart.; but if he be then dead, then and in such case I will and direct that the said trustees shall pay the said sum of £1,000 to his two brothers in equal shares, or the whole to the survivor of them.”

C Sir John Chetwode, having pre-deceased the relevant date, the question arose as to the effect of the last words which I have read; and the answer given was thus: after speaking of the word “then”, the Vice-Chancellor went on (4):

D “The only question arises, in the bequest to the two brothers, on the words, ‘or the whole to the survivor’. To what period is the survivorship to be applied? It is said to be meant that if both died during the life of the tenant for life, and one only the day before the other, the survivor was to take the whole, but it is difficult to believe that such could be the meaning of the testatrix, there being no motive for such a preference. Sir J. Chetwode is expressly to take only if he survives the last tenant for life; and, if he dies before, then she gives the sum of £1,000 to his two brothers, in equal shares, or the whole to the survivor of them. The obvious meaning is that, if one only survived the tenant for life, he should take the whole. It is in expression, therefore, a vested gift to the two as tenants in common, subject to be divested if one alone should survive the tenant for life, but which never was divested because that event did not happen. The two brothers, therefore, took vested interests as tenants in common, and the money is now divisible between their representatives. It may be well doubted whether this was the real intention, and whether the testatrix did mean that either brother should take any interest without surviving the tenant for life, but the force of the expression is otherwise.”

So again in *HAWKINS* it is stated (3rd Edn., at p. 316):

G “A bequest to several, or to a class, ‘or’ to such of them as shall be living at a given period, is construed as a vested gift to all, subject to be divested in favour of those living at that period, if there be such; and if none are then living, all are held to take.”

H Although the rule is associated with *Browne v. Lord Kenyon* (3), it appears in fact to be somewhat older and we were referred to a decision of SIR RICHARD PEPPES ARDEN in *Harrison v. Foreman* (5) which was to the same effect. It is, therefore, true to say that the rule or canon of construction has been regarded as one to be applied in cases of this kind for not less than one hundred and sixty years, and it is sanctioned further by references in the text-books like THEOBALD ON WILLS (11th Edn.), at p. 522 and JARMAN ON WILLS (8th Edn.), at p. 1356; but it is, after all, a rule of construction.

I I have read at length SIR JOHN LEACH's judgment in *Browne v. Lord Kenyon* (3) and it will be recalled that he said that the words there used, whatever may have been in the testator's mind, forced on the court the conclusion at which he arrived. It will be noted, however, that in *Browne v. Lord Kenyon* (3) (and the same is true of the earlier decision of SIR RICHARD PEPPES ARDEN in *Harrison v. Foreman* (5) and of a later decision, also of SIR JOHN LEACH, *Sturgess v. Pearson* (6)) that the first gift, which is said to be divested by the alternative

(3) (1818), 3 Madd. 410. (4) (1818), 3 Madd. at p. 416. (5) (1800), 5 Ves. 207.
(6) (1819), 4 Madd. 411.

gift to the survivors or survivor, was to the persons named as tenants in common. A
 If, therefore, in this case the estate had been given to the three sisters A, B and C
 in equal shares it would, I think, have been necessary to apply the rule, and
 right to apply it, on the ground that such direction is, according to the language,
 effective to confer an immediate vested interest as tenants in common in the
 fund in question; so that, if the words "survivors or survivor" should refer B
 to the period of distribution, then they must operate and can only operate as a
 divesting provision; but in this case there are no words of severance. The
 language is simply "to the three sisters". If, therefore, it takes effect it takes
 effect as a gift to them as joint tenants, and, incidentally, of course, as such
 (unless they sever their joint tenancy) the result would be that the survivors
 or survivor would in due course take.

Construing this will according to its language, I cannot indeed think it really C
 possible to treat this first part of the phrase as conferring and intended to confer
 a joint interest absolutely on the three sisters with a divesting provision added on.
 The divergence which arises where the first gift is to persons as tenants in
 common does not arise, and the most striking result of accepting the view of
 counsel for the first and second defendants, as counsel for the remaining defen- D
 dants pointed out, is this: in 1940 the second sister died so that thereafter
 Sarah Scott Douglas, according to the contention of the first and second defen-
 dants, was necessarily entitled whether or not she survived the widow. That
 seems to me to be an absurd result to introduce into the interpretation of these
 words. It seems, therefore, to me that, without any disrespect to or disregarding
 the effect of *Browne v. Lord Kenyon* (7) and the other cases, they can only E
 apply where the language of the first gift—and prima facie it would be because
 it is a gift to persons in undivided shares—renders the reference to survivors
 inconsistent with what precedes, unless the latter be regarded as a divesting
 provision.

One case was cited, viz., that in the Privy Council of *Penny v. Railways*
Comr. (8), which, it was suggested, might be in conflict with what I have said. F
 I do not read the will. The language was complicated and in more than one
 respect obscure; but it is not in doubt that the result in the end was that the
 four stepsons and the son in whose favour a first gift in remainder was made
 took not as joint tenants but as tenants in common. However, in the course
 of delivering the judgment of the Privy Council, LORD LINDLEY used this
 language (9):

"The form in which the first devise to the stepsons and son is expressed is G
 a very common form, and its effect is well established. It is not equivalent
 to a simple devise to such of the devisees as shall survive the widow and
 attain twenty-one. The effect of the clause is to give to all the devisees
 vested interests in fee subject to be divested as regards each devisee, in the
 event of his death in the lifetime of the testator's widow, in favour of H
 those devisees (if any) who survive her and attain twenty-one. If there are
 none such the divesting clause fails, the original vested gifts remain, and all
 the devisees take absolutely."

He then refers to *Sturges v. Pearson* (10). In the circumstances of *Penny v.*
Railways Comr. (8), it was not necessary to decide the broad question which is
 presented for us in this appeal. Therefore, in any case the language, if it was I
 thought to extend to the present case, would be obiter; but it is plain, as I have
 indicated, that LORD LINDLEY was not considering this particular type of case.
 The case before him was a case in which, as a result of a rather obscure provision
 of the will, the stepsons and son took originally not a joint interest in the estate
 but severed interests.

(7) (1818), 3 Madd. 410.

(8) [1900] A.C. 628.

(9) [1900] A.C. at p. 634.

(10) (1819), 4 Madd. 411.

A It seems to me, therefore, that *Penny v. Railways Comr.* (11) cannot be treated as an authority compelling us to construe this will and the particular language of this will as conferring an absolute vested interest in the three sisters as joint tenants only to be divested if one or more of them survived the widow.

B For the reasons which I have tried to state, therefore, I conclude, as did VAISEY, J., that here the words referable to survivorship, which it is now conceded relate to the widow's death, are merely expansive or expository of the previous words so as to make the right to obtain anything under the gift contingent on survivorship of the widow. As no sister survived the widow the gift, therefore fails altogether and the property will be distributed as on an intestacy. I think this appeal must be dismissed.

C SELLERS, L.J.: I agree, and there is nothing I wish to add.

HARMAN, L.J.: I also agree, and there is nothing I feel necessary to add to anything which has been said.

Appeal dismissed.

Solicitors: *Crossman, Black & Keith*, agents for *Adam Douglas & Son*, Alnwick, Northumberland (for all parties).

D [Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

E Re CLITHEROE'S SETTLEMENT TRUSTS.

[CHANCERY DIVISION (Danckwerts, J.), October 30, 1959.]

Settlement—Variation of trusts—Discretionary trust for specified class—Class included any future wife of married settlor—Subsequent alteration of tax legislation under which liability of settlor to tax might arise from inclusion of future wife within specified class—Variation of Trusts Act, 1958 (6 & 7 Eliz. 2 c. 53).

F By a settlement made in 1954 it was provided that the trustees should hold the income of a trust fund during a specified period for the maintenance or benefit of any one or more of a specified class of beneficiaries as the trustees should in their absolute discretion determine. The trustees had absolute discretion (subject during the lifetimes of the settlor's son and the settlor's wife and of the survivor of them to his or her consent) to pay or apply any part of the capital of the trust fund to or for the benefit of any one or more of the members of the specified class. The specified class included the wife and any future wife of the settlor, but did not include the settlor. In 1955 the settlor and his wife assigned all their interests under the settlement to their daughter on her marriage. In order to eliminate possible liability of the settlor to income tax by reason of s. 21 or s. 22 of the Finance Act, 1958 (which had been enacted in view of *Inland Revenue Comrs. v. Saunders*, [1957] 3 All E.R. 43) it was proposed to vary the specified class to exclude any future wife of the settlor. The arrangements proposed included a covenant by the settlor to pay to the trustees £100 in each year during any part of which there should be in existence a person (other than his present wife) who was the wife or widow of the settlor to be held on trust for her absolutely.

Held: the proposed variation would be approved on behalf of, among other beneficiaries, any person who might become the wife of the settlor, subject to evidence of the means of the settlor (so as to show that the proposed covenant was a responsible one) and of the capital value of the trust fund subject to the settlement.

[For the Variation of Trusts Act, 1958, see 38 HALSBURY'S STATUTES (2nd Edn.) 1130. A

For the Finance Act, 1958, s. 21 and s. 22, see *ibid.*, 498 and 500.]

Cases referred to:

Inland Revenue Comrs. v. Saunders, [1957] 3 All E.R. 43; [1958] A.C. 285; [1957]

3 W.L.R. 474; *affg.* S.C. sub nom. *Saunders v. Inland Revenue Comrs.*, B

[1956] 3 All E.R. 83; [1956] 1 Ch. 509; 28 Digest (Repl.) 279, 1243.

Roberts's Settlement Trusts, Re, (Feb. 27, 1959), "The Times."

Adjourned Summons.

This was an application by Lord Clitheroe to vary the terms of a settlement dated Mar. 8, 1954. The settlement, which initially was a settlement of £100, was made by Lord Clitheroe, then the Right Honourable Ralph Assheton, with the object of making provision for the benefit of a specified class, which was defined in the settlement as follows— C

"The expression 'the specified class' shall for the purpose of this deed mean the descendants of Sir Ralph Cockayne Assheton or the spouse of any of them provided always that the settlor shall not be a member of the specified class and his wife shall be a member." D

Clauses (3) and (4) of the settlement, which declared trusts of the sum of £100 and any further property which might be transferred thereafter into the names of the trustees, read as follows:

"(3) During the period commencing at the date of this deed and ending at the expiration of the lineal descendants now living of his late Majesty George the Fifth (hereinafter called 'the appointed period') the trustees shall (subject to the next following clause) pay divide or apply the income of the trust fund (less any part thereof which shall have been appointed under the provisions hereinafter contained) to or between or for the maintenance or benefit of any one or more to the exclusion of the other or others of the specified class as the trustees shall in their absolute discretion determine. E

"(4) It shall be lawful for the trustees at any time or times during the appointed period but subject to the consent in writing of the settlor's son and the settlor's wife or such of them as are still living and if more than one acting jointly and in agreement and after the death of the survivor of them at the trustees' absolute discretion to pay or apply any part or parts of the capital of the trust fund to or for the benefit of all or any one or more to the exclusion of the other or others of the specified class freed and released from the trusts concerning the same Provided always that during the life of the settlor any exercise by the trustees with such consent as aforesaid of the power in this clause contained shall be subject to the limitation that the capital of the trust fund remaining subject to the trusts of this settlement immediately after such exercise shall be of a value of not less than £100." F

By an assignment dated Dec. 9, 1955, in contemplation of the marriage of the daughter of the settlor and his wife, they (the settlor and his wife) assigned to their daughter all their interests under the settlement in property subject thereto to the intent that the settlor and his wife should be completely excluded from any benefit therein in any circumstances whatsoever. G

The court was asked to approve a variation of the trusts (proposed to be effected by deed of variation) on behalf of infants and unborn and unascertainable persons who might become beneficiaries under the settlement altering the definition of the specified class so that "neither the settlor nor any wife of the settlor shall be a member of the specified class". The deed of variation, which was intended to be executed to give effect to the proposed variation of trusts, would also contain a covenant by the settlor with the trustees of the settlement H I

- A that he or his personal representatives would pay the trustees the sum of £100 per annum in each calendar year during any part of which there was in existence a person (other than the settlor's present wife) who was the wife or widow of the settlor and the trustees were to hold such sum on trust for such wife or widow absolutely. Liability to income tax under s. 21 or s. 22 of the Finance Act, 1958, might arise if the settlement were not varied.
- B *P. J. Brennan* for the applicant, the settlor.
R. C. Seddon for the trustees and any future wife of the settlor.
H. H. Lomas for all members of the specified class other than any wife of the settlor.

C **DANCKWERTS, J.:** This is an application under the Variation of Trusts Act, 1958, in respect of a settlement dated Mar. 8, 1954, made by a gentleman who is now called Lord Clitheroe.

I have examined the matter somewhat closely and critically because it is a case in which it is plain that the whole object of the exercise of the power to vary is to eliminate a liability which would otherwise fall on the settlor for income tax and surtax in respect of a fund now included in the settlement.

D There are other circumstances also which induced me to investigate the matter with some care.

The settlement dated Mar. 8, 1954, was of the sum only of £100, but it is a settlement of a well-known kind which contemplates additional funds being brought into the settlement subsequently and being made subject to the same trusts. It was a settlement which as regards the beneficial provisions created

E an immediate discretionary trust with discretionary power also in the trustees' absolute discretion to pay

"or apply any part or parts of the capital of the trust fund to or for the benefit of all or any one or more to the exclusion of the other or others of the specified class freed and released from the trusts concerning the same."

F The point which has given trouble arises entirely from the specified class. The settlor made reference to the descendants of the father in this manner:

"The expression 'the specified class' shall for the purpose of this deed mean the descendants of Sir Ralph Cockayne Assheton [who is the father of the settlor] or the spouse of any of them provided always that the settlor shall not be a member of the specified class and his wife shall be a member."

G No doubt that looks all right on the face of it, but the trouble has arisen owing to the fact that the settlor might marry again and a future spouse might become a member of the specified class.

The second document which was executed on Dec. 9, 1955 was an assignment executed on the occasion of the marriage of the daughter of the settlor and his wife, and by it they appoint to her all their interests under the settlement which I have already mentioned. That still left the future spouses of the settlor untouched. That is clear from *Inland Revenue Comrs. v. Saunders* (1), where the Inland Revenue failed under a claim which they made under the provisions of s. 53 (2) of the Finance Act, 1938, to surtax on certain income comprised in the settlement. Thereupon the Inland Revenue did what they often do—they proceeded to get a provision inserted into the Finance Act to undo the destruction of

I their hopes which had occurred in the case decided by the courts. So there are provisions in s. 21 and s. 22 of the Finance Act, 1958, which would have the effect of undoing the advantages to the taxpayer brought to light in the decision in *Inland Revenue Comrs. v. Saunders* (1), to which I have referred. I am told that but for these new provisions the trouble would not have occurred in the present case. In these circumstances there is something to be said in favour of the taxpayer in the present case, which would not otherwise have enabled

(1) [1957] 3 All E.R. 43; [1958] A.C. 285.

me to regard this application favourably. Also there appears to have been a decision by VAISEY, J., on Feb. 26, 1959, in a case only reported, apparently, in "The Times" newspaper for Feb. 27, 1959, of *Re Roberts's Settlement Trusts* (2), in which the learned judge approved a variation under the Variation of Trusts Act, 1958, in very similar circumstances to those which have occurred in the present case.

Under the Variation of Trusts Act, 1958, s. 1, I have to be satisfied that the person on whose behalf I have to approve a variation procures a benefit, except in the case of protective trusts. In the present settlement the material trust is not a protective trust because there is not a determinable life interest, but the trust is an immediate discretionary trust under which the persons were benefiting. Accordingly, I must be satisfied not only that the proposed variation is for the benefit of the infant beneficiaries who have been joined in this application, but also for the benefit of any future spouse of the settlor, whose interests are going to be cut out by the proposed terms of the deed of variation.

The material provisions of the deed of variation are these. The proviso to the definition of any specified class in the original settlement is cut out and another proviso is substituted in the following terms: "that neither the settlor nor any wife of the settlor shall be a member of the specified class." That seems to be very clearly expressed. There is also a provision apparently intended to remove the power of the settlor or of any wife of the settlor to appoint trustees, because it was felt there might be some danger of that amounting to a means whereby a beneficial interest can be created. In compensation for future spouses losing their interest to share under the discretionary trusts under which they might take nothing at all, even when they came into existence, as the trustees in their discretion might otherwise decide, the settlor covenants with the trustees:

"that he or his personal representatives will pay to the trustees or other the trustees for the time being of the principal deed the sum of £100 per annum in each calendar year during any part of which there is in existence a person other than Lady Clitheroe who is the wife or widow of Lord Clitheroe and the trustees shall hold such annual sum upon trust for such wife or widow absolutely."

That, of course, is a substitute for any interest which the future spouses might take under the settlement and is purely a personal remedy against Lord Clitheroe and his personal representatives. That might be of very little value in the case of a person who was not of substance financially and also it would be affected by the question of what are the funds which are now the subject of the settlement. On this point there is really no evidence at all. Although the schedule in the proposed deed of variation sets out a number of properties, land, which have been included in the settlement, I have no evidence of the values of those properties. Also, though I may suspect that Lord Clitheroe is a man of means, I have no evidence whatever as to his means and I am not entitled to act in this court except on evidence which is properly before me.

Accordingly, what I propose to do is to approve all the proposals in principle but I require an affidavit giving some indication of the means of Lord Clitheroe so as to show that the covenant is a responsible one and also some evidence of the total capital value of the property now the subject of the settlement which I am being asked to vary.

Order accordingly.

Solicitors: *Budd Hart & Son*, agents for *Foysters*, Manchester (for all parties).
[Reported by E. COCKBURN MILLAR, Barrister-at-Law.]

(2) "The Times", Feb. 27, 1959.

A

Re KRAWITZ'S WILL TRUSTS.
KRAWITZ v. CRAWFORD AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), November 5, 6, 12, 1959.]

B

Will—Condition—Certainty—Condition subsequent—Gift over if daughter should marry a person who did not “practise the Jewish religion.”

Will—Gift to next of kin—Such of testator's “next of kin” according to the Statutes of Distribution as should be living in the United Kingdom at the decease of his daughter—Whether brothers and nieces of testator entitled to take with widow—Administration of Estates Act, 1925 (15 Geo. 5 c. 23), s. 50 (1).

C

By his will, dated Jan. 21, 1947, the testator gave his residuary estate on trust for his widow during her widowhood, and after her death or re-marriage on trust for his daughter Z. absolutely, provided that the residuary trust fund should not vest absolutely in Z. but should be retained by the trustees and held on protective trusts for the benefit of Z. for life and after her death on certain trusts for her issue. By cl. 7 (c) (iv) the testator directed that,

D

if the residuary trust fund or any part thereof should not vest in some person or persons under the preceding trusts, then after the death of Z. the fund, or any part thereof which should not so vest, should (subject to precedent trusts, powers and provisions) be held in trust for “such of my next of kin according to the Statutes of Distribution as shall be living in the United Kingdom at the decease of [Z.]”. By cl. 7 (c) (v) the testator declared that, if Z. should marry a person who “does not practise the Jewish religion”, then the trusts in favour of Z. and her children and issue should be void and of no effect and were thereby revoked, and the residuary trust fund should be held on trust for certain of the testator's next of kin, excluding Z. and her issue. The testator, who had lived in England continuously since 1904, died domiciled in England on May 28, 1947, and left surviving him his widow and Z., his only child. On Dec. 9, 1948, Z. was married. Her husband was not a Jew by birth, but was an adherent to the Jewish religion by conduct and by conviction. On Feb. 8, 1958, Z. died without having had any issue. At the date of her death, the only persons living in the United Kingdom who would have had an interest in the testator's estate, under Part 4 of the Administration of Estates Act, 1925, if

E

he had died on that date intestate and leaving no issue, were the widow, two brothers and four nieces of the testator. Several other relatives of the testator were living in South Africa.

F

Held: (i) clause 7 (c) (v) of the will was wholly inoperative because the expression “practise the Jewish religion” lacked the precision which was essential to the validity of a condition subsequent.

G

Clavering v. Ellison ((1859), 7 H.L. Cas. 707) and *Sifton v. Sifton* ([1938] 3 All E.R. 435) followed.

H

(ii) though the testator's widow was his only next of kin living at the death of Z., yet on the true construction of cl. 7 (c) (iv) of the will, and having regard to s. 50 (1)* of the Administration of Estates Act, 1925, the gift to such of his “next of kin according to the Statutes of Distribution as shall be living in the United Kingdom at the decease of [Z.]” was a gift

I

* Section 50 (1) of the Administration of Estates Act, 1925, reads: “References to any Statutes of Distribution . . . in a will coming into operation after the commencement of this Act, shall be construed as references to this Part [Part 4] of this Act; and references in such . . . will to statutory next of kin shall be construed, unless the context otherwise requires, as referring to the persons who would take beneficially on an intestacy under the foregoing provisions of this Part of this Act.”

The method of distribution on an intestacy is set out in s. 46 of the Act; see 9 HALSBURY'S STATUTES (2nd Edn.) 751. But, as respects persons dying after Jan. 1, 1953, s. 46 has been amended by the Intestates' Estates Act, 1952, s. 4 and Sch. 1.

to his widow and the six relatives (namely, the two brothers and the four nieces) who were living in England at the time of Z.'s death, and each of these seven persons took equally, as *personae designatae*, as joint tenants.

[As to uncertain conditions in wills, see 34 HALSBURY'S LAWS (2nd Edn.) 109, para. 143; and for cases on the subject, see 44 DIGEST 440, 441, 2667, 2668.

As to a gift, in a will, to "next of kin", see 34 HALSBURY'S LAWS (2nd Edn.) 317-320, paras. 367-369.

For the Administration of Estates Act, 1925, s. 50 (1), see 9 HALSBURY'S STATUTES (2nd Edn.) 757.]

Cases referred to:

Blaiberg, Re, Blaiberg & Public Trustee v. De Andia Yrarrzaval & Blaiberg, [1940] 1 All E.R. 632; [1940] Ch. 385; 109 L.J.Ch. 166; 162 L.T. 418; 2nd Digest Supp.

Bullock v. Downes, (1860), 9 H.L. Cas. 1; 3 L.T. 194; 11 E.R. 627; 44 Digest 876, 7328.

Clavering v. Ellison, (1859), 7 H.L. Cas. 707; 29 L.J.Ch. 761; 11 E.R. 282; 44 Digest 440, 2667.

Clayton v. Ramsden, [1943] 1 All E.R. 16; [1943] A.C. 320; 112 L.J.Ch. 22; 168 L.T. 113; 2nd Digest Supp.

Donn, Re, Donn v. Moses, [1943] 2 All E.R. 564; [1944] Ch. 8; 113 L.J.Ch. 61; 169 L.T. 335; 2nd Digest Supp.

Gilligan, In the Goods of, [1949] 2 All E.R. 401; [1950] P. 32; [1949] L.J.R. 1592; 2nd Digest Supp.

Hancock v. Watson, [1902] A.C. 14; 71 L.J.Ch. 149; 85 L.T. 729; 43 Digest 644, 792.

Hutchinson v. National Refuges for Homeless & Destitute Children, [1920] A.C. 795; 89 L.J.Ch. 469; 123 L.T. 439; 44 Digest 882, 7386.

Moss's Trusts, Re, Moss v. Allen, [1945] 1 All E.R. 207; 114 L.J.Ch. 152; 172 L.T. 196; 2nd Digest Supp.

Sifton v. Sifton, [1938] 3 All E.R. 435; [1938] A.C. 656; 107 L.J.P.C. 97; 159 L.T. 289; Digest Supp.

Winn, Re, Brook v. Whitton, [1910] 1 Ch. 278; 79 L.J.Ch. 165; 101 L.T. 737; 44 Digest 881, 7380.

Adjourned Summons.

The plaintiff, Bertha Krawitz, the widow of Eli Krawitz, deceased, and one of the executors and trustees of his will, dated Jan. 21, 1947, issued this originating summons for the determination of questions arising under cl. 7 (c) (iv) and cl. 7 (c) (v) of the will.

By cl. 7 (a) and (b) the trustees were directed to hold the testator's residuary trust fund on trust for the plaintiff during her widowhood and, after her death or re-marriage, on trust for the testator's daughter, Zena Krawitz, absolutely. By cl. 7 (c) the testator went on to direct:

"Provided that my residuary trust fund shall not vest absolutely in my said daughter but shall be retained . . . and held on the following trusts . . ."

Paragraphs (i), (ii) and (iii) of cl. 7 (c) set out certain trusts (which are not material) for the benefit of the daughter during her life and for her issue. Clause 7 (c) (iv) and cl. 7 (c) (v) provided:

"(iv) If my residuary trust fund or any part thereof shall not vest in some person or persons under the preceding trusts then after the death of my said daughter my residuary trust fund or the part thereof which shall not so vest shall (subject to the trusts powers and provisions hereby or by statute vested in my trustees in respect of the income or the capital thereof and to every exercise of the same by my trustees) be held in trust for such of my next of kin according to the Statutes of Distribution as shall be living in the United Kingdom at the decease of my said daughter.

- A " (v) Provided nevertheless and I hereby declare that if my said daughter shall either during my lifetime or after my death marry a person who does not practise the Jewish religion then the trusts hereinbefore in this present clause contained in favour of my said daughter and her children and issue shall be void and of no effect and are hereby revoked and in such case I direct that my residuary trust fund shall be held by my trustees upon trust
- B for such of my next of kin according to the Statutes of Distribution as shall then be living within the United Kingdom other than my said daughter or the child children or other issue of my said daughter . . . "

The testator died on May 28, 1947. The daughter married the second defendant, James O'Donnell, on Dec. 9, 1948, and died, without having had any children, on Feb. 8, 1958.

- C By her summons the plaintiff asked for the determination of the following questions, among others: (i) whether the gift of the testator's residuary trust fund, in cl. 7 (c) (v) of the will, to take effect (subject to the plaintiff's interest during her widowhood) if the daughter should marry a person not professing the Jewish religion, was void for uncertainty or otherwise, or was valid; (ii) if the gift was valid, whether it took effect (subject to the plaintiff's interest during her widowhood) on the daughter's marriage; (iii) if the said gift was void or, though valid, did not take effect on the daughter's marriage, whether the gift of the residuary trust fund in cl. 7 (c) (iv) of the will was void for uncertainty or otherwise, or was valid; and (iv) if either of the said gifts had taken effect, whether, on the true construction of the will and having regard to s. 50 of the Administration of Estates Act, 1925, and in the events which had happened,
- D the plaintiff was solely and absolutely entitled under such gift (as the only person other than the testator's daughter who would have taken beneficially on an intestacy under the provisions of Part 4 of the Act of 1925), or some, and what, other class of persons was entitled under such gift.

- E *R. W. Goff, Q.C., and E. I. Goulding* for the plaintiff, the testator's widow.
J. A. Plowman, Q.C., and J. A. Wolfe for the first and third defendants, brothers
- F of the testator.

M. Miller for the second defendant, the husband and personal representative of the testator's deceased daughter.

G. T. Hesketh for the fifth and seventh defendants, daughters and personal representatives of a deceased sister of the testator.

- G *J. Bradburn* for the fourth defendant, the daughter of a deceased brother of the testator, and the sixth defendant, another daughter of the testator's deceased sister.

Cur. adv. vult.

- Nov. 12. **VAISEY, J.**, read the following judgment: By his will dated Jan. 21, 1947, the testator, Eli Krawitz, appointed his wife, the plaintiff, Bertha Krawitz, and two other persons to be his executors and trustees thereof, and
- H gave his residuary estate on trust for the plaintiff during her widowhood, and after her death or re-marriage, on trust for his daughter, Zena Krawitz, absolutely, provided that the residuary trust fund should not vest absolutely in his said daughter (whom I shall call Zena), but should be retained and invested by his trustees on protective trusts for the benefit of Zena during her life. He directed that after Zena's death the said fund should be held on certain trusts for the
- I benefit of her issue as therein mentioned. Clause 7 (c) (iv) of the will provided that, if the residuary trust fund or any part thereof should not vest in any person under the preceding trusts (as hereinbefore mentioned), then after the death of Zena the said fund or the part thereof which should not vest as aforesaid should (subject to precedent trusts, powers and provisions) be held in trust

" . . . for such of my next of kin according to the Statutes of Distribution as shall be living in the United Kingdom at the decease of [Zena]."

Clause 7 (c) (v) of the will provided that, if Zena should, either during the

testator's lifetime or after his death, marry a person who "does not practise the Jewish religion", then the trusts in favour of Zena and her issue should be void and of no effect and were thereby revoked, and in such case the testator directed that the residuary trust fund should be held by the trustees on trust for certain of the testator's next of kin as therein specified (excluding Zena and her issue), with certain other directions not material to be further mentioned.

The testator died on May 28, 1947. His will was duly proved at Liverpool on Mar. 11, 1948, and his estate was and is of considerable value. He had lived in England continuously since the year 1904, and died domiciled in England. He left him surviving his widow (the plaintiff) and his daughter Zena, and no other issue. Zena was married once only, namely, on Dec. 9, 1948, at the Westminster Register Office, to the second defendant, James O'Donnell, who was not a Jew by birth. Having regard to the view which I take of cl. 7 (c) (v) of the will, the nature of the second defendant's association with the Jewish religion is not really material, but I will describe it for the sake of completeness in the narrative. It appears that for some time before his marriage the second defendant was a constant visitor at the plaintiff's home, and he would seem to have evinced an intense interest in the Jewish religion. He participated in and observed, along with the plaintiff and Zena, the ritual which he saw in their house. He accompanied them to the synagogue on a number of occasions. Shortly after his said marriage he is said to have been "formally received into the Jewish religion", whatever that may mean, and on Aug. 15, 1949, he and Zena went through a ceremony of marriage according to Jewish rites. The second defendant states on oath that both prior to and since the death of Zena he has "practised the Jewish religion", and it is clear to me that he is an adherent to that religion now, both by conduct and by conviction. On Feb. 8, 1958, Zena died. She never had any issue, and the second defendant is her legal personal representative.

The first question which arises for my decision is whether the gift of the testator's residuary trust fund contained in cl. 7 (c) (v) of his will, which was intended to take effect (subject to the plaintiff's interest during widowhood) if his daughter should marry a person not practising the Jewish religion, is void for uncertainty or is valid. I think that I am constrained by authority to say that the gift is void. I do not know, except in the broadest and most indefinite sense, what is meant by "practising" the Jewish religion, or, indeed, any religion, and the expression seems to me to lack altogether that precision which is essential to the validity of a condition subsequent, which this one, of course, is. The principal authorities on the point are well known and have become very familiar in recent years. The leading case is *Clavering v. Ellison* (1), and this was followed by *Sifton v. Sifton* (2), *Re Blaiberg, Blaiberg & Public Trustee v. De Andia Yrarrzaval & Blaiberg* (3), *Clayton v. Ramsden* (4), *Re Donn, Donn v. Moses* (5), and *Re Moss's Trusts, Moss v. Allen* (6). I do not propose to consider these cases in detail. The principle which they embody is well known and well established, and I think it clearly applies in the present case.

If that view of the matter is correct, cl. 7 (c) (v) of the will is wholly inoperative, and has, I think, no bearing on the construction of the clause which does take effect, which is cl. 7 (c) (iv). Under the terms of that clause, subject, of course, to the plaintiff's interest during widowhood, the fund is to go to such of the testator's next of kin according to the Statutes of Distribution as should be living in the United Kingdom at the decease of Zena, that is to say, on Feb. 8, 1958.

(1) (1859), 7 H.L. Cas. 707.

(2) [1938] 3 All E.R. 435; [1938] A.C. 656.

(3) [1940] 1 All E.R. 632; [1940] Ch. 385.

(4) [1943] 1 All E.R. 16; [1943] A.C. 320.

(5) [1943] 2 All E.R. 564; [1944] Ch. 8.

(6) [1945] 1 All E.R. 207.

A The testator's next of kin at the date of his death was, in the strictest and narrowest sense, Zena alone, or, in the sense now usually attributed to such an expression as we have here, were Zena and the plaintiff herself. I think, and I hold, that the testator's statutory next of kin at the date of his death were Zena and the plaintiff, and not Zena alone. Reference may be made to s. 18 of the Wills Act, 1837 (7), s. 50 (1) of the Administration of Estates Act, 1925 (8), and *In the Goods of Gilligan* (9). But Zena was not living at her own death and could not, on any view, participate in the gift, and I accordingly think that I must hold that the plaintiff was the only next of kin of the testator living at the death of Zena.

C That, however, by no means concludes the matter, because "statutory next of kin" in this context may be considered as a description of an artificial, hypothetical class, consisting of the persons who would have, at the death of Zena, been the testator's statutory next of kin if the testator himself had died on the day of Zena's death. If that is how the words should be understood, the persons entitled at that date must be confined to those who were living in the United Kingdom at the date of Zena's death, and according to the evidence D those persons would appear to be the following: the plaintiff; the first defendant, Joseph Crawford, a brother of the testator; the third defendant, Arthur Kay, also a brother of the testator; Dereen Field (the fourth defendant), the daughter of a deceased brother; and Jane Shochet, Irene Goldberg and Mildred Brodie (the fifth, sixth and seventh defendants), who were children of a deceased sister. E I have, I think, to decide between the claim of the plaintiff to be solely entitled and the claim of the seven persons whom I have just named. The widow's claim has apparently very sound foundations. Prima facie, a person's next of kin must be ascertained as at the date of his own death; see *Re Winn, Brook v. Whitton* (10). This presumption is, however, easily displaced by a context; see *Hutchinson v. National Refuges for Homeless & Destitute Children* (11), F distinguishing the leading authority of *Bullock v. Downes* (12).

It seems to me to be impossible to attribute an intention to the present testator which would, in quite likely events, that is to say those which have happened, give his estate to his widow absolutely on the termination of her own interest during widowhood. It seems much more reasonable to suppose that the testator was thinking of his near relatives (other than Zena, and, of course, G other than his widow), and the fact that many of such relatives were living abroad, that is to say, in South Africa, gives a special significance to the words "living in the United Kingdom" which might even be rephrased as meaning "other than those living in South Africa".

I decide in favour of the seven claimants. I think that they take as personae H designatae without regard to the quality and nature of the interests which they would have taken under an actual intestacy; that is to say, I hold that the plaintiff takes her one-seventh share equally with the other six, the nieces each taking a full share equally with their uncles, the two brothers; and all these people, all the seven, take together as joint tenants. The original gift to Zena absolutely might have given a title to her representative on the principle of I *Hancock v. Watson* (13), but the right of that representative is, in my judgment, completely displaced by the claim which I have admitted of the seven persons as above-mentioned. Except by the deduction of the costs which I am about

(7) For s. 18 of the Wills Act, 1837, which deals with the revocation of wills by marriage except in certain cases and contains a reference to "next of kin under the statute of distributions", see 26 HALSBURY'S STATUTES (2nd Edn.) 1339.

(8) The terms of the subsection are printed at p. 793, footnote, ante.

(9) [1949] 2 All E.R. 401; [1950] P. 32.

(10) [1910] 1 Ch. 278.

(11) [1920] A.C. 795.

(12) (1860), 9 H.L. Cas. 1.

(13) [1902] A.C. 14.

to mention, the plaintiff's interest during her widowhood remains, of course, unaffected by anything in this judgment. I order that the plaintiff's costs and expenses and the costs as between solicitor and client of the defendants must be raised out of the trust fund.

Order accordingly.

Solicitors: *Brown, Turner, Compton Carr & Co.* (for the plaintiff); *Ward, Bowie & Co.*, agents for *A. Conway*, Leeds (for all the defendants other than the second defendant); *Haslewoods*, agents for *Griffith, Smith, Dodd & Riley*, Brighton (for the second defendant).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

NOTE.

Re TREPCA MINES, LTD.

[CHANCERY DIVISION (Roxburgh, J.), October 20, 1959.]

Practice—Conduct of proceedings—Language—Foreign plaintiff wishing to conduct proceedings through interpreter—Discretion of court.

Adjourned Summons.

This was a summons, taken out by a solicitor acting for the applicant, Radomir N. Pachitch (Pasic) of 2 Place-de-Four, Geneva, Switzerland, a creditor of TrePCA Mines, Ltd., a company incorporated under the Companies Act, 1948, then in voluntary liquidation, to which summons the liquidator of the company was respondent, for an order that the respondent's decision rejecting the proof of the applicant in certain matters in the sum of £2,616,486, might be reversed and that the said proof might be ordered to be admitted in full. Security for costs in the sum of £650 had been ordered and evidence had been filed in the normal course. Both parties had given notice of their intention to cross-examine witnesses. Until the day of the hearing of the summons the applicant had been professionally represented. At the hearing the applicant appeared in person. He did not understand questions in English and soon after the hearing had begun he asked to be heard through an interpreter. He was unable to conduct his case unless he was allowed to conduct it through an interpreter. The case is reported only for the observations of the court and the exercise of its discretion on the question of the conduct of proceedings by the applicant through an interpreter.

The applicant appeared in person.

L. G. Scarman, Q.C., P. J. Sykes and R. O. C. Stable for the liquidator.

ROXBURGH, J., said that proceedings before the court must be conducted in English and in no other language (1). In particular, the proceedings could not be conducted in French, though HIS LORDSHIP might be able to proceed with

(1) HIS LORDSHIP mentioned the Welsh Courts Act, 1942 (5 & 6 Geo. 6 c. 40), 5 HALSBURY'S STATUTES (2nd Edn.) 421, to which his attention had been drawn, as being relevant to the question before him, though concerned with the Welsh language. Reference had also been made in argument on the question of the language in which the proceedings might be conducted to the following authorities—*Collier v. Hicks* (1831), 2 B. & Ad. 663; 9 L.J.O.S.M.C. 138; 9 L.J.O.S.K.B. 300; 109 E.R. 1290; 33 DIGEST 387, 982; and *R. v. Lee Kun*, [1916] 1 K.B. 337; 85 L.J.K.B. 515; 114 L.T. 421; 80 J.P. 166; 14 DIGEST (Repl.) 294. 2721; and also the Pleadings in English Act, 1362 (36 Edw. 3 c. 15), repealed by S.L.R. (1863), pleadings in English inrolled in Latin; and the Proceedings in Courts of Justice Act, 1731 (4 Geo. 2 c. 26), repealed by the Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59), whereby all proceedings in courts of justice in England were to be in English.

- A the hearing if the case were conducted in that language. The applicant could not have an advocate who was not a member of the bar. The applicant's case, if he had been able to put argument before the court, would have been that he wished to conduct the case himself through the medium of an interpreter, the interpreter being the go-between, and nothing more, between the applicant and the court. Theoretically an interpreter was merely a mouthpiece and not an advocate, though in fact when an interpreter translated counsel's questions into the language of a witness it might well happen that rules of evidence were broken, and counsel and the judge were powerless to prevent that unless they knew the language.

- In HIS LORDSHIP's view the question was wholly within the discretion of the judge. If the proceedings had been an action it was doubtful whether he would have proceeded. A judge was entitled to have a case opened to him, and it was certain that a case could not be opened by an interpreter without the judge's consent. These proceedings, however, were not an action. They were proceedings by summons in which the evidence had all been filed, subject only to cross-examination, and was in English. HIS LORDSHIP had no doubt that if he read the evidence he would be much better able to see what justice required than if he did not. There was no difficulty over that. The summons and affidavits were all settled by professional hands and, therefore, in the exercise of his discretion, in this particular case, he proposed to read the summons and the affidavits in support of it. Counsel for the respondent would then be invited to read the evidence filed on behalf of the respondent. HIS LORDSHIP would then read any affidavits filed in reply. At the end of that he would consider what justice required. He might not have taken this course if the respondent had objected, but the respondent was anxious that the court should go so far.

- [The case proceeded accordingly. In 1954 the applicant had obtained judgment in a Serbian court against the company for a large sum of money. This judgment had been obtained in the absence of the company, which had not submitted to the jurisdiction of the Serbian court, and had been set aside by a higher Serbian court for some reason that was not stated. The applicant produced a document of Oct. 15, 1959, showing that there would be a re-hearing in Belgrade. The applicant asked, through an interpreter, for the English proceedings to be adjourned pending the re-hearing in the Serbian court. HIS LORDSHIP, being satisfied on the authority of *Sirdar Gurdial Singh v. Rajah of Faridkote* (2) and *Emanuel v. Symon* (3) that the English court would not enforce the judgment of the Serbian court on the re-hearing, as it would be given in the absence of the company, even if the applicant obtained judgment, refused the adjournment.]

Solicitors: *Freshfields* (for the liquidator).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

J. BOLLINGER AND OTHERS v. COSTA BRAVA WINE COMPANY, LTD.

[CHANCERY DIVISION (Danckwerts, J.), October 22, 23, 26, 27, November 13, 1959.]

Passing Off—Geographical name descriptive of particular district of France—Plaintiffs a class of producers within that district—"Spanish Champagne" used to describe wine produced in Spain—Unlawful competition—Whether action lay to restrain such unfair competition.

Trade Mark—False trade description—Breach of statutory duty—Whether action for damages lies for breach of statutory duty under Merchandise Marks Acts, 1887 to 1953—Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 2 (2)—Merchandise Marks Act, 1953 (1 & 2 Eliz. 2 c. 48), s. 4.

It is unlawful competition, to restrain which an injunction will be granted, for a trader to seek to attach to his product a name or description, with which the product has no natural association, in order to make use of reputation and goodwill that has been gained by a product of other traders of which the origin is genuinely indicated by the name or description (compare p. 811, letter A, post).

On the hearing of preliminary points of law in an action by the plaintiffs (suing on behalf of themselves and all other producers of wine from grapes grown in the Champagne district of France) for an injunction to restrain the defendants from applying the description "Spanish Champagne" to wine made in Spain or made from grapes grown there, for a declaration that "Spanish Champagne" was a false trade description of such wine and for damages, the court made the following assumptions of fact. The plaintiffs carried on business in the Champagne district of France. For many years their wine had been known in the trade as "Champagne" and had a high reputation. Members of the public or in the trade ordering or seeing wine advertised as "Champagne" would expect to get wine produced in Champagne from grapes grown there. The defendants were marketing a wine not produced in the Champagne district and were selling it under the name of "Spanish Champagne". The plaintiffs alleged, in addition to other causes of action, breach of statutory duty under s. 2 (2) of the Merchandise Marks Act, 1887, as amended by s. 4 of the Merchandise Marks Act, 1953.

Held: (i) the right to use the description "Champagne", although the word was the name of a geographical area, was part of the plaintiffs' goodwill and was a right of property; it was immaterial that the plaintiffs were a class of persons producing goods in a particular area, rather than a single person, and accordingly an action for an injunction might lie at their suit.

Pillsbury-Washburn Flour Mills Co., Ltd. v. Eagle ((1898), 86 Fed. Rep. 608) applied.

(ii) the Merchandise Marks Acts, 1887 to 1953, did not impose any statutory duty on the defendants which enabled the plaintiffs to bring an action against them for breach of it.

[Editorial Note.] The description "unlawful competition" is convenient to describe trade competition which, though an injunction may be granted to restrain it, is not strictly the passing off by one trader of his goods as those of another, since there is no pretence that the goods are those of some other trader. Nevertheless the cause of action in the present case is part of the "law of passing off" in the broader sense, as is indicated at p. 811, letter B, post, the true

A basis of that law being injury to a right of property to protect which the court will interfere (see p. 806, letter D, post).

As to when proceedings for passing off lie, see 32 HALSBURY'S LAWS (2nd Edn.) 652, para. 961; and for cases on the subject, see 43 DIGEST 288, 1166-1168.

As to false trade descriptions, see 32 HALSBURY'S LAWS (2nd Edn.) 673, para. 985; and for cases on the subject, see 43 DIGEST 242, 243, 862-871.

B For the Merchandise Marks Act, 1887, s. 2, s. 3 (1) s. 17 and s. 19, see 25 HALSBURY'S STATUTES (2nd Edn.) 1114, 1116, and 1124, and for the Merchandise Marks Act, 1953, s. 4, see 33 HALSBURY'S STATUTES (2nd Edn.) 920.]

Cases referred to:

C *Abbott v. Sullivan*, [1952] 1 All E.R. 226; [1952] 1 K.B. 189; 3rd Digest Supp. *Atkinson v. Newcastle & Gateshead Waterworks Co.*, (1877), 2 Ex.D. 441; 46 L.J.Ex. 775; 36 L.T. 761; 33 Digest 23, 99.

Bradford Corp'n. v. Pickles, [1895] A.C. 587; 64 L.J.Ch. 759; 73 L.T. 353; 60 J.P. 3; 1 Digest 31, 242.

Braham v. Beachim, (1878), 7 Ch.D. 848; 47 L.J.Ch. 348; 38 L.T. 640; 43 Digest 288, 1166.

D *Butler (or Black) v. Fife Coal Co., Ltd.*, [1912] A.C. 149; 81 L.J.P.C. 77; 106 L.T. 161; 5 B.W.C.C. 217; 34 Digest 218, 1809.

California Fruit Cannerns' Assn. v. Myer, (1899), 104 Fed. Rep. 82.

Cowley v. Newmarket Local Board, [1892] A.C. 345; 62 L.J.Q.B. 65; 67 L.T. 486; 56 J.P. 805; 26 Digest 400, 1251.

E *Cutler v. Wandsworth Stadium, Ltd.*, [1949] 1 All E.R. 544; [1949] A.C. 398; [1949] L.J.R. 824; 2nd Digest Supp.

Day v. Brownrigg, (1878), 10 Ch.D. 294; 48 L.J.Ch. 173; 39 L.T. 553; 1 Digest 30, 237.

Dent v. Turpin, Tucker v. Turpin, (1861), 2 John & H. 139; 30 L.J.Ch. 495; 4 L.T. 637; 70 E.R. 1003; 43 Digest 328, 1481.

F *Doe d. Rochester (Bp.) v. Bridges*, (1831), 1 B. & Ad. 847; 9 L.J.O.S.K.B. 113; 109 E.R. 1001; 42 Digest 750, 1737.

Donohoe, Ltd. v. Cherry Brothers, Ltd., (1908), 26 R.P.C. 545; 43 Digest 241, r.

Draper v. Trist, [1939] 3 All E.R. 513; Digest Supp.

Dunnachie v. Young & Sons, (1883), 10 R. (Ct. of Sess.) 874; 20 Sc. L.R. 588; 43 Digest 220, a.

G *Free Fishers & Dredgers of Whitstable v. Elliott*, (1888), 4 T.L.R. 273; 43 Digest 297, 1229.

Groves v. Wimborne (Lord), [1898] 2 Q.B. 402; 67 L.J.Q.B. 862; 79 L.T. 284; 34 Digest 218, 1815.

Hubbuck & Sons v. Wilkinson, Heywood & Clark, [1899] 1 Q.B. 86; 68 L.J.Q.B. 34; 79 L.T. 429; 32 Digest 209, 2599.

H *Monk v. Warbey*, [1934] All E.R. Rep. 373; [1935] 1 K.B. 75; 104 L.J.K.B. 153; 152 L.T. 194; Digest Supp.

New York & R. Cement Co. v. Coplay Cement Co., (1890), 44 Fed. Rep. 277.

Pasmore v. Oswaldtwistle Urban District Council, [1898] A.C. 387; 67 L.J.Q.B. 635; 78 L.T. 569; 62 J.P. 628; 42 Digest 752, 1758.

I *Patent Agents Institute v. Lockwood*, [1894] A.C. 347; 63 L.J.P.C. 75; 71 L.T. 205; 42 Digest 613, 139.

Pillsbury-Washburn Flour Mills Co., Ltd. v. Eagle, (1898), 86 Fed. Rep. 608.

Reddaway v. Banham, [1896] A.C. 199; 65 L.J.Q.B. 381; 74 L.T. 289; 43 Digest 277, 1098.

Samuelson v. Producers Distributing Co., Ltd., [1931] All E.R. Rep. 74; [1932] 1 Ch. 201; 101 L.J.Ch. 168; 146 L.T. 37; Digest Supp.

Southorn v. Reynolds, (1865), 12 L.T. 75; 43 Digest 317, 1385.

- Spalding & Brothers v. Gamage (A. W.), Ltd.*, (1915), 84 L.J.Ch. 449; 32 A.R.P.C. 273; 43 Digest 264, 1018.
- Thwaites v. M'Evilly, Cantrell & Cochrane v. Murphy & Bradshaw*, [1904] 1 I.R. 310; 21 R.P.C. 397; 43 Digest 238, f.
- Weller v. Baker*, (1769), 2 Wils. 414; 95 E.R. 892.
- Whitstable Oyster Fishery Co. v. Hayling Fisheries, Ltd. & Tabor*, (1900), 17 R.P.C. 461; (1901), 18 R.P.C. 434; 43 Digest 329, 1496.

Preliminary Points of Law.

By order dated June 30, 1959, three points of law were ordered, under R.S.C., Ord. 25, r. 2 and r. 3, and Ord. 36, r. 1, to be disposed of before the hearing of this action which was brought by twelve plaintiffs suing on behalf of themselves and of all other persons who produced wine in the district of France known as the Champagne District and shipped such wine to England and Wales, for injunctions and other relief. The relief claimed by the statement of claim was an injunction to restrain the defendants from applying by their servants or agents or otherwise howsoever the descriptions Champagne or Spanish Champagne to wine made in Spain or produced from grapes grown in Spain; an injunction to restrain the defendants from passing off by their servants or agents or otherwise howsoever as and for wine produced in the district of France known as the Champagne District wine not so produced by advertising, offering for sale or selling the same as Spanish Champagne or under any other name or description that included the name Champagne; a declaration that the description Spanish Champagne and any other description that included the name Champagne was a false trade description of wine made in Spain or made from grapes grown in Spain; and an inquiry as to damages and payment of the amount found due. The relevant passages from the pleadings and the facts assumed are set out in the judgment.

R. O. Wilberforce, Q.C., P. J. S. Bevan, R. K. Kuratowski and E. G. Nugee for the applicants (plaintiffs).

Sir Milner Holland, Q.C., F. E. Skone James and S. H. Noakes for the respondents (defendants).

Cur. adv. vult.

Nov. 13. **DANCKWERTS, J.**, read the following judgment: In this action the twelve plaintiffs, who are all producers of wine in the Champagne district of France, object to the use by the defendants of the name "Spanish Champagne" for wine produced in Spain or from grapes grown in Spain; and the matter comes before the court on three points of law, directed, by an order dated June 30, 1959, to be disposed of before the trial of the action.

The points of law are as follows:

"(a) that assuming the truth of paras. 1 and 2 of the statement of claim if the defendants have as alleged in para. 3 of the statement of claim passed off or threatened or intended to pass off as or for champagne wine not produced by the Champagne houses in the Champagne district from grapes grown in the Champagne district and supplied by the Champagne houses to England and Wales they have not thereby done any act in respect of which any of the plaintiffs have a cause of action against them according to the law of England; (b) that s. 2 (2) of the Merchandise Marks Acts, 1887 to 1953 does not impose any statutory duty on the defendants or any statutory duty owed by the defendants to the plaintiffs and alternatively if the said section does impose any such statutory duty the same is not in law actionable at the suit of any of the plaintiffs or at all and (c) that the allegation in para. 5 of the statement of claim that certain acts of the defendants

A constitute unlawful competition is insufficient to support any cause of action known to English law."

It appeared from the arguments before me that points (a) and (c) were, in substance, part of the same cause of action relied on by the defendants, so that there were really only two points of law to be decided.

B The facts to be assumed for the purposes of the argument appear in the statement of claim:

C "1. Each of the plaintiffs is a company incorporated according to the laws of the Republic of France and carries on business as a producer of wine in the district of France known as and hereinafter referred to as the Champagne district and as a supplier of such wine to England and Wales. The plaintiffs sue on behalf of themselves and all other persons who produce wine in the Champagne district and supply such wine to England and Wales which other persons, together with the plaintiffs, are hereinafter called 'the Champagne houses'.

D "2. The wine produced by the Champagne houses and each of them and supplied by them to England and Wales is a naturally sparkling wine produced in the Champagne district by a process of double fermentation from grapes grown in the Champagne district and is and has for long been known to the trade and public throughout the United Kingdom as champagne and as such has acquired a high reputation. Any member of the trade or public in the United Kingdom ordering champagne or seeing wine advertised or offered for sale as champagne will expect the wine so ordered, advertised or offered for sale to be a naturally sparkling wine produced in the Champagne district from grapes grown in the Champagne district and no other wine.

E "3. The defendants are a company carrying on business at 75, Gray's Inn Road, London, W.C.1, as wine and spirit merchants and have passed off and threaten and intend to pass off, as and for champagne, wine not produced by the Champagne houses in the Champagne district from grapes grown in the Champagne district and supplied by the Champagne houses to England and Wales by advertising, offering for sale and selling the same as Spanish Champagne."

Then para. 4 of the statement of claim says:

G "Each of the descriptions 'Champagne' and 'Spanish Champagne' is a false trade description of wine produced in Spain and the sale particularised in para. 3 (b) hereof was a sale by the defendants of wine to which a false trade description had been applied and was an offence under s. 2 (2) of the Merchandise Marks Acts, 1887 to 1953, and was in breach of the statutory duty which the defendants owe to the plaintiffs."

Then para. 5 says:

H "The acts of the defendants particularised in para. 3 hereof constitute unlawful competition with the plaintiffs in the way of trade."

Then the plaintiffs claim that they have suffered damage and that the defendants intend to continue what they have been doing.

I I ought, I think, also to refer to the defence. In para. 2 of the defence the defendants say:

"... The defendants admit that a naturally sparkling wine produced in France has for a number of years past been sold in England under the description 'Champagne'."

The defendants do not make any other admissions as regards para. 2 of the statement of claim. They admit that they are selling a wine produced in Spain and intend going on doing it under the name "Spanish Champagne", and they then deny

"that if they passed off or threatened or intended to pass off as or for Champagne, wine not so produced or supplied, they would thereby have done any act in respect of which any of the plaintiffs would have a cause of action against them according to the law of England."

In para. 4 the defendants deny that this name "Spanish Champagne" is a false description, and they continue:

"The defendants deny that the said section imposes any statutory duty on the defendants or any statutory duty owed by the defendants to the plaintiffs. Alternatively, if the said section does impose any such statutory duty the same is not actionable at the suit of any of the plaintiffs or at all."

Then in para. 5 of the defence the defendants say that they do not admit that any of the alleged acts of the defendants constitute unlawful competition with the plaintiffs in the way of trade, and, alternatively, if such acts do constitute such unlawful competition the same is not relevant to any cause of action known to English law.

It appears, therefore, that, if the points of law are decided entirely against the plaintiffs, this will bring the action to an end; but, if any of the points of law are decided in the plaintiffs' favour, it does not necessarily follow that the action will succeed, because, on the facts, it will still be open to the defendants to show that they have not been guilty of any sort of passing off and that the description used by them for their wine is not a false trade description or otherwise contrary to the provisions of the Merchandise Marks Acts, 1887 to 1953. I am not deciding these questions of fact and evidence at this hearing, and I am not concerned with the question whether the plaintiffs are entitled to sue on behalf of all the wine producers in the Champagne district of France.

It is desirable, I think, to state the assumptions on which the arguments proceeded in a clear form. These are the assumptions: (1) The plaintiffs carry on business in a geographical area in France known as Champagne; (2) the plaintiffs' wine is produced in Champagne and from grapes grown in Champagne; (3) the plaintiffs' wine has been known in the trade for a long time as "Champagne" with a high reputation; (4) members of the public or in the trade ordering or seeing wine advertised as "Champagne" would expect to get wine produced in Champagne from grapes grown there; and (5) the defendants are producing a wine not produced in that geographical area and are selling it under the name of "Spanish Champagne".

It was admitted on behalf of the plaintiffs that the action was not a "passing-off action" in the sense that there was any allegation that the defendants' product was passed off as wine produced by any of the plaintiffs individually. The plaintiffs' first contention (which is the subject of points (a) and (c)) is that where a number of persons produce goods in a geographical area and these goods become known by the name of the geographical area and, as such, acquire a reputation, persons who produce similar goods outside the geographical area and attach the name of the geographical area to their goods are guilty of what is described in para. 5 of the statement of claim as "unlawful competition" and are passing off their goods as the goods of other persons in a way which the law prohibits. It was said that the name "Champagne" was part of the plaintiffs' goodwill which was injured by the defendants' conduct and that the law was not so limited as to deprive persons so injured of a right of action to protect their property, and that it is not an objection that the plaintiffs have no exclusive right to the name "Champagne" in the sense that they share the right to use it with all other persons who produce wine in the Champagne area.

The defendants, on the other hand, claim that the plaintiffs' case could not come within the well-settled ambit of a passing-off action, and contend that the law does not provide a civil remedy for such matters as are the subject of the plaintiffs' complaint.

A On the assumptions which have to be made for the purpose of these arguments (which, as I have pointed out, do not necessarily represent the true facts of the case), the taking of the name of a product which is associated with growers in a different district appears, *prima facie*, to be a reprehensible course of conduct, but whether it is actionable must depend on principle and the authorities which are relevant. A very large number of cases, as well as text-books, was cited to me in argument.

B The well-established action for "passing off" involves the use of a name or get-up which is calculated to cause confusion with the goods of a particular rival trader, and I think that it would be fair to say that the law in this respect has been concerned with unfair competition between traders rather than with the deception of the public which may be caused by the defendant's conduct, C for the right of action known as a "passing-off action" is not an action brought by the member of the public who is deceived but by the trader whose trade is likely to suffer from the deception practised on the public but who is not himself deceived at all. This aspect seems to me to be obscured in the passage in CLERK & LINDSELL ON TORTS (11th Edn.), p. 2:

D "An action at common law lay for 'passing off' where there was an intent to deceive on analogy to an action for fraud, but unless the plaintiff proved that there was an intent to deceive no action lay. In equity, however, an injunction could be obtained to restrain the defendant from continuing a practice that was calculated to deceive, although there was no proof of an intent to deceive. Damages was not a remedy available in equity, but where the defendant had full knowledge of all the facts equity treated him as if he had an intention to deceive, and in such a case directed against him an account of profits arising from his fraud, but only from the date of his knowledge. Accordingly, where the 'passing off' was entirely innocent on the part of the defendant, who desisted so soon as the facts were brought to his notice, the plaintiff had no remedy by way of injunction and none for an account of profits. At common law no action would lie at all, but had there been a deceit an action would lie independently of proof of damage, though only nominal damages might be obtainable. It will, therefore, be observed that there were two different causes of action, one arising from deceit and the other from an equitable quasi-property. Under the dual administration of law and equity since 1873 this fact seems to have been obscured, so that as long ago as 1915 it could be suggested that nominal damages would lie for an innocent passing off. It is not suggested that the present law is less logical than the old, but this confusion has left a legacy in the uncertainty which surrounds the true nature and extent of this 'quasi-property' in a trade description or name or, perhaps, goodwill."

H The last few words seem to me to be truly related to the nature of the "passing off" action, but nowhere in that passage is the point made clear that the plaintiff is not deceived; he has caught the defendant deceiving other persons by pretending that his goods are those of the plaintiff. The point is that the deception is injuring the plaintiff's trade.

I WINFIELD ON TORT (6th Edn.), p. 733 et seq. seems to me to approach the subject more correctly in regarding the cause of action as being an example of competition which is unlawful. After pointing out that, in general, trade competition is lawful, the author refers to the examples of unlawful competition, such as interference by threats or slander of title, and includes "passing off", concluding that the basis of the proceedings is the protection of rights of property affecting the plaintiff's trade, for there is no right of action where there is no interference with a plaintiff's trade (see *Day v. Brownrigg* (1)—the "Ashford Lodge" case). That difficulty does not arise in the present case. The whole

basis of the plaintiffs' complaints is the damage which is alleged to be caused to the plaintiffs' trade in the wine called "Champagne". A

The view that the law is interfering to protect rights of property is clearly supported by the observations of LORD PARKER in *Spalding & Brothers v. A. W. Gamage, Ltd.* (2) (the "Orb" football case);

"There appears to be considerable diversity of opinion as to the nature of the right, the invasion of which is the subject of what are known as passing-off actions. The more general opinion appears to be that the right is a right of property. This view naturally demands an answer to the question—property in what? Some authorities say, property in the mark, name or get-up improperly used by the defendant. Others say, property in the business or goodwill likely to be injured by the misrepresentation. LORD HERSCHELL in *Reddaway v. Banham* (3), expressly dissents from the former view; and if the right invaded is a right of property at all, there are, I think, strong reasons for preferring the latter view"; B C

and LORD PARKER (4) points out that the plaintiff was not the party deceived. The statements of LORD PARKER and LORD HERSCHELL are good enough for me; and the same view is supported by the statements of ROMER, L.J., in *Samuelson v. Producers Distributing Co., Ltd.* (5), and of GODDARD, L.J., in *Draper v. Trist* (6), where he says: D

"In passing-off cases, however, the true basis of the action is that the passing off by the defendant of his goods as the goods of the plaintiff injures the right of property in the plaintiff, that right of property being his right to the goodwill of his business." E

The plaintiffs claim that their goodwill in the name or description "Champagne" is injured by the defendants' conduct. Counsel for the defendants did not contest the correctness of the statements in those cases, but pointed out that each of them was a case of interference with the name or description of the goods of a particular trader. The issue still is whether an action lies at the suit of one or more traders who, as well as others, use or are entitled to use the particular name or description. F

I was referred by counsel for the plaintiffs to a number of English cases, which were admitted not to be decisive. The earliest of these is the strange case of "the dippers", that is to say *Weller v. Baker* (7). This case related to medicinal springs at Tunbridge Wells, and by certain articles of agreement made between the lord of the manor and the free tenants it had been agreed that no person should be permitted to follow the employment of a "dipper" except persons who had been chosen by the homage at the courts baron and approved by the lord of the manor, preference being given to the wives, widows and daughters of the freehold tenants, the number being limited to twelve. These articles of agreement were confirmed by a statute of George II. The "dippers" were women who attended at the springs and delivered the water therefrom to persons resorting thereto, and the dippers were rewarded with gratuities for doing this. The defendant, Dorcas Baker, who, though chosen by the homage, was not approved by the lord of the manor, proceeded to dip water and to receive gratuities, and the action was brought by the six chosen dippers and their husbands claiming that the defendant's conduct deprived them of moneys which they would otherwise have received. It was held by the Court of King's Bench that an action on the case lay for the defendant's interference with the plaintiffs' "right of employment" (being both an injury and damage), and that all the dippers had properly joined in the action. The G H I

(2) (1915), 32 R.P.C. at p. 284; 84 L.J.Ch. at p. 450.

(3) [1896] A.C. 199.

(4) (1915), 32 R.P.C. at p. 283; 84 L.J.Ch. at p. 450.

(5) [1931] All E.R. Rep. 74 at p. 81; [1932] 1 Ch. 201 at p. 210.

(6) [1939] 3 All E.R. 513 at p. 526.

(7) (1769), 2 Wils. 414.

A court certainly considered that the defendant's conduct was a tort, and it would appear that the plaintiffs' employment was regarded as a freehold right of property; but the case does not seem to be very close to the present problem.

Dent v. Turpin (8) relates to the watchmakers who were concerned with the great clock at Westminster. E. J. Dent had three places of business, and when he died in 1853 he bequeathed two of the businesses to his stepson Frederick B Rippon, who subsequently took the name of "Dent", and the other to his stepson Richard Dent. The testator always labelled his watches "Dent, London". The defendants were watchmakers and exporters who had no connexion with the name "Dent" at all, but labelled their watches "Dent, London". The plaintiff was the administratrix of Frederick Dent who herself had carried on his business. On demurrer it was argued that the plaintiff could not take C proceedings without joining the administratrix of Richard Dent. PAGE WOOD, V.-C., held that the plaintiff was entitled to succeed, observing that

"... it is quite enough to aver, as the bill does, that these articles were manufactured and marked with the trade mark in question without the consent of the plaintiff or of the other person entitled to use the name of Dent."

D This was, of course, clearly a case of passing off by using the plaintiff's mark, but it does appear to show that the plaintiff need not have an exclusive right to the mark if the defendant has no right to it at all.

Very much to the same effect is *Southorn v. Reynolds* (9). One of two brothers E who separately manufactured clay tobacco pipes at Broseley in Shropshire and sold them under the name of "Southorn's Broseley pipes" in continuation of a business founded by their father, brought the action against the defendant, Reynolds, who was a pipe manufacturer in the City Road, London, and had no establishment at or any connexion at Broseley, and, somewhat impudently, it would appear, sold his pipes in boxes conspicuously labelled "Reynolds' purified F clay pipes, made by Southorn, from Broseley". He had gone to Broseley to obtain someone of the name of "Southorn" and had taken into his employment an individual of that name who was simply an ordinary workman. PAGE WOOD, V.-C., following his own decision in *Dent v. Turpin* (8), granted an injunction, in spite of the objection taken that the plaintiff had not an exclusive right to the name. In this case both a surname and a geographical description were involved.

G *Braham v. Beachim* (10) is of interest, because the case concerns a name which was geographical. The defendants, who did not work a colliery in the parish of Radstock but did work seams of coal connected with the seams of coal in the parish of Radstock, called themselves "the Radstock Colliery Proprietors". The plaintiffs were the Dowager Countess Waldegrave and the trustees of her marriage settlement, and they worked all the coal in the parish of Radstock, H with a small exception. FRY, J., granted an injunction restraining the defendants, unless and until they should acquire a colliery or coal mine within the parish of Radstock, from trading under or using the name or style used by them or any other name or style signifying that the defendants were proprietors of any colliery at Radstock. The relevance of this case is weakened, however, because it appears that the order was really made on the basis that "the Radstock Colliery Proprietors" would be taken to refer to the plaintiffs' business, I and, therefore, in substance, the case is one of ordinary passing off.

Now come the two oyster cases. In *Free Fishers & Dredgers of Whitstable v. Elliott* (11) the plaintiffs were a company incorporated under a statute of George III and were entitled to the soil of the marine manor of Whitstable, to the exclusive right of fishing therein, and also to the exclusive right of taking tolls from ships anchoring in the bay. The defendant, who was the contractor for

(8) (1861), 2 John. & H. 139, see at p. 143.

(10) (1878), 7 Ch.D. 848.

(9) (1865), 12 L.T. 75.

(11) (1888), 4 T.L.R. 273.

the refreshment department of the Royal Courts of Justice, sold what he called "Whitstable native oysters" in the building at 2s. per dozen. The plaintiffs claimed that the only genuine Whitstable native oysters were those produced on their beds and alleged that the defendant's oysters were French oysters known in the trade as "seconds". It appeared that the oysters sold by the defendant came from the bed of the Sea Salter & Ham Oyster Company at Whitstable, which were adjacent to those of the plaintiffs, but it also appeared that these oysters had not been born in the estuary of the Thames but on the coast of France and had been laid down on the beds of the Sea Salter Company until they arrived at maturity. STIRLING, J., found that the term "Whitstable native oysters" was not a proper description of the defendant's oysters. He said that the term "Whitstable" was properly applicable to any oysters matured at Whitstable, but that the term "native" meant oysters which came into being at a few places on the coast of Essex, and not only at Whitstable. So that "Whitstable native oysters" meant oysters not only matured at Whitstable, but also born there or at one of the places in Essex. In a reserved judgment STIRLING, J., seems to have come to the conclusion that the name "Whitstable native oysters", primarily descriptive and geographical, had come to be the trade name of the plaintiffs, and he remarked that if the defendant or the Sea Salter company, from whom he purchased, were selling oysters properly designated as "Whitstable native oysters" he could not have interfered. He felt suspicious about the conduct of the Sea Salter Company, but thought that the defendant might have acted in innocence. But, as the defendant declined to give an undertaking to discontinue the use of the name, an injunction was granted. There is obviously some relevance in this case to the present, but I think that there is some justification for the comment of counsel for the defendants that it was a case of ordinary passing off.

The other oyster case (to which my attention was called by counsel for the defendants) is *Whitstable Oyster Fishery Co. v. Hayling Fisheries, Ltd. & Tabor* (12). The plaintiffs were, apparently, the same corporation as the plaintiffs in the earlier case, and they claimed that the proper word "Whitstable" in the trade description of oysters was confined to the plaintiffs and the Sea Salter Company and indicated the oysters of one or other and no other. The plaintiffs complained that the defendants had recently taken to selling oysters, not those produced by the plaintiffs or the Sea Salter Company, as "Whitstables", "Whitstable natives, selected" and other similar names and were passing off these oysters as those cultivated or matured by the plaintiffs or the Sea Salter Company. The action was dismissed, and it appears that the result of the case turned entirely on the question whether the description "Whitstable oysters" had acquired a secondary meaning, namely, either the plaintiffs' oysters or those of the Sea Salter Company. BUCKLEY, J., said (13):

"In all cases such as this the question to be determined is one of fact, and what I have to try here first is whether these words 'Whitstable Natives', or 'Whitstable Oysters', which, according to their ordinary meaning would convey oysters, or oysters of a kind, coming from Whitstable, have a secondary meaning, by which the trade and the public understand them to mean not simply that thing—that class of goods—but certain goods which the plaintiffs only, or the plaintiffs and the Sea Salter Company, supply. I answer that question of fact by saying that the evidence satisfies me that the words are understood by the trade to mean not the plaintiff company's goods, or the Sea Salter Company's goods, but a particular class of goods which are known in the trade by that name."

Counsel for the defendants, very naturally, relied on this case, but I do not think that it is conclusive against the plaintiffs in the present case, because it appears to

A me that BUCKLEY, J., reached a finding of fact (stated by him (14) and discussed by him (15)) which differs in nature from the assumptions of fact which I am required to make for the purposes of the present case. BUCKLEY, J., seems to have thought that the term meant merely a particular class of oysters having certain characteristics, which is not the assumption on which I have to act.

B I turn now to the Scottish case, *Dunnachie v. Young & Sons* (16). The pursuers, who were two separate firms, manufactured firebricks at the farm of Glenboig from fireclay on the farm and had registered trade marks "Glenboig" and "Star Works, Glenboig", with "J.D." and a star; and their firebricks had attained a great reputation at home and abroad. The defenders made firebricks from a seam of clay identical in character with the clay worked at Glenboig, but about two miles from Glenboig, and stamped their bricks "Youngs Glenboig", advertising them as made from Glenboig clay. The court granted an interdict; but it is plain that, apart from the fact that the two firms who had the right to use the word "Glenboig" for their firebricks were the pursuers, the case is simply a passing-off case. Though "Glenboig" was a geographical expression, it was the trade mark, in whole or in part, of each of the aggrieved firms.

D I must now deal with the three American cases to which I was referred. The first of these, *New York & R. Cement Co. v. Coplay Cement Co.* (17), decided by two judges of the Federal Circuit Court in Pennsylvania, is in the defendants' favour. Some fifteen or twenty parties, including the plaintiffs, manufactured cement in the town of Rosendale, in the State of New York, and the cement made in Rosendale and its vicinity had for many years been known as "Rosendale Cement". The defendants were manufacturing and selling cement as "Anchor Rosendale Cement", though it was made in Lehigh County, Pennsylvania. The court held that it was insufficient to show that the plaintiffs had a mere right in common with others to use a particular trade mark, trade name or style of goods, and it was necessary to show an exclusive ownership or property therein. The court did not review the authorities and said that they relied on the general principles of the law which seemed to be the most applicable to the case. So the action failed. The court were oppressed with the difficulties which might arise if persons could bring actions in respect of such things as Dresden china or Irish linen, and thought it might "open a Pandora's box of vexatious litigation". But the proposition of the need for exclusive right, as stated by the court, apart from the other American cases, seems to me to be at variance with the English cases *Dent v. Turpin* (18) and *Southorn v. Reynolds* (19).

G The next case, *Pillsbury-Washburn Flour Mills Co., Ltd. v. Eagle* (20), a decision of three Federal judges on appeal from the Circuit Court of the Northern District of Illinois, is, in my view, irreconcilable with the last-mentioned case. This was an action by a number of manufacturers, including one, the one named in the case, which was an English company, who for many years had manufactured flour on a large scale at the city of Minneapolis in Minnesota. The defendants were wholesale and retail grocers, selling flour at Chicago, Illinois. The plaintiffs sought to stop them from using on barrels and sacks containing flour the words "Minnesota Patent" or "Minneapolis, Minnesota" or "Minneapolis, Minn." The plaintiffs had for many years identified their flour by the words "Minneapolis", "Minneapolis, Minn.", or "Minneapolis, Minnesota", or "Minnesota Patent". The use of the words "Minnesota" or "Minnesota Patent" was understood by the trade and the public to mean flour made under a certain patent process somewhere in the State of Minnesota. Originally, before 1893, it appeared that the defendants had stocked and sold the plaintiffs' flour under the name and description used by them, but after 1893 proceeded to

(14) (1900), 17 R.P.C. at p. 475.

(15) (1900), 17 R.P.C. at pp. 471, 472.

(16) (1883), 10 R. (Ct. of Sess.) 874.

(17) (1890), 44 Fed. Rep. 277.

(18) (1861), 2 John & H. 139.

(19) (1865), 12 L.T. 75.

(20) (1898), 86 Fed. Rep. 608.

use the names and descriptions complained of for flour produced at Milwaukee, in Wisconsin, which was alleged to be inferior flour sold at a cheaper price. The court, after an extensive examination of the authorities, including numerous English cases, and among them nearly all the leading English cases on ordinary passing off, came to the conclusion that an injunction ought to be granted, reversing the decision of the court below. A curious circumstance is that the *New York Cement Co.* case (21) was referred to on an incidental point without any note of disapproval. Counsel for the defendants sought to weaken the relevance of this case by reason of the court's reliance on a number of the ordinary cases of passing off and said that the pleading in the case was simply on the basis of passing off. The reply of counsel for the plaintiffs to this was to observe that the court was dealing with two propositions, as it went through the cases: (1) that geographical expressions may constitute a trade description and (2) that the plaintiffs need not have an exclusive right to use the trade description. The case is, of course, not binding on me, and it was contended by counsel for the defendants that it was not in accordance with English law.

The remaining American case is *California Fruit Cannery Assn. v. Myer* (22). The headnote is:

"Canning companies in California, who put up and sell fruits grown in that state, have the right to use thereon the name 'California' as a trade designation, and, when their products have become well and favorably known by such name, are entitled to protection by injunction against the fraudulent use on cans of the same kind of fruit, grown and put up elsewhere, of labels designating it as California fruit, and falsely stating that it is put up in that state."

This fairly states the effect of the case, which was decided by a single Federal judge in the Circuit District of Maryland, and the short judgment follows the *Pillsbury-Washburn Flour Mills* case (23).

Counsel for the defendants contended that the mere fact that a defendant's conduct is injurious to the plaintiff or even, may be, unlawful does not necessarily give the plaintiff a cause of action; and no doubt this is true in certain circumstances. He relied on (amongst other cases) *Patent Agents Institute v. Lockwood* (24). In this case the Institute of Patent Agents and three registered patent agents practising in Glasgow sought to prevent the defender describing himself as a patent agent, and were held not entitled to an injunction. But this case has probably more relevance on the question relating to the Merchandise Marks Acts and is not of assistance on the present point. Another instance of loss being caused without the person so damnified being entitled to a remedy is *Abbott v. Sullivan* (25), to which I was also referred; and there are, of course, the examples of mere extravagance of language, which are recognised as part of everyday life, such as "the puffing" cases, an example of which is *Hubbuck & Sons v. Wilkinson, Heywood & Clark* (26).

The substance of the argument of counsel for the defendants was that, before a person can recover for loss which he suffered from another person's act, it must be shown that his case falls within the class of actionable wrongs. But the law may be thought to have failed if it can offer no remedy for the deliberate act of one person which causes damage to the property of another. There are such cases, of course, but they occur, as a rule, when the claims of freedom of action outweigh the interests of the other persons who suffer from the use which a person makes of his own property. (For example, see *Day v. Brownrigg* (27) and *Bradford Corp'n. v. Pickles* (28).)

There seems to be no reason why such licence should be given to a person,

(21) (1890), 44 Fed. Rep. 277.

(23) (1898), 86 Fed. Rep. 608.

(25) [1952] 1 All E.R. 226; [1952] 1 K.B. 189.

(27) (1878), 10 Ch.D. 294.

(22) (1899), 104 Fed. Rep. 82.

(24) [1894] A.C. 347.

(26) [1899] 1 Q.B. 86.

(28) [1895] A.C. 587.

A competing in trade, who seeks to attach to his product a name or description with which it has no natural association so as to make use of the reputation and goodwill which has been gained by a product genuinely indicated by the name or description. In my view, it ought not to matter that the persons truly entitled to describe their goods by the name and description are a class producing goods in a certain locality, and not merely one individual. The description is

B part of their goodwill and a right of property. I do not believe that the law of passing off, which arose to prevent unfair trading, is so limited in scope. In my view, the decision in *Pillsbury-Washburn Flour Mills Co., Ltd. v. Eagle* (29) is good sense, and I find nothing in the English cases which is at all inconsistent with the reasoning of the American court, except possibly some of the remarks of BUCKLEY, J., in *Whitstable Oyster Fishery Co. v. Hayling Fisheries, Ltd.* (30)

C which, I think, related to the particular circumstances of the trade in oysters in those cases.

I think that the law should and does provide a remedy for the type of unfair competition which is set out in para. (a) of the points of law (31); but I wish to emphasise again that this conclusion is based on the assumptions of fact which I am required to make for the purpose of the present hearing, and I must

D not be taken to have accepted in any other way the allegations that what the defendants have been doing causes or is likely to cause any confusion with the wine produced in the Champagne district of France. I think that it is desirable to state this, lest persons who have not followed the basis of the present hearing should be under misapprehension as to the effect of my decision. In short, I am not deciding whether the description "Spanish Champagne" is calculated

E to deceive.

I turn now to the point depending on the Merchandise Marks Acts, 1887 to 1953. It is desirable to see what the Acts do. The really relevant Act is the Act of 1887. Section 2 creates offences as to trade marks and trade descriptions. Subsection (1) provides:

F "Every person who—(a) forges any trade mark; or (b) falsely applies to goods any trade mark or any mark so nearly resembling a trade mark as to be calculated to deceive; or (c) makes any die, block, machine, or other instrument for the purpose of forging, or of being used for forging, a trade mark; or (d) applies any false trade description to goods; or (e) disposes of or has in his possession any die, block, machine, or other instrument

G in this section mentioned to be done, shall, subject to the provisions of this Act, and unless he proves that he acted without intent to defraud, be guilty of an offence against this Act."

Paragraph (d) is the material paragraph for the purposes of the present case. Subsection (2) contains ancillary provisions relating to the exposure of offending things for sale (32). Subsection (3) contains the penalties for offences, which are

H severe, being on conviction on indictment imprisonment for a term not exceeding two years, or a fine, or both imprisonment and fine, and up to four months' imprisonment or a £20 fine on summary conviction, with increased penalties on summary conviction for second or subsequent offences.

Among the definitions of "trade descriptions" in s. 3 (1) of the Merchandise Marks Act, 1887, is

I "... any description, statement, or other indication, direct or indirect ... (b) as to the place or country in which any goods were made or produced, or (c) as to the mode of manufacturing or producing any goods, or (d) as to the material of which any goods are composed ...

"The expression 'false trade description' means a trade description

(29) (1898), 86 Fed. Rep. 608.

(30) (1900), 17 R.P.C. 461.

(31) The point of law is stated at p. 802, letter H, ante.

(32) A new s. 2 (2) was substituted by s. 4 of the Merchandise Marks Act, 1953.

which is false [or misleading] in a material respect as regards the goods to which it is applied . . .”

The word “misleading” was added by the Merchandise Marks Act, 1953.

It is not necessary to set out all the provisions of the Merchandise Marks Act, 1887, but s. 17 may be noted, as it provides that on the sale or in the contract for the sale of any goods the vendor shall be deemed to warrant that the trade description is not a false trade description within the meaning of the Act, unless the contrary is expressed in some writing signed by or on behalf of the vendor and delivered at the time of the sale or contract to and accepted by the vendee. In s. 19 there is a saving provision that the Act shall not exempt any person from any action, suit or other proceeding which might, but for the provisions of this Act, be brought against him.

There has been a very large number of decisions on the question whether a duty is imposed by a statute so as to create a civil cause of action. In *Cutler v. Wandsworth Stadium, Ltd.* (33), the principles are described by LORD SIMONDS as follows (34):

“The only rule which in all circumstances is valid is that the answer must depend on a consideration of the whole Act and the circumstances, including the pre-existing law, in which it was enacted. But that there are indications which point with more or less force to the one answer or the other is clear from authorities which, even where they do not bind, will have great weight with the House. For instance, if a statutory duty is prescribed, but no remedy by way of penalty or otherwise for its breach is imposed, it can be assumed that a right of civil action accrues to the person who is damaged by the breach. For, if it were not so, the statute would be but a pious aspiration. But, as LORD TENTERDEN, C.J., said in *Doe d. Rochester (Bp.) v. Bridges* (35), ‘. . . where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner.’ This passage was cited with approval by the EARL OF HALSBURY, L.C., in *Pasmore v. Oswaldtwistle Urban District Council* (36). But this general rule is subject to exceptions. It may be that, though a specific remedy is provided by the Act, yet the person injured has a personal right of action in addition. I cannot state that proposition more happily, or, indeed, more favourably to the appellant, than in the words of LORD KINNEAR in *Butler (or Black) v. Fife Coal Co., Ltd.* (37). ‘If the duty be established, I do not think there is any serious question as to the civil liability. There is no reasonable ground for maintaining that a proceeding by way of penalty is the only remedy allowed by the statute. The principle explained by LORD CAIRNS in *Atkinson v. Newcastle Waterworks Co.* (38) and by LORD HERSCHELL in *Cowley v. Newmarket Local Board* (39) solves the question. We are to consider the scope and purpose of the statute and in particular for whose benefit it is intended. Now the object of the present statute is plain. It was intended to compel mine owners to make due provision for the safety of the men working in their mines, and the persons for whose benefit all these rules are to be enforced are the persons exposed to danger. But when a duty of this kind is imposed for the benefit of particular persons, there arises at common law a correlative right in those persons who may be injured by its contravention.’ An earlier and a later example of the application of this principle will be found in *Groves v. Lord Wimborne* (40) and *Monk v. Warbey* (41), in the former of which cases

(33) [1949] 1 All E.R. 544; [1949] A.C. 398.

(34) [1949] 1 All E.R. at p. 548; [1949] A.C. at p. 407.

(35) (1831), 1 B. & Ad. 847. (36) [1898] A.C. 387. (37) [1912] A.C. at p. 165.

(38) (1877), 2 Ex.D. 441. (39) [1892] A.C. 345. (40) [1898] 2 Q.B. 402.

(41) [1934] All E.R. Rep. 373; [1935] 1 K.B. 75.

A the Act in question was described by A. L. SMITH, L.J., as '... a public Act passed in favour of the workers in factories and workshops to compel their employers to do certain things for their protection and benefit.' "

B In the case before the House of Lords, however, the statute, which required the provision of space for bookmakers at dog racing tracks, was held not to give a cause of action to an individual bookmaker against the occupier of a licensed dog racing track.

C The principles discussed have often been applied, and I do not think that there is any advantage in going through the circumstances of the cases in which the result has either been the one way or the other. Looking at the Merchandise Marks Acts as a whole and considering the other provisions of the Acts, as well as the provisions to which I have referred specifically, I do not find it possible to reach the conclusion that the statutes give a rival trader a civil right of action. If the Act had the protection of any class of persons in mind I think it was the purchasers of goods which might be misleadingly described. But I do not think that the Acts give a civil cause of action to anyone, except where expressly provided. The severe penalties contained in the Acts are, in my view, the remedies provided by the Acts, apart from specific provisions in particular cases. For instance, s. 17 of the Act of 1887 gives to a purchaser a right of action for breach of warranty, which would appear to be unnecessary if the other provisions of the Act already gave a cause of action. Moreover, both rival traders in a passing-off action and purchasers of goods in an action based on deceit have rights of action apart from these statutes and those rights are carefully preserved by s. 19 of the Act of 1887.

D I was referred by counsel for the plaintiffs to two Irish cases in which relief was obtained by rival traders in a civil action based on the provisions of the Merchandise Marks Act, 1887. These are *Thwaites & Co. v. M'Evilly* (42), and also *Donohoe, Ltd. v. Cherry Brothers, Ltd.* (43). But in these cases it seems to have been assumed that the statute created a civil right of action, and I do not think that I can treat them as deciding the point which I have to decide.

E In my view, therefore, the answer on point (b) must be (44) that the Acts do not impose any statutory duty on the defendants which enables the plaintiffs to bring an action against them.

Points (a) and (c) stated at p. 802, letters H and I, ante, decided in plaintiffs' favour; point (b) there stated decided in defendants' favour.

Solicitors: *Monier-Williams & Keeling* (for the plaintiffs); *Summer & Co.* (for the defendants).

[Reported by E. COCKBURN MILLAR, Barrister-at-Law.]

(42) [1904] 1 I.R. 310; 21 R.P.C. 397.

(43) (1908), 26 R.P.C. 545.

(44) The point of law which is (b) is stated at p. 802, letter I, ante.

R. v. STALLY.

[COURT OF CRIMINAL APPEAL (Barry, Diplock and Salmon, JJ.), October 2, 1959.]

Road Traffic—Motor vehicle—Taking and driving away without owner's consent—Accused not present when vehicle wrongfully taken by another person—Whether travelling in the vehicle subsequently, knowing it to have been taken without lawful authority, sufficient to constitute offence—Road Traffic Act, 1930 (20 & 21 Geo. 5 c. 43), s. 28 (1).

On the night of Feb. 14/15, 1959, W. drove a motor van away from where it had been parked by its owner, and later in the night W. and the appellant used the van to make a number of journeys. The appellant and W. were each charged, on indictment, with taking and driving away a motor vehicle without lawful authority, contrary to s. 28 (1) of the Road Traffic Act, 1930. W. pleaded guilty. The appellant pleaded not guilty, his defence being that, although he had entered the van shortly after it had been taken and driven away by W., he had not been present when W. took the van. In the summing-up the directions to the jury included a direction that if the appellant had entered the van, subsequently to the taking of it by W., knowing that W. had no permission to be driving it, the appellant would be guilty. The jury were not directed that if they were to convict they must be satisfied that the initial taking by W. was part of a joint enterprise with the appellant.

Held: if the appellant had had no part in the taking of the van by W. but had got into it subsequently knowing that W. had no permission to drive it, the appellant would not have been guilty of an offence against s. 28 (1) of the Road Traffic Act, 1930; the summing-up amounted to a misdirection in law, and therefore the conviction must be quashed.

Appeal allowed.

[**Editorial Note.** The decision in this case may be considered with that of a Divisional Court of the Queen's Bench Division in *Ross v. Rivenall* ([1959] 2 All E.R. 376), where the appellant had claimed to be an innocent passenger in a car, which had been taken and driven away without lawful authority contrary to s. 28 (1) of the Road Traffic Act, 1930, but the Divisional Court was satisfied, on the evidence, that a prima facie case of association between the appellant and the driver of the car had been made out.

As to the offence of taking and driving away a motor vehicle without authority, see 31 HALSBURY'S LAWS (2nd Edn.) 676, para. 1002.

For the Road Traffic Act, 1930, s. 28 (1), see 24 HALSBURY'S STATUTES (2nd Edn.) 598.]

Appeal.

The appellant, Ronald James Stally, was convicted at the County of London Sessions on Mar. 11, 1959, of taking and driving away a motor vehicle without the consent of the owner or other lawful authority, contrary to s. 28 of the Road Traffic Act, 1930, and was sentenced to nine months' imprisonment. He appealed against conviction. The facts appear in the judgment.

Kevin Winstain for the appellant.

R. D. Harman for the Crown.

BARRY, J., delivered the following judgment of the court: The appellant was convicted at the County of London Sessions of taking and driving away a motor vehicle without lawful authority, contrary to s. 28 of the Road Traffic Act, 1930. He was thereafter sentenced by the deputy chairman to a term of nine

A months' imprisonment. He now appeals to this court on the ground that the jury were misdirected by the learned deputy chairman as to certain legal aspects of the case.

B The facts are extremely simple and need only be set out in the very broadest outline. During the night of Feb. 14, 1959, a Bedford motor van was taken from outside a house in Neville Road. That van belonged to Mr. Day and he had given permission neither to the appellant nor to another man by the name of Wise to take or drive away that vehicle. In the early hours of the following morning the van was found in a street in the East End of London and the appellant and Wise were either in it at the time when the police officers discovered the van or had, on their own showing, been in it for some time. Indeed, the van had been used by the appellant and Wise to make several journeys within the London district that night.

D The appellant's case was that on the evening of Feb. 14 he met Wise at a dance hall. They left there together and met two girls who invited them to a party. They went to the party and thereafter, at about 1.30 a.m., they attempted to obtain a taxi to drive the girls and themselves home. Unfortunately, one at least of the girls had drunk too much at the party and was ill, and the taxi driver refused to take them as fares. The appellant says that he then went off to try to find another taxi but he was unsuccessful and ultimately returned. On his return he found Wise and the two girls in a van, not in Neville Road, but in another street very close to it. According to the evidence, the engine of the van at that time had been running and it seems clear that Wise, who pleaded guilty, had driven the van from Neville Road to the place where the appellant entered the van, the appellant not being present at that period. Indeed, Wise, who gave evidence at the trial, stated specifically that the appellant was not present when he, Wise, took the van from Neville Road. Whether or not that was proved, there was no evidence adduced by the prosecution to indicate that the appellant had, in fact, been present when the van was first removed.

G In directing the jury, the learned deputy chairman indicated to them clearly and with complete accuracy that, in order to find the appellant guilty of taking and driving away the motor van without the consent of the owner, it was quite unnecessary for the appellant to have been actually in the driving seat at any time and in control of the motor van. It would be quite sufficient, as the deputy chairman very clearly pointed out, if the two men, the appellant and Wise, had been acting in concert in relation to the taking of the motor van without the owner's consent (1). Unfortunately, as it appears to us, after giving this extremely clear direction, the learned deputy chairman proceeded to say:

H "There is another way in which [the appellant] can be guilty of taking and driving away this motor vehicle. The law puts it in this way. If one person originally removes a motor vehicle without the consent of the owner and drives it away, anybody else subsequently getting into that motor vehicle, if they know perfectly well that the driver has taken it without the consent of the owner, is guilty of the offence. So if you came to the conclusion that Wise originally removed the van from Neville Road, and subsequently picked up [the appellant], and [the appellant] knew perfectly well that Wise had taken the vehicle without the permission of the owner, [the appellant] would still be guilty of the offence. Taking and driving away is a continuing offence. It goes on all the time the vehicle is being driven, so [the appellant] could be guilty in those circumstances."

(1) See per LORD PARKER, C.J., in *Ross v. Rivenall* ([1959] 2 All E.R. at p. 377).

Again, at a later stage in the summing-up, the learned deputy chairman posed this question to the jury: A

“ Was [the appellant] a party to that [i.e., the taking of the motor van by Wise and the driving of it away] either present and taking part in the commission of the offence at the time when the van was removed, or subsequently joining that van, knowing perfectly well that Wise had no permission to be driving it? If you are satisfied that either of these positions is the correct one, you should convict [the appellant].” B

In the opinion of this court, the two passages to which I have referred state the law in very much too broad a way and, in fact, amount to a misdirection. If the learned deputy chairman had made it clear that, once the jury were satisfied that the appellant was a party to the taking in the sense that the taking had been a joint enterprise even though he himself was not present when the vehicle was actually removed, no complaint could possibly have been made. The difficulty, as we see it, is that the learned deputy chairman indicated to the jury that they would be entitled to find the appellant guilty of this offence on the mere ground, and the sole ground, that he entered the vehicle some time after it had been taken knowing that the driver of the vehicle had, in fact, taken it and driven it away without the consent of the owner. In very many cases the fact that a man entered a car which he knew had been stolen and then drove in it might well lead the jury to the conclusion that that man had been a party to the original taking in the sense that the taking had been a joint enterprise between him and the driver of the car. In the passages in the summing-up to which I have referred, the learned deputy chairman did not direct the jury that on the evidence they must be satisfied that the appellant was in fact a party to the taking. It might well have been on this evidence that the jury would have so found, if so directed. It is, however, also possible that the jury took the view in this case that the appellant played no part at all in the taking of the van, and that, although when he came up to the van, which had already been taken by Wise, he was aware that Wise had taken it without the owner's consent, he had, none the less, been quite unaware that Wise was going to take it: in those circumstances, to say that the mere fact of entering the van and being driven in it would constitute a taking and driving away seems to this court to be an inaccurate statement of the law. In our view, the only possible course is to quash this conviction. C
D
E
F

Appeal allowed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Solicitor, Metropolitan Police.*

[Reported by N. P. METCALFE, Esq., *Barrister-at-Law.*]

A

HOCHSTRASSER (INSPECTOR OF TAXES) v. MAYES.

[HOUSE OF LORDS (Viscount Simonds, Lord Radcliffe, Lord Cohen, Lord Keith of Avonholm and Lord Denning), October 13, 14, 15, November 30, 1959.]

Income Tax—Income—Indemnity to employee against loss on house purchase—

B

Employers' housing assistance scheme—Reimbursement of loss on transfer to new place of employment—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), Sch. 9, Rules applicable to Sch. E, r. 1.

In order to assist married male members of its staff to buy suitably located houses for occupation by themselves and their families in the event of their being transferred from one part of the country to another as a result of their employment, Imperial Chemical Industries, Ltd. operated a housing scheme under which it provided interest-free loans for the purchase of houses and guaranteed the employee against a loss through depreciation in the value of the house. Under the terms of the agreement signed by each employee taking advantage of the scheme, he was required, if he wished to sell or let the house on being transferred to a new place of employment in the company's service, to offer to sell the house first to the company. If the company accepted it, the employee received the current market value ascertained by valuation and if the company declined he was free to sell the house; and in either case he received from the company the amount by which the price fell short of his expenditure on the house. Further, if the employee (or his personal representatives) sold the house within twelve months after the company's refusal of an offer made on transfer, or after his retirement or death, he or his personal representatives became entitled to the amount by which the price fell short of his expenditure on the house, and, if in such case the house was not sold within the twelve months, to the amount by which a valuation fell short of such expenditure. If the employee wished to sell the house before any of these events occurred, he became entitled to the benefit of the guarantee, provided that he obtained the company's consent and offered the house to the company. The employee was bound to keep the house in good tenable repair. The agreement was to continue in force until twelve months after the employee's death, but ceased automatically on certain other eventualities (including retirement, cesser of employment, selling or letting or ceasing to use the house as a permanent residence).

D

E

F

G

H

An employee, a married man, was transferred by the company to a new district, and he thereupon offered his house for sale to the company under the agreement. The company declined the offer, and the employee sold the house with the consent of the company. The employee suffered a loss on the sale and the company paid him £350, being the amount for which the company admitted liability. The Crown claimed income tax under Sch. E in respect of that sum of £350. There was evidence that the salaries paid by the company compared favourably with salaries paid by other employers not operating a housing scheme.

I

Held: the £350 was not liable to tax under Sch. E because the Crown failed to show that it was a payment for services (and consequently, that it was a profit from the employee's office or employment), there being nothing in the housing agreement to suggest that such was the nature of the payment except the relationship of the parties, which was not sufficient to justify such a conclusion.

Inland Revenue Comrs. v. Duke of Westminster ([1935] All E.R. Rep. 259) applied.

Decision of the COURT OF APPEAL ([1958] 3 All E.R. 285) affirmed.

[As from the year of assessment 1956-57, the relevant terms of para. 1 of Sch. E to the Income Tax Act, 1952, were superseded by those enacted in s. 10 (1) of the Finance Act, 1956. Under these, tax is still chargeable in respect

of emoluments from "any office or employment" within the particular descriptions in s. 10 (1). Paragraph 1 of Sch. 9 to the Act of 1952 is amended by the Finance Act, 1956, s. 44 and Sch. 5. A

As to taxation of collateral payments to the holder of an office or employment, see 20 HALSBURY'S LAWS (3rd Edn.) 322-324, para. 592; and for cases on the subject, see 28 DIGEST (Repl.) 225-237, 971-1040.

For r. 1 of the Rules applicable to Sch. E in Sch. 9 to the Income Tax Act, 1952, see 31 HALSBURY'S STATUTES (2nd Edn.) 522.] B

Cases referred to:

Beak v. Robson, [1943] 1 All E.R. 46; [1943] A.C. 352; 112 L.J.K.B. 141; 169 L.T. 65; 25 Tax Cas. 33; 28 Digest (Repl.) 232, 1008.

Bridges v. Hewitt, *Bridges v. Bearsley*, [1957] 2 All E.R. 281; 37 Tax Cas. 289, 306; [1957] 1 W.L.R. 674; 28 Digest (Repl.) 227, 985. C

Cowan v. Seymour, [1920] 1 K.B. 500; 89 L.J.K.B. 459; 122 L.T. 465; 7 Tax Cas. 372; 28 Digest (Repl.) 225, 971.

Hartland v. Diggines, [1926] All E.R. Rep. 573; [1926] A.C. 289; 95 L.J.K.B. 392; 134 L.T. 492; 10 Tax Cas. 247; 28 Digest (Repl.) 234, 1023.

Herbert v. McQuade, [1902] 2 K.B. 631; 71 L.J.K.B. 884; 87 L.T. 349; 66 J.P. 692; 4 Tax Cas. 489; 28 Digest (Repl.) 225, 973. D

Inland Revenue Comrs. v. Westminster (Duke), [1935] All E.R. Rep. 259; [1936] A.C. 1; 104 L.J.K.B. 383; 153 L.T. 223; sub nom. *Westminster (Duke) v. Inland Revenue Comrs.*, 19 Tax Cas. 490; 28 Digest (Repl.) 339, 1505.

Nicoll v. Austin, (1935), 19 Tax Cas. 531; 28 Digest (Repl.) 230, 1003.

Seymour v. Reed, [1927] All E.R. Rep. 294; [1927] A.C. 554; 96 L.J.K.B. 839; 137 L.T. 312; 11 Tax Cas. 625; 28 Digest (Repl.) 232, 1009. E

Appeal.

Appeal by the Crown from an order of the Court of Appeal (JENKINS, PARKER and PEARCE, L.JJ.), dated July 7, 1958, and reported [1958] 3 All E.R. 285, affirming an order of UPJOHN, J., dated Dec. 20, 1957, and reported [1958] 1 All E.R. 369, on a Case Stated under the Income Tax Act, 1952, s. 64. The facts are set out in the opinion of VISCOUNT SIMONDS, at p. 819, letter B, post. F

John Pennyquick, Q.C., and *A. S. Orr* for the Crown.

F. N. Bucher, Q.C., and *Hubert H. Monroe* for the respondent.

The House took time for consideration.

Nov. 30. The following opinions were read. G

VISCOUNT SIMONDS: My Lords, the question at issue in this appeal is whether the respondent, who was at all material times an employee of Imperial Chemical Industries, Ltd. (I.C.I.), was rightly assessed under Sch. E to the Income Tax Act, 1952, in the sum of £1,170, which included a sum of £350 paid to him in circumstances to be now stated.

I will first remind your Lordships of the relevant statutory provisions. It is, by s. 156 of the Income Tax Act, 1952, provided as follows:— H

"The Schedule referred to in this Act as Sch. E is as follows—

"Schedule E

"1. Tax under this Schedule shall be charged in respect of every public office or employment of profit . . . I

"2. Tax under this Schedule shall also be charged in respect of any office, employment or pension the profits or gains arising or accruing from which would be chargeable to tax under Sch. D but for the proviso to para. 1 of that Schedule . . .

"5. The provisions set out in Sch. 9 to this Act shall apply in relation to the tax to be charged under this Schedule."

Schedule 9, so far as relevant, was as follows:

A "Rules Applicable to Sch. E

"1. Tax under Sch. E shall be annually charged on every person having or exercising an office or employment of profit mentioned in Sch. E, or to whom any annuity, pension or stipend chargeable under that Schedule is payable, in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom for the year of assessment, after deducting the amount of duties or other sums payable or chargeable on the same by virtue of any Act of Parliament, where the same have been really and bona fide paid and borne by the party to be charged."

B I will now refer to the facts of the case, which I must do by reference to the Case Stated by the Commissioners for the General Purposes of the Income Tax, using so far as possible their own language. The respondent is a married man with
C two children who were born in 1949 and 1953. He has been employed by I.C.I. since 1941, at which time he lived with his parents at Welwyn. His first employment was as a laboratory assistant. In September, 1950, he was transferred to the I.C.I. works at Hillhouse in Lancashire on appointment as an assistant technical officer (chemist). During the first few months, which were a probationary period, he lived in rooms. On Apr. 27, 1951, he entered into a service agree-
D ment with I.C.I., of which for the purpose of this case the salient feature was that he agreed to serve anywhere in the United Kingdom of Great Britain and Northern Ireland and that I.C.I. should be at liberty to change the locality of his employment within those limits. There was also a provision that, should I.C.I. require him to change his residence, they would pay him such removal and other
E expenses incidental thereto as they should consider fair and reasonable in the circumstances, and a further provision that the agreement, if not otherwise previously determined, might be terminated by either party by three months' notice in writing. It was at the time of his transfer to Hillhouse that the respondent first learned of a scheme established by I.C.I. to assist their married employees to purchase houses for their own occupation, a summary of which was given
F to him. At first he found trouble in purchasing a house owing to the limitations on price with which he had to comply in order to be eligible for assistance under the scheme, but in June, 1951, he purchased No. 16, Ribble Road, Fleetwood, for the sum of £1,850, of which £90 was provided by himself, £1,460 was borrowed on first mortgage from a building society and £300 was borrowed on second mortgage from I.C.I. This purchase was made pursuant to a so-called housing
G agreement, the terms of which have been considered to be of vital importance to this case. It was dated June 1, 1951, and was in the standard form for which the scheme provided. The agreement is very elaborate in character, defining with great nicety the conditions on and the limits within which I.C.I. will implement the guarantee against loss on resale which is its main purpose. Its provisions have been summarised by JENKINS, L.J. (1), and I am glad to adopt his summary, which is as follows:

H "(i) In the event of the employee being transferred to a new place of employment in the service of [I.C.I.] and consequently desiring to sell or let the house, the employee must offer to sell the house to [I.C.I.]. If [I.C.I.] accepts, then the house is to be bought by [I.C.I.] at the current market value ascertained by valuation; and if such value is less than the employee's
I expenditure on the house [I.C.I.] becomes liable to pay the difference to the employee. If [I.C.I.] declines, then the employee is at liberty to sell to a third party and [I.C.I.] becomes liable to pay the employee the amount, if any, whereby the price realised falls short of his expenditure on the house (see cl. 2 of the agreements).

"(ii) In the event of the sale of the house by the employee or his personal representatives within twelve months after (a) the refusal by [I.C.I.] of an offer made on transfer under (i) above or (b) the retirement of the employee

or (c) the death of the employee (whichever first happens) [I.C.I.] becomes liable to pay to the employee or his personal representatives the amount if any whereby the price realised on such sale falls short of the employee's expenditure on the house (see cl. 3 (1)).

"(iii) If the house is not sold before the expiration of the period of twelve months mentioned in (ii) above, then there is to be a valuation of the house and [I.C.I.] becomes liable to pay to the employee or his personal representatives the amount (if any) whereby the employee's expenditure on the house exceeds the amount of the valuation (see cl. 3 (2)).

"(iv) If at any time before such one of the three events mentioned in (ii) above as shall first happen the employee while still in the service of [I.C.I.] desires to sell the house, he may do so, but in that case he is only to be entitled to the benefit of [I.C.I.'s] guarantee against capital loss if he obtains [I.C.I.'s] consent to the sale and offers to sell the house to [I.C.I.]. If [I.C.I.] accepts the offer then the house is to be bought by [I.C.I.] on similar terms to those stated in (i) above (i.e., with the benefit of the guarantee). If [I.C.I.] declines the offer, then the employee may sell to whom he pleases and [I.C.I.'s] guarantee is to apply to any resulting capital loss (see cl. 4).

"The agreement is to continue in force for a period expiring twelve calendar months after the death of the employee, but subject to fulfilment of accrued rights it ceases automatically on such one of the following events as shall first happen, that is to say if the employee shall:—(a) Be transferred for service with [I.C.I.] elsewhere and offers to sell the house to [I.C.I.]. (b) Retire from the service of [I.C.I.] on pension. (c) Cease to be employed by [I.C.I.] for any other reason. (d) Sell or let the property or any part thereof. (e) Cease to use the house as a permanent residence (see cl. 11). It is a condition precedent to [I.C.I.] affording to the employee a guarantee against any capital loss he may suffer that the employee shall at all times keep the house in good tenantable repair (see cl. 6)."

In October, 1954, the respondent was transferred to Wilton Works in the county of York and thereupon offered his house for sale to I.C.I. under the housing agreement. I.C.I. declined the offer and the respondent sold it, with their consent, for £1,500. The sum of £350 (being the loss for which I.C.I. admitted liability on resale) was duly paid or credited to the respondent by I.C.I. This is the sum in respect of which tax under Sch. E is claimed to be exigible from the respondent. It is right that I should add one further paragraph from the Case Stated on which reliance was placed by the Crown or the respondent. It was as follows:

"(G) I.C.I. have to move a great number of their staff from one part of the country to another. The company recognises that the transfer of a married man involves him in domestic upheaval. Although a man might be willing to buy a house in the new location, his chief worry was the loss he might make if he had to sell the house. I.C.I. try to operate a staff policy which results in a contented staff. Unless the staff are contented they do not do their best work. I.C.I. therefore introduced the housing scheme so that they should have employees whose minds were eased to some extent of the worry of possible financial embarrassment in the future arising out of the removal occasioned by the company's action. The agreement cannot operate unless and until the house is sold for less money than it costs to buy. Under the housing agreement the employees cannot make a profit as a result of the housing agreement. An employee's salary is calculated quite independently of anything he might receive under the housing agreement. I.C.I. salaries compare favourably with salaries paid by other employers not operating a housing scheme."

On these facts, the commissioners held that the sum in question was not

A assessable to tax. Their reason was that the payment was to meet a capital loss incurred by the respondent in fulfilling the obligations of his employment. This is not precisely the way in which the case has been subsequently presented and I need say no more about it. UPJOHN, J., before whom the matter first came, after a review of the relevant case law, expressed himself thus in a passage which appears to me to sum up the law in a manner which cannot be improved

B on. He said (2):

“In my judgment, the authorities show this, that it is a question to be answered in the light of the particular facts of every case whether or not a particular payment is or is not a profit arising from the employment. Disregarding entirely contracts for full consideration in money or money’s worth and personal presents, in my judgment not every payment made to an

C employee is necessarily made to him as a profit arising from his employment. Indeed, in my judgment, the authorities show that, to be a profit arising from the employment, the payment must be made in reference to the service the employee renders by virtue of his office, and it must be something in the nature of a reward for services past, present or future.”

D In this passage, the single word “past” may be open to question, but apart from that it appears to me to be entirely accurate. Applying the law thus stated to the facts of the present case, the learned judge held that the sum of £350 was not a profit “therefrom”, that is arising from the office or employment. In the Court of Appeal the same view was taken by JENKINS, L.J., and PEARCE, L.J. PARKER, L.J., came to a different conclusion and for that

E reason (and in deference to the argument of learned counsel) I must deal somewhat more fully with the case than I should otherwise have thought necessary. At the outset, the learned lord justice stated the relevant principle of law thus (3):

“Where you find that an employee has during the course of his employment received from his employer a benefit in money or money’s worth, that receipt is a profit of his employment and taxable as such unless (i) it amounts to a gift to him in his personal capacity, e.g., a benefit conferred out of affection or pity; or (ii) it has been received for a consideration other than the giving of services.”

F

And he goes on to point out that, in these two exceptions, though the benefits are received by him while he is an employee and might not have been received but for his being an employee, yet in his hands the benefit is not a reward for

G services—a distinction which, abandoning the vernacular, as YOUNGER, L.J., had in an earlier case (4), PEARCE, L.J., describes (5) by saying that the employment in such a case is a *causa sine qua non* of the benefit but not the *causa causans*. PARKER, L.J., then examines the facts of the case and comes to a conclusion which he expresses in these words (6):

H “Bearing these considerations in mind, I find it quite impossible to arrive at any conclusion other than that there is no substantial consideration apart from services.”

This, put in other words, is a finding that the substantial consideration for the payment by I.C.I. of £350 to the respondent was the rendering of service by him.

I My Lords, if in such cases as these the issue turns, as I think it does, on whether the fact of employment is the *causa causans*, or only the *sine qua non*, of benefit, which, perhaps, is only to give the natural meaning to the word “therefrom” in the statute, it must often be difficult to draw the line and say on which side of it a particular case falls. But I think that the approach should not be exactly that of PARKER, L.J. It is for the Crown, seeking to tax the subject, to prove that the tax is exigible, not for the subject to prove that his

(2) [1958] 1 All E.R. at p. 374.

(3) [1958] 3 All E.R. at p. 295.

(4) In *Cowan v. Seymour*, 7 Tax Cas. at p. 384.

(5) [1958] 3 All E.R. at p. 299.

(6) [1958] 3 All E.R. at p. 296.

case falls within exceptions which are not expressed in the statute but arbitrarily inferred from it. Thus, in the present case, it is for the Crown to establish that a payment made under the housing agreement is a reward for the employee's services. Let me interpolate that the addition of the words "as such" adds nothing to the proposition. How, then, does the Crown seek to prove its case? It does not, and could not, suggest that the agreement is in any way colourable. Nevertheless it is driven to the argument that a payment made under it is a reward for services and nothing else. This argument it fortifies by a close analysis of the benefit or detriment accruing to or suffered by the employee, and concludes that no substantial consideration for the payment moves from the employee. My Lords, I altogether dissent from this argument and conclusion. There is nothing express or implicit in the agreement which suggests that the payment is a reward for services except the single fact of the relationship of the parties and it is clear enough from *Inland Revenue Comrs. v. Duke of Westminster* (7) that that fact alone will not justify such a conclusion. On the other hand, there is the significant fact that the salary earned by the employee compares favourably with salaries paid by other employers not operating a housing scheme, and is the same whether or not he takes advantage of the housing scheme. This at once suggests that there is some other reason for the payment than services rendered or to be rendered. Nor, though it was little stressed by the respondent, can I ignore his particular status as a married man peculiarly in need of housing accommodation, which made him, with other married employees, an object of particular concern to his employers. In these circumstances, I should be disposed to say that the Crown has failed to make a case and leave the matter there. For, assuming, as I must assume, that the agreement is not colourable, I doubt whether it is relevant to ask what, if any, consideration moved from the employee and whether it was substantial or sufficient or what you will. Nor, if it became relevant, should I, in the present case, feel equal to the task of weighing the benefit or detriment enjoyed by the one side or the other. It was a bargain and, as good bargains should be, thought by each side to be worth while. I have the highest authority for my course if I leave it there and "reject the lore of nicely calculated less or more".

My Lords, in the course of the argument a considerable number of authorities were cited, some of them decisions of this House. In nothing that I have said have I intended to cast any doubt on them. I should not be justified in doing so. But I do not apologise for going back to the very words of the statute and ignoring explanatory words like "as such", nor do I think it useful to examine whether an agreement under which payment is made is "collateral". The question is one of substance not form. I accept, as I am bound to do, that the test of taxability is whether from the standpoint of the person who receives it the profit accrues to him by virtue of his office: see *Seymour v. Reed* (8) and *Herbert v. McQuade* (9). I do not doubt that a taxable profit may take the form of the discharge of an employee's obligation as well as of a direct payment: cf. *Hartland v. Diggins* (10), nor that a lump sum payment to directors may in some circumstances, just as in other circumstances it may not, be subject to tax. Here fine distinctions have been made which are not directly relevant to the present case. Again there may well be cases, of which *Nicoll v. Austin* (11) is an example, where a managing director or other officer of a company is taxable in respect of the outgoings of a house occupied by him which are discharged by the company. Such cases may be near the line, as may cases in which the question is whether a payment is made to an employee as a reward for his services or (to use the words of PARKER, L.J.'s exception) is made out of affection or pity.

(7) [1935] All E.R. Rep. 259; 19 Tax Cas. 490.

(8) [1927] All E.R. Rep. 294; 11 Tax Cas. 625.

(10) [1926] All E.R. Rep. 573; 10 Tax Cas. 247.

(9) 4 Tax Cas. 489.

(11) 19 Tax Cas. 531.

A But having said that, my Lords, I must add that, in my opinion, there is little doubt on which side of the line the present case falls. It was not established by the facts found by the commissioners nor was it a legitimate inference from those facts that the sum of £350 paid to the respondent was a reward for his services. The appeal should, in my opinion, be dismissed with costs.

B **LORD RADCLIFFE:** My Lords, I have had the opportunity of reading in advance the speech which has just been delivered by my noble and learned friend. I agree with his conclusion that this appeal ought to be dismissed, and I agree with the reasons which he advances for his opinion. It is not necessary, therefore, that I should say more than a few words as to what I regard as the determining consideration in this case. It is, as he says, near the line. I do not imply by that that I find any particular difficulty in deciding on which side of the line it lies; but it is not easy in any of these cases in which the holder of an office or employment receives a benefit which he would not have received but for his holding of that office or employment to say precisely why one considers that the money paid in one instance is, in another instance is not, a "perquisite or profit . . . therefrom".

D The test to be applied is the same for all. It is contained in the statutory requirement that the payment, if it is to be the subject of assessment, must arise "from" the office or employment. In the past several explanations have been offered by judges of eminence as to the significance of the word "from" in this context. It has been said that the payment must have been made to the employee "as such". It has been said that it must have been made to him "in his capacity of employee". It has been said that it is assessable if paid "by way of remuneration for his services" and said further that this is what is meant by payment to him "as such". These are all glosses and they are all of value as illustrating the idea which is expressed by the words of the statute. But it is, perhaps, worth observing that they do not displace those words. For my part, I think that their meaning is adequately conveyed by saying that, while it is not sufficient to render a payment assessable that an employee would not have received it unless he had been an employee, it is assessable if it has been paid to him in return for acting as or being an employee. It is just because I do not think that the £350 which are in question here were paid to the respondent for acting as or being an employee that I regard them as not being profits from his employment. The money was not paid to him as wages. The wages of employees are calculated independently of anything which they get under the housing scheme and the I.C.I. salaries compare favourably with salaries paid by other employers in the chemical industry who do not operate a housing scheme. We are bound to say on the facts found for us that the source of the £350 was the housing agreement into which the respondent had entered on June 1, 1951, and that the circumstance that brought about his entitlement to the money was not any services given by him but his personal embarrassment in having sold his house for a smaller sum than he had given for it.

I I regard the employer's payment as being in substance a free benefit conceded to his employee. It is true enough that the guarantee or indemnity offered was not unqualified, that an employee adopting the housing scheme undertook certain obligations, and that some of these were capable of enuring in certain events to the advantage of the employer. But there is no reason to suppose that the employer's purpose in proposing the scheme was to obtain these advantages. What it wanted was to ease the mind and mitigate the possible distress of an employee who, having sunk money in buying a house, might find himself called on at short notice to put it on the market without any assurance of getting the whole of his money back. To me, therefore, it seems beside the point to scrutinise the housing agreement with the aim of measuring precisely how much in the way of valuable consideration was afforded by the employee

under the agreement. I should have taken the same view of the result if he had afforded none. The essential point is that what was paid to him was paid to him in respect of his personal situation as a house-owner who had taken advantage of the housing scheme and had obtained a claim to indemnity accordingly. In my opinion, such a payment is no more taxable as a profit from his employment than would be a payment out of a provident or distress fund set up by an employer for the benefit of employees whose personal circumstances might justify assistance.

My Lords, I said at the beginning that I thought this case was near the border line. I have tried to indicate clearly why I do not regard the payment as falling on the side of taxability. On the other hand, I do not find in this decision any qualification of the principle that an employer who pays an employee's personal bills as part of his reward for services rendered is paying a taxable wage or profit under Sch. E. That is a different case.

LORD COHEN: My Lords, the facts have been sufficiently stated by the noble and learned Lord on the Woolsack and I need not repeat them. The question for your Lordships' decision is whether the respondent is liable to income tax under Sch. E on the sum of £350 which he received, not under his service agreement with Imperial Chemical Industries, Ltd., but under an indemnity contained in the housing agreement entered into between him and the company when, on his transfer to Hillhouse, he bought a house to accommodate himself and his family and received assistance from I.C.I. in the purchase thereof and an indemnity in certain events against loss on the resale of it for less than the purchase price.

The Crown claimed tax on this sum of £350 as being due under Sch. E in respect of his office or employment with I.C.I. The relevant provision of the Rules applicable to Sch. E is contained in para. 1 of Sch. 9, which provides that

"Tax under Sch. E shall be annually charged on every person having or exercising an office or employment of profit mentioned in Sch. E . . . in respect of all salaries, fees, wages, perquisites or profits whatsoever *therefrom*" (the italics are mine).

This claim has been rejected by the General Commissioners, by UPJOHN, J., and by a majority of the Court of Appeal but on somewhat different grounds. The commissioners rejected it on the ground that the payment was to meet a capital loss and was, therefore, not assessable to income tax. UPJOHN, J., adopted the statement of the law by MORRIS, L.J., in *Bridges v. Hewitt, Bridges v. Bearsley* (12), where the learned lord justice said:

" . . . the fact that someone who receives a benefit is the holder of an office does not by itself prove that what he received was a profit from the office. That has to be decided by considering on the evidence whether what was received was received as remuneration for the services rendered in the office."

Accepting this as the true test, UPJOHN, J., came to the conclusion that the sum of £350 now in question was not a profit. It was, he said (13), something which was wholly collateral and really had nothing to do with the office or the services which the respondent was bound to render to his employers. JENKINS, L.J., and PEARCE, L.J., in the Court of Appeal reached the same conclusion, but JENKINS, L.J., examined the proposition that counsel advanced on behalf of the Crown in the Court of Appeal and before us and said (14) that he was prepared to accept that proposition but that, even so, on the facts of the case before him he was satisfied that the Crown's appeal failed. The proposition in its final form before us was that an employee is liable to pay tax under Sch. E on everything received by the employee as such unless it is received for full consideration in money or money's worth other than services as employee.

(12) [1957] 2 All E.R. at p. 301; 37 Tax Cas. at p. 324.

(13) [1958] 1 All E.R. at p. 378.

(14) See [1958] 3 All E.R. at p. 290.

A My Lords, I confess the words "as such" cause me some difficulty. They have been used more than once by learned judges in reported cases; for instance, by MORRIS, L.J., in *Bridges v. Hewitt*, *Bridges v. Bearsley* (15), when after citing from Sch. 9 to the Act the words

"in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom for the year of assessment",

B he said,

"The word 'therefrom' must be construed in its context. A profit accruing by reason of holding an office or employment may be a profit 'therefrom'. This may be so even though some payment which is received is not made by the employer of the recipient and even though the payment is made voluntarily. The profit need not necessarily be made in the form of a cash payment. The conception which is introduced by the word 'therefrom' is that some taxable remuneration may accrue to a person by reason of his having or exercising an office or employment of profit. The reference is to what is received by the holder of an office or employment in that capacity; to the holder of the office or employment as such."

D My Lords, I am prepared to accept that statement of the law but it is, I think, clear from the final conclusion of MORRIS, L.J., in the case last cited and from the decisions cited by JENKINS, L.J., in his judgment in the present case (see, especially, *Beak v. Robson* (16), per VISCOUNT SIMON, L.C., and *Cowan v. Seymour* (17), per YOUNGER, L.J.), that it is not enough for the Crown to establish that the employee would not have received the sum on which tax is claimed had he not been an employee. The court must be satisfied that the service agreement was the causa causans and not merely the causa sine qua non of the receipt of the profit.

E My Lords, on the facts of the present case I am satisfied that JENKINS, L.J., was right, when he said (18):

F "It may well be said here, I think, that, while the taxpayer's employment by [I.C.I.] was a causa sine qua non of his entering into the housing agreement and consequently in the events which happened receiving a payment from [I.C.I.], the causa causans was the distinct contractual relationship subsisting between [I.C.I.] and the taxpayer under the housing agreement, coupled of course with the event of the house declining in value."

G PARKER, L.J., did not, I think, differ from his brethren as to the principles of law applicable to the case; he differed only on the application of those principles to the facts of the case, for he said (19):

"... I find it quite impossible to arrive at any conclusion other than that there is no substantial consideration apart from services."

H My Lords, I differ from this conclusion. It is clear from the finding of the commissioners that the respondent was receiving under his service agreement the full salary appropriate to the appointment he held; the housing scheme pursuant to which the housing agreement was made was introduced by I.C.I. not to provide increased remuneration for employees but as part of a general staff policy to secure a contented staff and to ease the minds of employees compelled to move from one part of the country to another as the result of the company's action. The housing agreement itself gave advantages to the company which may not be easy to quantify but which are not negligible or colourable. For these reasons, as well as for the reasons given by the noble and learned Lord on the Woolsack, I agree with JENKINS, L.J. (18) that the housing agreement constituted a genuine bargain advantageous, no doubt, to

(15) [1957] 2 All E.R. at pp. 295, 296; 37 Tax Cas. at p. 318.

(16) [1943] 1 All E.R. at p. 47; 25 Tax Cas. at p. 41. (17) 7 Tax Cas. at p. 384.

(18) [1958] 3 All E.R. at p. 294.

(19) [1958] 3 All E.R. at p. 296.

the respondent, but also not without its advantages to I.C.I., and I see no reason for disregarding it as the source of the payment sought to be taxed in this appeal. A

I would dismiss this appeal.

LORD KEITH OF AVONHOLM: My Lords, I agree.

LORD DENNING: My Lords, Mr. Mayes, the respondent, is a married man with two children. He has for many years been employed by Imperial Chemical Industries under a service agreement at a salary which at the material time was some £820 a year. It was provided by the agreement that, if his employers wished to transfer him from one part of the country to another, they were at liberty to do so, but in that event they were to pay his removal expenses. He was first employed at Welwyn in Hertfordshire but later he was transferred by the company to Hillhouse in Lancashire. In 1951 he found a house in Lancashire suitable for his needs at a price of £1,850. He had only £90 of his own, so he had to borrow the rest on mortgage. A building society lent him £1,460 at interest and his employers lent him £300 free of interest. Imperial Chemical Industries had a housing scheme to help employees placed as he was; and it was under this scheme that they lent him the £300. His employers also agreed that, if he were to be afterwards transferred to any other part of the country and so had to leave the house, they would guarantee him against any loss or depreciation on it. The detailed terms were set out in a housing agreement. Three years later, Imperial Chemical Industries transferred him to Wilton in Yorkshire and he had to leave the house. He sold it at a loss. He had paid £1,850 for it but he only sold it for £1,500. So he incurred a loss of £350. His employers, Imperial Chemical Industries, were bound under the housing agreement to indemnify him against this loss and they did so. They paid him £350. He used it to pay off the money he had borrowed, so he made nothing out of it at all. The Crown now claim that this £350 is a profit from his employment and taxable under Sch. E. B
C
D
E

My Lords, tried by the touchstone of common sense—which is, perhaps, rather a rash test to take in a revenue matter—I regard this as a plain case. No one coming fresh to it, untrammelled by cases, could regard this £350 as a profit from the employment. The respondent did not make a profit on the resale of the house. He made a loss. And even if he had made a profit, it would not have been taxable. How, then, can his loss be taxable, simply because he has been indemnified against it? I can readily appreciate the case which was put in argument—namely that, if an employer, by way of reward for services, agrees to indemnify his employee against his losses on the stock exchange, the payments which the employee received under the indemnity would be taxable. But that would be because the losses were his own affair and nothing to do with his employment; the payments of indemnity would there be a straight reward for services. This payment of £350 was nothing of that kind. It was a loss which the respondent incurred in consequence of his employment and his employers indemnified him against it. I cannot see that he gets any profit therefrom. If the respondent had been injured at work and received money compensation for his injuries, no one would suggest that it was a profit from his employment. Nor so here where all he receives is compensation for his loss. Why, then, if this case is as plain as I think it is, has it got so far as to reach your Lordships' House? Only, I suggest, because of a broad proposition which the Crown advanced about "profits". This proposition was put forward almost as if it were a definition of what the law regards as the "profits" of an employment. It was supported with quite a show of authority. So much so that the Court of Appeal were induced to accept it as correct—though the majority, to be sure, refused to hold that it applied in this case. I need hardly say that, if there were available to your Lordships a definition of "profits", it would be a pearl of great price. But I am afraid that this pearl turned out to be cultivated and not real. It was culled from the cases F
G
H
I

A and not from the statute. It did not survive the critical examination of your Lordships. When subjected to close scrutiny, it was found to be studded with ambiguities and defaced by exceptions. It would, if accepted, put a greater burden on the taxpayer than ever the statute warrants, and it would introduce more confusion into a subject where enough already exists.

B I would ask your Lordships, therefore, to put on one side the proposition submitted by the Crown and to go back to the words of the statute. I do not find much help in any of the previous decisions; and the speeches in them cannot rule the day. They show the way in which judges look at cases and in that sense are useful and suggestive but, in the last resort, each case must be brought back to the test of the statutory words. So tested the question simply is: Was this £350 received by the respondent a "profit" from his employment?

C I think not, for the simple reason that it was not a remuneration or reward or return for his services in any sense of the word. I would, therefore, dismiss this appeal.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue*; *J. W. Ridsdale*, Solicitor to Imperial Chemical Industries, Ltd. (for the respondent).

D [Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

E

HOBBS v. HOBBS AND COUSENS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Stevenson, J.), October 21, 1959.]

F *Discovery—Production of documents—Privilege—Taxation of costs—Instructions for brief—Whether respondent to party and party taxation (co-respondent in divorce suit) entitled to inspect brief delivered to petitioner's counsel.*

Divorce—Costs—Taxation—Instructions for brief—Respondent (co-respondent in suit) seeking inspection of petitioner's counsel's brief—Privilege.

G A brief delivered to counsel is a privileged document and an opposing party is not entitled to inspect it or its contents for the purpose of contesting the item "Instructions for Brief" on taxation of a bill of costs.

H The husband obtained a decree of divorce on the ground of the wife's adultery with the co-respondent, and the co-respondent was ordered to pay the costs of the suit. The husband lodged his bill of costs which included two items, namely, a sum claimed as expenses by the husband in coming to England to attend the trial and an item "Instructions for Brief", to both of which the co-respondent wished to object. At the hearing before the registrar for the purpose of taxing the bill, and after the decree had been made absolute, the co-respondent applied to inspect the brief and its contents which had been delivered to the husband's counsel. The husband opposed the application on the ground that the brief was privileged.

I **Held:** the co-respondent was not entitled to inspect the brief since that was a privileged document which remained privileged notwithstanding that the litigation had been concluded.

Bullock v. Corry ((1878), 3 Q.B.D. 356) and observations of SIR WILLIAM BRETT, M.R., in *Pearce v. Foster* ((1885), 15 Q.B.D. at p. 119) applied.

[As to the principle that a document once privileged is always privileged, see 12 HALSBURY'S LAWS (3rd Edn.) 49, para. 69, note (1); and for cases on the subject, see 18 DIGEST (Repl.) 92, 93, 756-762.]

As to the co-respondent being ordered to pay costs, see 12 HALSBURY'S LAWS (3rd Edn.) 402, para. 894; and for cases on the subject, see 27 DIGEST (Repl.) 572, 573, 5276-5293. A

As to taxation of costs in divorce suit, see 12 HALSBURY'S LAWS (3rd Edn.) 461, para. 1035; and for cases on the subject, see 27 DIGEST (Repl.) 671, 672, 6376-6386.]

Cases referred to:

Bullock v. Corry, (1878), 3 Q.B.D. 356; 47 L.J.Q.B. 352; 38 L.T. 102; 42 J.P. 232; 18 Digest (Repl.) 92, 759.

Pearce v. Foster, (1885), 15 Q.B.D. 114; 54 L.J.Q.B. 432; 52 L.T. 886; 50 J.P. 4; 18 Digest (Repl.) 93, 760.

See also cases referred to at p. 830, footnote, post.

Summons adjourned into open court. C

In this case the co-respondent, against whom an order for costs had been made, applied on taxation to inspect the brief delivered to the husband's counsel so that he might contest items in the husband's bill of costs.

By a petition dated Nov. 4, 1957, the husband sought a divorce on the ground of the wife's adultery with the co-respondent. The wife and the co-respondent denied the adultery and the wife cross-prayed for divorce on the ground of the husband's cruelty. Both the husband and the wife asked for the discretion of the court. On Feb. 10, 1959, Mr. Commissioner EDGEDALE, Q.C., granted the husband a decree, in the exercise of his discretion, on the ground of the wife's adultery with the co-respondent, and ordered the co-respondent to pay the costs. On May 5, 1959, the petitioner's bill of costs was lodged for taxation. This bill included two substantial items, namely, £228 as the expense of the husband coming to England from Dar-es-Salaam for the trial and two hundred guineas as "Instructions for Brief". D

On May 12, 1959, the decree was made absolute. On May 29, 1959, Mr. Registrar TOWNLEY MILLERS partly taxed the bill but adjourned the question of the husband's expenses in attending the court. The co-respondent then filed notice that he was acting in person, but failed to attend a further appointment before the registrar on June 25, 1959. However, he forwarded to the registrar objections to the taxation. These objections were argued before the registrar on July 29, 1959, when the co-respondent asked permission to inspect for himself the brief delivered to the husband's counsel, together with the accompanying documents. The husband's solicitors resisted this application claiming that the brief was privileged. The registrar referred the question of privilege to the judge. This question came before STEVENSON, J., on July 30, 1959, when His LORDSHIP adjourned the matter into open court for argument by the Queen's Proctor. E

The co-respondent appeared in person.

J. G. Wilmers for the husband. F

J. P. Comyn for the Queen's Proctor. G

STEVENSON, J., stated the facts and continued: The husband's bill was lodged for taxation in the usual way and it included, I am told, although I have not been invited to go into it in any detail, two substantial items, namely, £228 which was the expense of the husband coming to this country from Dar-es-Salaam for the trial of the case, and an item of "Instructions for Brief" amounting to two hundred guineas. The taxation took place on various days in May and June of this year and in the course of it the co-respondent, who was by that time acting in person and who appeared before the registrar to resist the taxation of costs against him, asked to be allowed to inspect the brief which had been delivered to counsel for the petitioner in order that he might contest items in the bill, particularly the two hundred guineas to which I have referred, and the learned registrar has referred to me the question whether a litigant in H

A the position of the co-respondent should be permitted to inspect the brief on the other side.

Let me say at once that at first sight it seems not unreasonable that the co-respondent should ask to be allowed to inspect the contents of the brief for which he is going to be required to pay something by way of party and party costs. The co-respondent argues that he must see and become familiar with the contents of that document in order to qualify himself to present his contention that the fees he is required to pay are excessive. In the ordinary course of events a litigant is entitled to see and learn all that he can about the matters in possession of the other side which are relevant to the issue between him and the other side. But there is no doubt that legal professional privilege, which has a sure and unshakable foundation in our law, protects from disclosures not only documents which embody communications between a client and his legal adviser which come into existence in the course of litigation, in anticipation of litigation, but even documents which without contemplation of any litigation at all come into existence in order to enable the client to obtain the legal advice which he requires.

As this case has been argued by a litigant in person it is perhaps desirable that I should say that that privilege has a sound basis in common sense. It exists for the purpose of ensuring that there shall be complete and unqualified confidence in the mind of a client when he goes to his solicitor or when he goes to his counsel that that which he there divulges will never be disclosed to anybody else. It is only if the client feels safe in making a clean breast of his troubles to his advisers that litigation and the business of the law can be carried on satisfactorily.

E That is the principle with which the co-respondent in the present case finds himself faced when he says that he ought, as a matter of justice and common sense, to be allowed to inspect and closely examine the contents of the brief which has been delivered to counsel on behalf of his adversary. I am satisfied that he is not entitled to inspect that brief or its contents and I so determine the question that has been submitted to me on this reference.

F It has been rightly pointed out to the co-respondent that the fact that the taxing registrar and nobody else is permitted to see that document does not in the least prevent him, the co-respondent, from contending that the sums which he is invited to pay by way of costs are excessive having regard to the brief and its contents and it is, of course, the duty of the taxing registrar closely to scrutinise the contents of this or any other brief to see that it is not overloaded with surplus matter which exceeds what is reasonably necessary for the presentation of the petitioner's case. The co-respondent can, and I doubt not will, make that request and I have no doubt that that duty which rests on the taxing registrar will be faithfully performed.

H The co-respondent has also made the point that this litigation is now concluded, the decree has been made absolute, and he therefore suggests that no harm will be done now by permitting him to see this document. There is, however, an abundance of authority in support of the proposition that once legal professional privilege attaches to a document, of which a brief to counsel such as this is only one example, that privilege attaches for all time and in all circumstances. There are a number of cases which demonstrate that, in particular the judgment of SIR ALEXANDER COCKBURN, C.J., in *Bullock v. Corry* (1) and also the judgment of SIR WILLIAM BRETT, M.R., in *Pearce v. Foster* (2). Even if that were not plain, as I am satisfied it is, it is, of course, a feature of litigation in this Division that even after the litigation has achieved the degree of finality marked by a decree absolute dissolving a marriage, more often than not there remains to be decided a number of questions relating to the disposal of the children of the

(1) (1878), 3 Q.B.D. 356.

(2) (1885), 15 Q.B.D. 114 particularly at p. 119.

marriage and maintenance in which the conduct of the parties may have a significance. Even if there were any doubt as to the view which I have expressed about the area covered by legal professional privilege, it is plain that in litigation in this Division it would have the most intolerable consequences if someone in the position of the present co-respondent were permitted to see the inside of the brief which was delivered on behalf of the petitioner.

I have been greatly assisted by a most careful argument on behalf of the Queen's Proctor and by an admirable argument from counsel for the petitioner in which they have been good enough exhaustively to analyse a number of authorities (3) which deal with this matter but I do not think it necessary for the purpose of determining this question to burden my judgment with a long analysis of those authorities because I am satisfied that the answer to the question "Can the co-respondent see this brief?" is "No, he cannot" and I so determine.

Order accordingly.

Solicitors: *Jaques & Co.* (for the husband); *Queen's Proctor.*

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

(3) Counsel for the Queen's Proctor referred to: *Curtis v. Beaney*, [1911] P. 181; 80 L.J.P. 87; sub nom. *In the Goods of Cooper*, *Curtis v. Beaney*, 105 L.T. 303; 18 Digest (Repl.) 94, 769. *Jones v. Great Central Ry. Co.*, [1910] A.C. 4; 79 L.J.K.B. 191; 100 L.T. 710; 18 Digest (Repl.) 107, 917. *Walsham v. Stainton*, (1863), 2 Hem. & M. 1; 3 New Rep. 241; 9 L.T. 603; 71 E.R. 357; 18 Digest (Repl.) 101, 848. *Nicholl v. Jones*, (1865), 2 Hem. & M. 588; 5 New Rep. 361; 71 E.R. 592; 18 Digest (Repl.) 55, 417. *Wilson v. Rastall*, (1792), 4 Term Rep. 753; 100 E.R. 1283; 22 Digest (Repl.) 399, 4284. *Seabrook v. British Transport Commission*, [1959] 2 All E.R. 15. *Longthorn v. British Transport Commission*, [1959] 2 All E.R. 32. Counsel also referred to R.S.C., Ord. 65; Matrimonial Causes Rules, 1957, r. 68; RAYDEN ON DIVORCE (7th Edn.) at p. 1163; 12 HALSBURY'S LAWS (3rd Edn.) 39, 44, 59; 15 HALSBURY'S LAWS (3rd Edn.) 420; 26 HALSBURY'S LAWS (2nd Edn.) 102; CORDERY'S LAW RELATING TO SOLICITORS (4th Edn.), pp. 289, 297; and 228 L.T. Jo. 50.

Counsel for the husband referred to: *Anderson v. Bank of British Columbia*, (1876), 2 Ch.D. 644 at p. 649; 45 L.J.Ch. 449; 35 L.T. 76; 18 Digest (Repl.) 102, 863. *Minet v. Morgan*, (1873), 8 Ch. App. 361 at pp. 367, 368; 42 L.J.Ch. 627; 28 L.T. 573; 18 Digest (Repl.) 96, 793. *Mostyn v. West Mostyn Coal & Iron Co., Ltd.*, (1876), 34 L.T. 531 at p. 532; 18 Digest (Repl.) 96, 794. *Knight v. Waterford (Marquess)*, (1836), 2 Y. & C.Ex. 22 at p. 36; 160 E.R. 296; 18 Digest (Repl.) 99, 826. *Bolton v. Liverpool Corpn.*, (1833), 1 My. & K. 88; 1 L.J.Ch. 166; 39 E.R. 614; 18 Digest (Repl.) 121, 1040. *Wilson v. Rastall* (supra). *Bullock v. Corry*, (1878), 3 Q.B.D. 356 at p. 358; 47 L.J.Q.B. 352; 38 L.T. 102; 42 J.P. 232; 18 Digest (Repl.) 92, 759. *Calcraft v. Guest*, [1898] 1 Q.B. 759 at p. 761; 67 L.J.Q.B. 505; 78 L.T. 283; 18 Digest (Repl.) 93, 761. *Pearce v. Foster*, (1885), 15 Q.B.D. 114; 54 L.J.Q.B. 432; 52 L.T. 886; 50 J.P. 4; 18 Digest (Repl.) 93, 760. *Watson v. M'Ewan*, *Watson v. Jones*, [1905] A.C. 480; 74 L.J.P.C. 151; 93 L.T. 489; 32 Digest 109, 1407. *Schneider v. Leigh*, [1955] 2 All E.R. 173; [1955] 2 Q.B. 195; [1955] 2 W.L.R. 904; 18 Digest (Repl.) 93, 763. Counsel also referred to 12 HALSBURY'S LAWS (3rd Edn.) 38, para. 54, 44, para. 61.

A UNIT CONSTRUCTION CO., LTD. v. BULLOCK (INSPECTOR OF TAXES).

[HOUSE OF LORDS (Viscount Simonds, Lord Goddard, Lord Radcliffe, Lord Cohen and Lord Keith of Avonholm), November 2, 3, 30, 1959.]

B *Income Tax—Residence—Company—Place where management and control is exercised—Subsidiary company in East Africa—Parent company in fact exercising central management and control in London—Finance Act, 1953 (1 & 2 Eliz. 2 c. 34), s. 20 (9).*

C Three African wholly owned subsidiaries of an English company were companies registered in Kenya. The meetings of the directors of these subsidiaries, in whom the powers of management were vested by the subsidiary companies' articles of association, could not validly be held in the United Kingdom; and initially the management of the three African subsidiaries was carried on in Kenya. Subsequently the control and management of the African subsidiaries was taken over by the English parent company and during 1952 and 1953 de facto control of the African subsidiaries was exercised by the directors of the parent company in London (though this was contrary to the articles of association of the African subsidiaries), the local directors of the African subsidiaries standing aside and not exercising their powers of management. An English subsidiary of the parent company sought to deduct, in the computation of its profits for income tax purposes, payments made to the African subsidiaries under s. 20 of the Finance Act, 1953, as being subvention payments to associated companies. By s. 20 (9) of the Act of 1953 a company could not be an "associated company" unless it was resident in the United Kingdom. It was admitted that the three African subsidiaries were resident throughout in East Africa and it was common ground that a company might have two residences.

E **F** **Held:** the place where the central management and control of a company in fact was, though their being there was irregular and contrary to the constitution of the company, nevertheless determined the place of residence of the company; accordingly, the three African subsidiaries were resident in the United Kingdom and the subvention payments were deductible in computing the profits of the English subsidiary, any second residence of the African subsidiaries in East Africa being immaterial for the present purposes.

G Dictum of LORD LOREBURN, L.C., in *De Beers Consolidated Mines, Ltd. v. Howe* ((1906), 5 Tax Cas. at p. 213) applied.

Swedish Central Ry. Co., Ltd. v. Thompson ((1925), 9 Tax Cas. 342) and *Todd v. Egyptian Delta Land & Investment Co., Ltd.* ((1928), 14 Tax Cas. 119) explained.

H Decision of the COURT OF APPEAL (sub nom. *Bullock (Inspector of Taxes) v. Unit Construction Co., Ltd.*) ([1959] 1 All E.R. 591) reversed.

[As to residence of a company for income tax purposes, see 20 HALSBURY'S LAWS (3rd Edn.) 302, para. 552, 395, para. 723; and for cases on the subject, see 28 DIGEST (Repl.) 251-256, 1113-1134.

For the Finance Act, 1953, s. 20, see 33 HALSBURY'S STATUTES (2nd Edn.) 121.]

I Cases referred to:

American Thread Co. v. Joyce, (1913), 108 L.T. 353; 6 Tax Cas. 163; 28 Digest (Repl.) 257, 1137.

Bradbury v. English Sewing Cotton Co., [1923] A.C. 744; 92 L.J.K.B. 736; 129 L.T. 546; 8 Tax Cas. 481; 28 Digest (Repl.) 208, 881.

Cesena Sulphur Co. v. Nicholson, Calcutta Jute Mills Co. v. Nicholson, (1876), 1 Ex.D. 428; 45 L.J.Q.B. 821; 35 L.T. 275; 1 Tax Cas. 83, 88; 28 Digest (Repl.) 251, 1113.

- De Beers Consolidated Mines, Ltd. v. Howe*, [1906] A.C. 455; 75 L.J.K.B. 858; 95 L.T. 221; 5 Tax Cas. 198; 28 Digest (Repl.) 257, 1135. **A**
- Egyptian Delta Land & Investment Co., Ltd. v. Todd*, [1929] A.C. 1; 98 L.J.K.B. 1; 140 L.T. 50; sub nom. *Todd v. Egyptian Delta Land & Investment Co., Ltd.*, 14 Tax Cas. 119; 28 Digest (Repl.) 254, 1124.
- Koitaki Para Rubber Estates, Ltd. v. Federal Comr. of Taxation*, (1940), 64 C.L.R. 15, 241. **B**
- New Zealand Shipping Co., Ltd. v. Thew*, (1922), 8 Tax Cas. 208; 28 Digest (Repl.) 258, 1145.
- Swedish Central Ry. Co., Ltd. v. Thompson*, [1925] A.C. 495; 94 L.J.K.B. 527; 133 L.T. 97; 9 Tax Cas. 342; 28 Digest (Repl.) 254, 1123.
- Union Corpn., Ltd. v. Inland Revenue Comrs., Johannesburg Consolidated Investment Co., Ltd. v. Inland Revenue Comrs., Trinidad Leaseholds, Ltd. v. Inland Revenue Comrs.*, [1952] 1 All E.R. 646; 34 Tax Cas. 207; *affd.* H.L., [1953] 1 All E.R. 729; [1953] A.C. 482; 34 Tax Cas. 279; [1953] 2 W.L.R. 615; 28 Digest (Repl.) 446, 1938. **C**

Appeal.

Appeal by the taxpayers, Unit Construction Co., Ltd., from an order of the Court of Appeal (JENKINS, ROMER and PEARCE, L.JJ.), dated Feb. 12, 1959, and reported sub nom. *Bullock (Inspector of Taxes) v. Unit Construction Co., Ltd.*, [1959] 1 All E.R. 591, affirming an order of WYNN-PARRY, J., dated July 22, 1958, and reported [1958] 3 All E.R. 186, on a Case Stated under the Income Tax Act, 1952, s. 64. The appellant company had appealed to the Special Commissioners of Income Tax against assessments to income tax made on them under the Income Tax Act, 1952, Sch. D, Case I, for 1953-54 in the sum of £110,000 less £36,388 capital allowances and for 1954-55 in the sum of £200,000 less £50,000 capital allowances. The appeal concerned payments made by the appellant company which they claimed to deduct in computing their profits for the purposes of the assessments as follows: £15,000 paid to Booth & Co. (Africa), Ltd. in 1952; £8,000 paid to Booth & Co. (Africa), Ltd. in 1953; £29,000 paid to Booth & Co., Ltd. in 1952; £27,500 paid to Booth & Co., Ltd. in 1953; £33,000 paid to Bulleys Tanneries, Ltd. in 1952; £11,500 paid to Bulleys Tanneries, Ltd. in 1953. The sole question in dispute was whether the three companies receiving the payments were companies resident in the United Kingdom in 1952 and 1953 within the meaning of the Finance Act, 1953, s. 20 (9). It was common ground that, if they were so resident, the payments were subvention payments which the appellant company were entitled to deduct in computing their profits under s. 20. The appellant company were an English wholly owned subsidiary and the three companies were wholly owned African subsidiaries of the parent company, Alfred Booth & Co., Ltd. The facts in the Case Stated appear in the report of the appeal before WYNN-PARRY, J. ([1958] 3 All E.R. at pp. 187-190). **D**

Heyworth Talbot, Q.C., and *J. L. Creese* for the appellant company. **E**

Roy Borneman, Q.C., and *A. S. Orr* for the Crown. **F**

The House took time for consideration. **G**

Nov. 30. The following opinions were read. **H**

VISCOUNT SIMONDS: My Lords, the appellant company is a wholly owned subsidiary of an English company, Alfred Booth & Co., Ltd. So are three companies, Booth & Co. (Africa), Ltd., Booth & Co., Ltd., and Bulleys Tanneries, Ltd., all of which are companies registered in Kenya under the laws of that colony. To these three companies, to which I will sometimes refer as "the African subsidiaries", the appellant company made certain payments in the years 1952 and 1953 and claims to be entitled under s. 20 of the Finance Act, 1953, to deduct them for the purpose of its assessment to income tax under Case I of Sch. D for the relevant years. It is common ground that **I**

A it is entitled to do so if, and only if, such companies were then "resident in the United Kingdom and carrying on a trade wholly or partly in the United Kingdom". My Lords, the claim of the appellant company was sustained by the Commissioners for the Special Purposes of the Income Tax Acts, but on a Case Stated by them was rejected by WYNN-PARRY, J., whose decision was affirmed by the Court of Appeal.

B It will, I think, appear that the point for your Lordships' consideration in the present case is a short one, though any mention of so vexed a question as the residence of a company is likely to give rise to prolonged discussion. Here there are findings of fact which learned counsel for the Crown was constrained to admit that he could not challenge, and the only question is whether the conclusion in law which the Special Commissioners drew from those facts was

C correct. I should like at the outset to say that this case was stated with conspicuous clarity for the opinion of the court, and that the detailed and careful review of the facts by the Special Commissioners led them irresistibly to the conclusion which they thus state:

D "We find that . . . the boards of directors of the African subsidiaries (who are the people one would have expected to find exercising control and management) were standing aside in all matters of real importance and in many matters of minor importance affecting the central management and control, and we find that the real control and management was being exercised by the board of directors of Alfred Booth & Co., Ltd., in London."

E This being their conclusion of fact, it is not surprising that, as a matter of law, they concluded that these companies were resident in London. For it has been trite law for two generations or more that a limited company "resides for income tax purposes where its real business is carried on" and that its "real business is carried on where the central management and control actually abides". This test has not only been reasserted and applied over and over again in judicial decisions; it has now also received legislative recognition: see

F s. 468 (7) of the Income Tax Act, 1952. It cannot be questioned by your Lordships. The familiar words that I have cited come from LORD LOREBURN, L.C.'s speech in *De Beers Consolidated Mines, Ltd. v. Howe* (1). At that time the possibility of an artificial person such as a limited company residing in two countries at one and the same time had not been fully examined. Twenty

G years later in *Swedish Central Ry. Co., Ltd. v. Thompson* (2), ROWLAT, J., saw no difficulty in such a concept and indeed found it easier for a corporation to have two residences than for a natural person and, though in the same case in the Court of Appeal ATKIN, L.J. (3), said that he felt constrained by authority to come to a different conclusion and in the House of Lords, LORD ATKINSON, in a powerful dissenting speech, took the same view (4), it must now be regarded

H as clear law that an artificial person may like a natural person have more than one residence. The relevance of this consideration is that at an early stage in the proceedings (before the Special Commissioners, I think) it was admitted on behalf of the appellant company that the African subsidiaries were resident in Africa. I do not know what considerations led to this admission being made, but it appears to me to have no weight, if it is conceded as a matter of law that a company may have two residences. It is not necessary for me

I (and I count it my good fortune) on this occasion at any rate to determine in what sense a company may be said to reside not only in that country in which, and in which alone, the central management of its business is exercised, but in another country also. I share to the full the difficulty entertained and expressed by DIXON, J., in *Koitaki Para Rubber Estates, Ltd. v. Federal Comr. of Taxation* (5), to which reference was made in the judgment of the Court of

(1) 5 Tax Cas. at p. 213. (2) 9 Tax Cas. at p. 352. (3) 9 Tax Cas. at p. 370.

(4) See 9 Tax Cas. at p. 376.

(5) (1940), 64 C.L.R. at p. 19.

Appeal. I leave to others the reconciliation of the *Swedish Central Ry. Co.* A case (6) to which I have referred and *Todd v. Egyptian Delta Land & Investment Co., Ltd.* (7).

What, then, my Lords, were the reasons which led the courts below to hold in face of this finding of fact and this state of the law that the African subsidiaries were not resident in the United Kingdom? Undoubtedly they raise a difficult and interesting question of law, which, if decided in the manner B now contended for by the Crown, must have far-reaching and probably deplorable consequences for the Revenue. For the contention of learned counsel for the Crown which has so far found favour with the courts is no less than this, that if, by the constitution of the company, that is by its memorandum and articles of association, interpreted in the light of the relevant law, i.e., in this C case the law of Kenya, the management of the company's business is contemplated as being exercised and ought, therefore, to be exercised in Kenya or at any rate outside the United Kingdom, then for the purpose of British income tax law the facts are to be disregarded and the control and management which as a fact are found to abide in the United Kingdom are to be regarded as abiding outside it. There is no doubt, I think, that the management of the African D subsidiaries, which were incorporated in Kenya under the Kenya Companies Ordinance and registered in Nairobi, was placed in the hands of its directors and that their articles of association expressly provided that directors' meetings might be held anywhere outside the United Kingdom. Nor can there be any doubt—for this is the unchallengeable finding of the commissioners—that the management of the businesses of the companies was not exercised in the manner E contemplated. Whence it follows that the businesses were conducted in a manner irregular, unauthorised and, perhaps, unlawful. It is this fact which led the learned judge to say in words which were approved by the Court of Appeal (8):

"It must follow, to my mind, that . . . no weight or attention can be given to the activities of the board of the parent company in relation to the taxpayers [the appellant company] and the African subsidiaries for the purpose of considering whether or not any of them are resident in the F United Kingdom."

So, also, the Court of Appeal, observing on the test of residence laid down in the authorities, said that (9) "there is no reason at all to suppose that the judges had in mind such a case as the present in which de jure management G is vested in one company whilst de facto control is vested in another", and again they insisted (9) that it was "acts or other elements . . . regular and not irregular, constitutionally lawful and not unlawful" that must be regarded in determining the question of management and, therefore, of residence.

My Lords, I should certainly be prepared to admit that the many judges who in the past have pronounced on this question had not in mind such a case H as this. But, with great respect to those who take a different view, the present case does not seem to lie outside the principle underlying their judgment. Nothing can be more factual and concrete than the acts of management which enable a court to find as a fact that central management and control is exercised in one country or another. It does not in any way alter their character that, in greater or less degree, they are irregular or unauthorised or unlawful. The I business is not the less managed in London because it ought to be managed in Kenya. Its residence is determined by the solid facts, not by the terms of its constitution however imperative. If, indeed, I must disregard the facts as they are, because they are irregular, I find a company without any central management at all. For, though I may disregard existing facts, I cannot invent facts which do not exist and say that the company's business is managed in Kenya. Yet

(6) 9 Tax Cas. 342.

(7) 14 Tax Cas. 119.

(8) [1958] 3 All E.R. at p. 194.

(9) [1959] 1 All E.R. at p. 596.

- A it is the place of central management, which, however much or little weight ought to be given to other factors, essentially determines its residence. I come, therefore, to the conclusion, though truly no precedent can be found for such a case, that it is the actual place of management, not that place in which it ought to be managed, which fixes the residence of a company. If it were not so, the result to the Revenue would be serious enough. In how many
- B cases would a limited company register in a foreign country, prescribe by its articles that its business should be carried on by its directors meeting in that country and then claim that its residence was in that country though every act of importance was directed from the United Kingdom?

- In my opinion, WYNN-PARRY, J., and the Court of Appeal have adopted a wrong test in this admittedly difficult case. I would allow this appeal and
- C restore the determination of the commissioners. The Crown must pay the appellant company's costs here and below.

- My Lords, since writing this opinion, I have been privileged to read the opinion which my noble and learned friend, LORD RADCLIFFE, will deliver, and I wish to add that I concur in his observations and in particular in the manner in which he would reconcile the two decisions of this House to which I
- D have referred and in his view of the weight that should be given to the admission made by the appellant company concerning the residence of the subsidiary companies in Kenya.

- LORD RADCLIFFE:** My Lords, it seems that the opinion of this House, on the important question raised by the appeal differs from the unanimous judgment of the Court of Appeal and the judgment of WYNN-PARRY, J., in the
- E High Court. I think, therefore, that I ought to say in my own words why it is that I regard these judgments as incorrect. It is best to begin by making it plain what are the essential facts of the case and what is the exact question which requires decision. The general facts are found for us by the Special Commissioners and are set out in detail in the Case Stated. In my view, they
- F admit of only one conclusion, that, by the year 1952, every decision of any importance that concerned the running of the businesses in Kenya of the Alfred Booth & Co., Ltd. subsidiaries was being taken in London by directors of the parent company. To manage the subsidiaries in this way was inconsistent with the provisions for their management laid down by their respective articles of association, under which the boards of directors held the managerial power and their meetings could not validly be held in the United Kingdom. On the other
- G hand, this departure of practice from form was not due to any initial intention to conceal the former by the latter. It came about because, between 1948 and 1950, the subsidiaries had been operating so unsuccessfully that the parent company decided, to use the words of the Case Stated (see para. 5 (2)),

- “the situation of the African subsidiaries was becoming so serious that it was unwise to allow them to be managed in Africa any longer, and . . . their management must be taken over by the directors of Alfred Booth & Co., Ltd., in London.”
- H

- On those facts, the seat of the “central management and control” of the subsidiaries changed, and passed from Africa to the United Kingdom. This is a straightforward case of *de facto* control being actively exercised in the United
- I Kingdom, while the local directors “stood aside” from their directorial duties and never purported to function as a board of management.

On those facts the question has arisen whether the subsidiaries are entitled to be regarded as resident in the United Kingdom during the years 1952 and 1953, with the consequence that each of them would fall within the description of “a company resident in the United Kingdom and carrying on a trade wholly or partly in the United Kingdom” for the purposes of s. 20 (9) of the Finance Act, 1953. If they do, then the appellant company, which is also an Alfred Booth & Co. subsidiary, can treat certain payments which it made to them in

those years as "subvention payments" under the section and, accordingly, A
can deduct them from its assessments under Case I of Sch. D for the years
1953-54 and 1954-55.

The appellant company has throughout the case admitted that the three
African subsidiaries were at all material times resident in East Africa. This is
spoken of as an admission, though it seems to me that it might just as well
be described as a claim. The grounds on which this "admission" was founded B
are not before us. I do not know whether they were supposed to be the fact of
incorporation in Kenya, or the adoption of articles of association under the
Kenya Companies Ordinance of 1933, or the residence in Kenya of the ostensible
directors, or the practical side of business being done in Kenya, or a combination
of some or all of these facts. Since it has been common ground between the
parties that a company may have more than one residence for the purposes of C
taxation, I do not think that the admission has any particular bearing on the
point that we have to decide; nor has it been so treated in any court. For
my part, however, I wish that the admission had not been made. I do not
know precisely what it is intended to concede; and I have found that decisions
of courts are sometimes the less satisfactory on questions of principle because the
issue has been prejudiced by the making of an admission which turns out to D
embody a legal conclusion as well as matters of fact. The ascertainment of a
limited company's residence for tax purposes involves several very familiar
propositions. No statute hitherto has laid down any definition of this residence
or prescribed any rules for determining it, except so far as sub-s. (7) of s. 468
of the Income Tax Act, 1952, not only governs that section but also forms a
statutory acceptance of an existing rule. I think that a statutory code could E
have been provided and on the whole I regret that it has not. On the other hand,
the necessity of establishing some common standard for the treatment of different
taxpayers meant that the courts of law were bound in course of time to produce
and apply some general principle of their own to form an acceptable test of
residence. No doubt it might have taken a variety of forms—the country
of incorporation, the site of general meetings, the site of meetings of the directors' F
board were all possible candidates for selection as the criterion. In fact, as
we know, the principle was adopted that a company is resident where its central
control and management abide; words which, according to the decision of the
House of Lords that finally propounded the test (*De Beers Consolidated Mines,*
Ltd. v. Howe (10)), are equivalent to saying that a company's residence is where
its "real business" is carried on. G

It is true that the law so declared substitutes a judicial formula for the general
words of the statute, a form of limitation which one normally seeks to avoid.
But, in the circumstances, I believe such a process to have been inevitable, and,
in my opinion, the *De Beers* judgment (11), followed as it is by a number of
other judgments of the highest authority which have accepted the same principle,
must be treated today as if the test which it laid down was as precise and as H
unequivocal as a positive statutory injunction. That means that there is no
escape from LORD LOREBURN, L.C.'s words (10):

"a company resides, for purposes of income tax, where its real business
is carried on . . . I regard that as the true rule; and the real business is"
carried on where the central management and control actually abides."

I do not know of any other test which has either been substituted for that of
central management and control or has been defined with sufficient precision
to be regarded as an acceptable alternative to it. To me, at any rate, it seems
impossible to read LORD LOREBURN's words without seeing that he regarded the
formula he was propounding as constituting the test of residence. If the condi-
tions he postulated were present, there was residence; if they were not, other
conditions did not suffice to make up residence. And so, I think, his meaning I

A was universally understood, not least in judgments of this House (see *American Thread Co. v. Joyce* (12); *New Zealand Shipping Co., Ltd. v. Thew* (13); *Bradbury v. English Sewing Cotton Co.* (14)), for the next twenty years.

So far as I am able to perceive, only two qualifications have since appeared which mar at all the simplicity and generality of this test. One is that the facts of individual cases have not always so arranged themselves as to make it possible
 B to identify any one country as the seat of central management and control at all. Though such instances must be rare, the management and control may be divided or even, at any rate in theory, peripatetic. Situations of this kind do not arise just to tease the minds of judges; they are the product of some peculiar necessity, political or otherwise. *Union Corpn., Ltd. v. Inland Revenue Comrs.* (15) was of this kind. The facts were not such as to allow of LORD LOREBURN's test
 C being applied, and, therefore, some other basis of decision had to be selected. The solution chosen by the Court of Appeal appears to have been that residence arose in any country in which "to a substantial degree" acts of controlling power and authority were exercised; and in this the line of reasoning followed was avowedly adapted from the judgment of DIXON, J., in *Koitaki Para Rubber Estates, Ltd. v. Federal Comr. of Taxation* (16). It may, perhaps, still be open
 D to question whether, where the facts are such that LORD LOREBURN's test cannot be applied as a whole, the correct way of determining residence is, so to speak, to fragmentate his principle and establish a residence for tax purposes wherever the exercise of some portion of controlling power and authority can be identified. The point does not arise for our decision in this case and I express no view at all on it. I only note the decision in the *Union Corpn.* case (17) as
 E an instance of dual or multiple residence for tax purposes which has its origin in the fact that circumstances do not always make it feasible to apply the LOREBURN formula. The other difficulty that has appeared is the decision of this House in 1925 in *Swedish Central Ry. Co., Ltd. v. Thompson* (18). To all appearances that laid down the proposition that, although there was a residence in Sweden by virtue of central control and management being exercised there,
 F there was at the same time residence in England by virtue of incorporation here and the performance here of administrative duties such as exercising the custody of the company's seal and registration of transfers. The novel idea thus appeared that there were some circumstances that could establish residence for a company, even though its central management and control were being concurrently exercised elsewhere. Unfortunately it is impossible to discover
 G from the decision what exactly those circumstances are, because, as so often arises under income tax procedure when judgment is given on Cases Stated by commissioners, the conclusion of the House involved nothing more positive than that the commissioners who had heard the case had facts before them on which it was open to them in law to find that there was English residence. Conversely, when *Todd v. Egyptian Delta Land & Investment Co., Ltd.* (19)
 H reached this House in 1928, it was held that, on facts not markedly dissimilar from those of the earlier case, the commissioners were entitled to find that there was no residence in England. With these two decisions of equal authority to be reckoned with, I think that it is impossible for anyone today to declare with any conviction what are the circumstances or what is the combination of circumstances that constitute residence for a company in one taxing jurisdiction
 I at a time when the central management and control of its affairs are being actually conducted in another.

My Lords, I cannot avoid the opinion that the *Swedish Central Ry. Co.* decision (18) was an unfortunate one, having regard to the course of authority both before and after its date. Few people can feel that there is any close

(12) 6 Tax Cas. at p. 165.

(13) 8 Tax Cas. 208.

(14) 8 Tax Cas. 481.

(15) [1952] 1 All E.R. 646; 34 Tax Cas. 207; [1953] 1 All E.R. 729; 34 Tax Cas. 279.

(16) (1940), 64 C.L.R. 15.

(17) [1953] 1 All E.R. 729; 34 Tax Cas. 279.

(18) 9 Tax Cas. 342.

(19) 14 Tax Cas. 119.

analogy between the residence imputed to a company and the residence imputed to an individual. While it is not difficult to see that the circumstances that make an individual "resident" may reproduce themselves for him at one and the same time in more than one country, it is much harder, when a company is concerned, to feel satisfied that two quite different tests, depending on different sets of circumstances, can each be applied concurrently for the purpose of determining residence. For any one taxing authority the relevant question is whether the company is resident within the area of its jurisdiction or non-resident; it is not required to ascertain positively whether or not the company is also resident within another jurisdiction. If the accepted test is that a company is resident in that country where its central management and control abide and the facts are that at the material date that central management and control do not abide in England, it seems that in such cases the nature of the test itself precludes the conclusion that the company is nevertheless resident here.

I am myself of the opinion that the best way of treating the matter is to regard the *Swedish Central Ry. Co.* (20) and the *Egyptian Delta Land Co.* (21) decisions as if they were in effect one decision of the House, and the speech of VISCOUNT SUMNER in the later case as affording an authoritative commentary on the significance of the earlier. He was party to both of them. If this is done much of the difficulty disappears; for it is clear that LORD SUMNER wished it to be understood that the Swedish Central Railway Co.'s business and administration were of such a nature that what managing and controlling had to be done were in fact done as much on English as on Swedish soil. He regarded the key of the earlier decision as being contained in the words of LORD CAVE, L.C. (22):

"The central management and control of a company may be divided, and it may 'keep house and do business' in more than one place; and, if so, it may have more than one residence."

On this basis, the 1925 decision of the House is no more than a decision on that special class of case, such as I have already noticed with reference to the *Union Corp'n., Ltd.* (23), where the facts themselves are genuinely such as not to admit of a finding that central management and control are exercised in or from any one country. There will then be only one category of exception from the principle of the *De Beers* case (24) and not an undefined second class.

My Lords, what I have been saying about this question of double residence has no direct relevance to what has to be decided in the present appeal. I thought it necessary, however, to make some attempt to deal with the background because, owing to the admission that has been made asserting an African residence for the three subsidiaries, we are put in the position, if we allow the appeal, of accepting that each of them has residence in two different countries without passing on the validity of the alleged residence in Africa or, indeed, knowing what are supposed to be the determining circumstances that bring it about. I do not think that satisfactory. This case ought not to be regarded as in any sense an authority on the problems of double residence for companies. It deals only with what is a different point, whether, assuming that all the acts which constitute central management and control of the subsidiaries' affairs take place in England, an English residence arises despite the fact that the persons who performed those acts had no authority under the companies' regulations to do so nor could the meetings, if any, at which the decisions to act were taken validly be held in England. It is that point which has been argued before us.

The view which has hitherto prevailed both in the High Court and the Court of Appeal is expressed in the words which appear in the unanimous judgment of the latter court (25):

(20) 9 Tax Cas. 342.

(21) 14 Tax Cas. 119.

(22) 9 Tax Cas. at p. 373.

(23) [1953] 1 All E.R. 729; 34 Tax Cas. 279.

(24) 5 Tax Cas. 198.

(25) [1959] 1 All E.R. at p. 597.

- A "... only constitutional, and therefore authorised, management and control are relevant to an inquiry as to the residence of a company . . ."

This conclusion, at any rate at first sight, is not attractive to me, since it appears to reduce to a mere formal reading of regulations an inquiry that has generally been regarded as one of "actual fact". It has been built out of two propositions both of which were accepted before us by counsel for the Crown as containing the essence of his argument. The first proposition lays stress on the consideration that none of the many judicial pronouncements which have asserted control and management to be the test of residence was directed to such circumstances as the present in which the appellant company's own regulations conflict with what has been done. This no doubt is true; but I think it a very large step to deduce from that that such pronouncements, despite the unvarnished plainness of their language, can have no bearing on the issue now before us. After all, the purport of all of them is to repeat that the question where control and management abide must be treated as one of fact or "actuality"; and here control and management in London remain a fact, despite the failure to adapt the companies' articles to the occasion. The articles prescribe what ought to be done; but they cannot create an actual state of control and management in Africa which does not exist in fact. In litigation inter partes this sort of situation may, perhaps, be brought about by the operation of the law of estoppel, but here I see no ground for saying, nor has it been argued, that there is any estoppel either by words or conduct which binds the appellant company in the face of the Revenue.

E Ought we then to adopt this principle that evidence of what has happened in fact must be excluded by a rule of law if what has been done is inconsistent with the regulations of a company? In my opinion, it would be wrong to do so. I cannot see how the corollary of such a principle could fail to be that, if you cannot look beyond what the regulations of the company provide for, it is only those regulations which need to be or indeed can be referred to when a question of residence arises. Companies could be equipped with the most comprehensive sets of constitutions providing for management to be located in this or that selected taxing jurisdiction, and, however much the written requirements were in fact departed from for reasons of convenience or otherwise, all efforts to establish the true facts relating to the actual seat of management would founder on the ground that what had been done was merely "unconstitutional". Certainly limited companies ought to keep their internal regulations up to date and to reform them in accordance with the facts. But I cannot think that such considerations are sufficient to introduce an important qualification on this accepted test by which you try to ascertain what are the real facts about the seat of management and control and to put in its place what seems to be the merely formal device of studying a set of written regulations. I do not believe that this would conduce to the health of revenue administration. I think it much better to adhere to the approach laid down by LORD LOREBURN, L.C., in the *De Beers* case (26):

"This is a pure question of fact, to be determined, not according to the construction of this or that regulation or bye-law, but upon a scrutiny of the course of business or trading";

I or by LORD HALSBURY, L.C. (*American Thread Co. v. Joyce* (27)):

"... the real test ... and that which has been accepted as a test, is where what we should call the head office in popular language is, and where the business of the company is really directed and carried on in that sense."

It is said that, if we admit evidence of the subsidiaries' real practice and course of business, we shall make the Crown's task of revenue collection very much

the more burdensome. I should be sorry to do that. Their work is difficult enough as it is; nor, indeed, is the situation of the taxpayer altogether an amiable one. But residence has hitherto been regularly treated as a question of fact as to which inquiry must be conducted, and I do not see that, by rejecting the idea that the printed regulations close the matter and requiring or allowing further investigation as to what really happens, we are adding materially to the Crown's burden. If this makes too elaborate a test, the proposed alternative would be altogether too simple; and much of the effective administration of revenue collection will continue to depend, as it always has, on the measure of candour and responsibility that is shown by the individual taxpayer and his professional advisers.

I would allow the appeal.

My noble and learned friend, **LORD GODDARD**, asks me to say that he concurs in this opinion.

LORD COHEN: My Lords, the short point for your decision is whether three companies incorporated in Kenya, all wholly owned subsidiaries of an English company, Alfred Booth & Co., Ltd. (which I shall hereafter call "the parent company"), were at the relevant periods resident in the United Kingdom within the meaning of sub-s. (9) of s. 20 of the Finance Act, 1953. If they were so resident in the United Kingdom, but not otherwise, the appellant company, also a wholly owned subsidiary of the parent company, was entitled in computing its profits for the years 1953-54 and 1954-55 to deduct certain payments (in the section called "subvention payments") made by it to the African subsidiaries in the years 1952 and 1953. It has been throughout common ground between the parties that the African subsidiaries were at all material times resident in East Africa, but the appellant company contends that they were also resident in the United Kingdom. The admission that the African subsidiaries were resident in East Africa is not destructive of the appellant company's contention because, ever since the decision of your Lordships' House in *Swedish Central Ry. Co., Ltd. v. Thompson* (28) it has been well established that for income tax purposes a company can simultaneously have two residences in different countries.

Both parties accepted the test of residence laid down by **LORD LOREBURN**, L.C., in *De Beers Consolidated Mines, Ltd. v. Howe* (29), where he said:

"The decision of **KELLY, C.B.**, and **HUDDLESTON, B.**, in the *Calcutta Jute Mills Co. v. Nicholson* and the *Cesena Sulphur Co. v. Nicholson* (30), now thirty years ago, involved the principle that a company resides, for purposes of income tax, where its real business is carried on. Those decisions have been acted upon ever since. I regard that as the true rule; and the real business is carried on where the central management and control actually abides. It remains to be considered whether the present case falls within that rule. This is a pure question of fact, to be determined, not according to the construction of this or that regulation or bye-law, but upon a scrutiny of the course of business and trading."

Relying on this citation counsel for the appellant company said that the question where the central management and control actually abides must be a question of fact, and that the finding of the Special Commissioners (see para. 10 of the Case Stated (31)) that the real control and management was being exercised by the board of directors of the parent company in London is conclusive in his favour. Counsel for the Crown did not, I think, seriously dispute that there was evidence on which the Special Commissioners could so find. In any event, I think it is plain from the Case Stated as a whole that there was ample evidence

(28) 9 Tax Cas. 342.

(29) 5 Tax Cas. at p. 213.

(30) 1 Tax Cas. 83, 88.

(31) See p. 833, letter D, ante.

A to support their conclusion and it is irrelevant whether or not your Lordships would have reached the same conclusion.

Counsel for the Crown, however, submitted that the issue between the parties was not a pure question of fact. He pointed out that in none of the reported cases had the real control and management been exercised in breach of the regulations of the company, whereas in the present case the articles of each
 B of the African subsidiaries had been so framed that it should have been impossible for the control and management, vested as it was in the respective boards of directors, to be exercised in London. Thus, in art. 28 of the articles of association of Booth & Co. (Africa), Ltd. it was provided that "Directors' meetings may be held anywhere outside the United Kingdom and cl. 81 of Table A shall be construed accordingly". A similar provision is to be found
 C in the articles of association of each of the other African subsidiaries. Counsel argued, and his argument found favour with both WYNN-PARRY, J., and the Court of Appeal, that the observations of LORD LOREBURN and of other judges in decided cases as to the acts or other elements which may determine the residence of a limited company, must have envisaged such acts or other elements as being regular and not irregular, constitutionally lawful and not unlawful.
 D Accordingly, both courts below held that, since the acts of the parent company on which the Special Commissioners relied constituted an usurpation of the directing power of the African subsidiaries, such acts could not warrant the attribution to the African subsidiaries of a second residence in England. In reaching this conclusion, ROMER, L.J., delivering the judgment of the court, relied on the judgment of the Court of Appeal delivered by SIR RAYMOND
 E EVERSHED, M.R., in *Union Corpn., Ltd. v. Inland Revenue Comrs.* (32). He cited a passage from that judgment where SIR RAYMOND EVERSHED said (33):

"The company may be properly found to reside in a country where it 'really does business', that is to say, where the controlling power and authority which, according to the ordinary constitution of a limited liability
 F company, is vested in its board of directors, and the exercise of that power and authority, is to some substantial degree to be found."

My Lords, I do not read the reference to the "ordinary constitution of a limited liability company" as evidencing an intention to make any addition to the test indicated by LORD LOREBURN in the *De Beers* case (34). I think that all
 G SIR RAYMOND EVERSHED was saying was that, in almost every case, the articles of association of a limited company vest the control of the company in the board of directors and that, accordingly, if you found out that the board of a company habitually met in a particular country, you would thus settle the residence of that company. He plainly had not in mind a case such as the present, where it would appear that the board of directors appointed under the articles did not meet at all during the period relevant to the assessments
 H now in question, nor was he expressing any opinion as to what the right conclusion would be, if, for instance, the control was vested not in the board but in managing agents. It seems to me that, in the circumstances disclosed in the Case Stated, the commissioners, if the Court of Appeal were right as to the law, might, but for the admission made by the appellant company, have been compelled to find that the African subsidiaries had no residence anywhere.
 I Moreover, it may well be asked what the position would have been had the business of each of the African companies been conducted by their duly appointed boards but, in disregard of the articles, all the board meetings had been held in London and all instructions had been issued from London. Logically, if the Court of Appeal were right, these meetings should be disregarded and the African subsidiaries could not be held to be resident in England, but counsel for the Crown shrank from carrying his argument to this logical conclusion.

(32) [1952] 1 All E.R. 646; 34 Tax Cas. at p. 259.

(33) [1952] 1 All E.R. at p. 657; 34 Tax Cas. at p. 271.

(34) 5 Tax Cas. 198.

Counsel for the Crown suggested that, unless the application of LORD LORE-BURN's principle was made in accordance with the Court of Appeal's interpretation of it in the present case, the consequences would be disastrous and companies could vary their liability by moving control to and fro. My Lords, so they could, even on the Court of Appeal's view, if they amended the relevant articles (not a very difficult process in the case of a hundred per cent. subsidiary). Moreover, the adoption of the interpretation of the law laid down by the Court of Appeal could lead to the strange consequences which I have already indicated. My Lords, I do not think that adherence to the test laid down by LORD LORE-BURN and to the application thereof which, as I think, has hitherto been adopted—namely, that the question where the central control actually abides is a question of fact for the decision of the commissioners—will lead to any disastrous consequences. The facts of the case before your Lordships are most unusual. It is surely exceptional for a parent company to usurp the control; it usually operates through the boards of the subsidiary companies, and, had the commissioners found in the present case that that was what had in substance happened, it may well be that your Lordships could not have disturbed that finding. But they have found to the contrary, and, as I have already said, it seems to me that there was evidence justifying their conclusion.

For these reasons, I would allow the appeal.

LORD KEITH OF AVONHOLM: My Lords, there is one point that has given me difficulty in this case. The commissioners are not, I think, concerned with whether the powers of directors of a company are exercised in accordance with the constitution of the company. If the actings of a person or corporation are such as to attract liability to tax or give some entitlement to relief from tax, so long at least as these actings are not a facade to cover a reality which has a different result, the commissioners have, I think, no concern with the legality, or otherwise, of these actings. It is the facts of the case that have to be considered with the legal results that follow. For that reason I could not agree with the ratio of the decision of the Court of Appeal. But, when the facts of this case are considered, I feel considerable doubt whether they establish that the "African subsidiaries" were at the material times resident in the United Kingdom. What they show is that another company, Alfred Booth & Co., Ltd., resident in London, through its board, exercised the real management and control of the African subsidiaries. There is no suggestion that it was authorised so to do by the boards of the African subsidiaries. It is true that Alfred Booth & Co., Ltd., was the parent company and controlling shareholder of the subsidiary companies, but that does not avoid the fact that it was a different person from the African subsidiaries. I should have thought, therefore, that there might be a question whether the African subsidiaries could be said to be in any sense resident in the United Kingdom in respect that no actings of theirs could be said to show that the central management and control actually abided there. On the other hand, it is matter of concession that the African subsidiaries have a residence in Africa and, if there is nothing to show that they have also a residence in the United Kingdom, the appeal would be bound to fail. This question was not, however, raised on the appeal and did not, as I understand, enter into the decision of the Court of Appeal, and as your Lordships think that, on the issues raised in this appeal, the appeal should be allowed, I, with some hesitation, am prepared to agree with your Lordships.

Appeal allowed.

Solicitors: *Herbert Smith & Co.; Solicitor of Inland Revenue.*

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

A DEVENISH v. P.D.I. HOMES (HYTHE), LTD.

[COURT OF APPEAL (Hodson and Ormerod, L.JJ.), November 13, 1959.]

County Court—Appeal—New trial—Discretion of county court judge to allow—
Fresh evidence—Principle on which discretion must be exercised—C.C.R.,
Ord. 37, r. 5 (1).

B The discretion of a county court judge under C.C.R., Ord. 37, r. 5 (1)*
to order a new trial on an appeal from a registrar must be exercised judicially;
and, where the application for a new trial is based on fresh evidence, the
discretion should be exercised on the principles† established in the Supreme
Court which were applied (by the House of Lords in *Brown v. Dean*, [1910]
C A.C. 373) to the power to order a new trial under the County Courts Act,
1888, s. 93‡.

Accordingly, a plaintiff who, having a solicitor to advise him, did not
call at a county court trial certain evidence that was then available should
not be granted an order for a new trial merely to enable him to put the
evidence before the court.

D Appeal allowed.

[**Editorial Note.** The decision in the present case may be considered with
that in *Meyer v. Leanse* ([1958] 3 All E.R. 213 at pp. 218, 219).

As to a county court judge's power to order a new trial on appeal from a final
order by a registrar, see 9 HALSBURY'S LAWS (3rd Edn.) 320, para. 778.]

E Case referred to:

Brown v. Dean, [1910] A.C. 373; 79 L.J.K.B. 690; 102 L.T. 661; 13 Digest
(Repl.) 449, 720.

Interlocutory Appeal.

F The defendants appealed against an order of His Honour JUDGE HARINGTON,
Q.C., in Southampton County Court setting aside the judgment of the registrar
in their favour and ordering a new trial. The facts are stated in the judgment
of HODSON, L.J.

D. H. Stansfeld for the defendants.

M. J. Turner for the plaintiff.

G **HODSON, L.J.:** This is an appeal by the defendants from an order of
His Honour JUDGE HARINGTON, Q.C., in Southampton County Court given on
July 8, 1959. The order of the learned judge was made in an action between
Mr. Devenish, the plaintiff, and P.D.I. Homes (Hythe), Ltd., the defendants.
The plaintiff had made a claim against the defendants for breach of contract,
alleging that he was wrongfully dismissed by the defendants from their employ-
ment. The issue in the case, which was the subject-matter of controversy,
H was what were the terms of the agreement of service which was entered into by
the plaintiff with the defendants on Dec. 21, 1958, when they agreed to employ
him as a foreman? The plaintiff was saying that he was not to work on Satur-
day and that that was a term of the employment. The defendants were saying:
No. His employment as a general foreman in the building trade was to be the
normal employment, involving the normal working hours from eight to five,
I less one hour for lunch, Monday to Friday, and from eight to noon on Saturday.
There being a dispute between the parties whether the terms of employment
involved Saturday working or not, it had an important bearing on the question
whether or not the plaintiff had come to work on Saturday or not in the early
stages of his employment. He said that he did not and the defendants say that
he did. It appears that he had available in court corroborative evidence that

* Rule 5 (1) is printed at p. 844, letter C, post.

† These are indicated at p. 845, footnote (3), post.

‡ The relevant part of s. 93, repealed, is printed at pp. 844, 845, post.

he was not there on Saturdays in the early months of the employment except on one occasion. A

The action was tried not by the learned judge, but, by consent of the parties, by the registrar, who, after hearing the evidence of both sides, dismissed the claim, the plaintiff having been previously peremptorily discharged by his employers because he did not obey their orders and had not worked on Saturdays. The registrar said: B

"In the particular circumstances I took the view that the plaintiff's refusal to attend went to the root of the contract between the parties and, consequently that the defendants were justified in dismissing the plaintiff."

The plaintiff, who was dissatisfied with the decision of the registrar, applied to the judge (from whom this appeal is brought) under C.C.R., Ord. 37, r. 5 (1), C which provides:

"Any party affected by a judgment or final order of the registrar may, except where he has consented to the terms thereof, appeal therefrom to the judge, who may upon such terms as he thinks just—(a) set aside or vary the judgment or order or any part thereof, or (b) give any other judgment or make any other order in substitution therefor, (c) remit the action or matter or any question therein to the registrar for re-trial or further consideration, or (d) order a new trial to take place before the judge." D

The learned judge, purporting to exercise the discretion given him by the rule, ordered a new trial. In his judgment, he set out the issues between the parties and pointed out that the plaintiff had informed his solicitor a fortnight before the trial of the existence of witnesses who were available to support his case but that his solicitor had not called them. He considered in those circumstances that a body of evidence which might have affected the mind of the tribunal was not called through no personal fault of the plaintiff and therefore he thought that the plaintiff ought to have another opportunity of putting his case before the court. E

The appeal which is brought to this court is brought on these grounds—there are two other grounds but I need only refer to the grounds relevant for this purpose. These are: F

"That the said evidence was available to the plaintiff at and before the date of the hearing before the learned registrar and could with reasonable diligence have then been adduced by him and the learned judge misdirected himself in holding that such evidence ought thereafter to be admitted. That the learned judge misdirected himself in holding that the plaintiff ought to be granted a new trial because the plaintiff was dissatisfied with his solicitor's conduct of his case before the learned registrar." G

The principles on which new evidence is admitted are well known and have often been discussed in proceedings before the High Court, where R.S.C., Ord. 58, r. 9, provides and limits to some extent the way in which this discretion is to be exercised. The position in the county courts is not the same. It depends on the rule which I have read which contains no reference to special cases; but it is, I think, controlled by the rule that discretion of this kind must be judicially exercised. The question therefore arises whether a plaintiff, as in this case, who is advised by a solicitor and does not call available evidence at the hearing in the first instance before the registrar or another tribunal, can have a further opportunity of putting that evidence before the court. It is on the face of it contrary to principle, as was pointed out by LORD LOREBURN, L.C., in *Brown v. Dean* (1). That was a case in which the courts were considering the wording of s. 93 of the County Courts Act, 1888, which gave power to the county court judge "if he shall think just, to order a new trial to be had upon such terms as H I

A he shall think reasonable". It is pointed out that the discretion is a judicial and not an arbitrary discretion. LORD LOREBURN, L.C., in his judgment referred (2) to the judgment of FARWELL, L.J., in the Court of Appeal and quoted this passage:

B "In the present case the county court judge has disregarded those principles (3), and has granted a new trial on affidavits which show at the outside that there will be oath against oath on a new trial—and that is clearly not enough—which show nothing in the nature of surprise, fraud, or conspiracy, and which also state nothing to show that the information alleged could not with reasonable diligence have been obtained at the first trial."

C It is not questioned that the evidence now available could reasonably have been obtained at the first trial. The only question really is whether the county court judge today is in the same position as the county court judge was when he was acting under the powers conferred by s. 93 of the County Courts Act, 1888, which is now replaced by r. 5 of Ord. 37. It has been pointed out to us that C.C.R., Ord. 37, r. 5 (1), which I have read is not in exactly the same terms as C.C.R., Ord. 37, r. 1 (1), which deals with the general powers of the county court judge to order a new trial. Rule 1 (1) reads:

"The judge shall in every case have the power to order a new trial to be had upon such terms as he thinks reasonable, and in the meantime to stay the proceedings."

E It is conceded that a judge acting under that rule is under the same obligation as he was in *Brown v. Dean* (4) under the County Courts Act, 1888, but it is contended that the effect of the wording of C.C.R., Ord. 37, r. 5, is different. I have looked at the wording of that rule and I confess I cannot find anything which leads me to the view that there is any wider discretion to be exercised under r. 5 than there is under r. 1. I cannot see that the words "affected by a judgment or final order" can possibly make any difference. The words of the Act (5) referred to in *Brown v. Dean* (4) "if he shall think just" do not appear either in r. 1 or r. 5 or r. 6; but it seems to me plain on the wording of the rule that there is no difference in principle, and that the principle must be operated in these cases in the same way as it was directed to be used in *Brown v. Dean* (4).

F I have not referred to another part of that case where there was a slight difference of opinion between two members of their Lordships' House because G I do not think it is material to the question we have now to consider.

Counsel for the plaintiff referred us to various other rules and to the section of the Act (6) which regulates appeals to this court. Particularly, he referred us to C.C.R., Ord. 13, r. 1 (1) (h), dealing with cases where a party has a right to appeal from the registrar's order and he has contrasted those words. Sub-rule (h) reads

H "Where the registrar has made an order to which this rule applies, any party who is dissatisfied therewith may apply to the judge on notice to

(2) [1910] A.C. at p. 375.

(3) The principles to which FARWELL, L.J., was referring were those established by *Young v. Kershaw*, *Burton v. Kershaw* ((1899), 81 L.T. 531). They may be summarised as follows—all material evidence which could with reasonable skill and diligence be adduced at the trial must be adduced at the trial; and therefore, if a new trial is to be ordered on the ground of new evidence, (i) the party asking for the new trial must show that there has been no remissness on his part in adducing all possible evidence at the trial, and (ii) the new evidence must be such that, if adduced, it would render it probable almost beyond doubt that the verdict would be different. This summary is based on the judgment of COLLINS, L.J., in that case, which is substantially to the same effect as that of SMITH, L.J.; but WILLIAMS, L.J., stated the principle somewhat differently, saying that it was necessary that, on looking at the new evidence, the court should be of the opinion that the verdict given at the trial resulted from mistake, surprise or fraud.

(4) [1910] A.C. 373.

(5) County Courts Act, 1888, s. 93, repealed.

(6) County Courts Act, 1959, s. 113.

vary or rescind the order, and on the hearing of the application the judge may vary or rescind the order and may make such order as may be just." A

I myself do not gain any assistance from the wording of that order which simply gives any party who is dissatisfied a right of appeal.

For the reasons which I have endeavoured to give, I think that this appeal should be allowed on the ground that the exercise of the discretion by the learned judge to order a new trial to the plaintiff was not a proper judicial exercise of his discretion. I would, therefore, allow the appeal. B

ORMEROD, L.J.: I agree and have nothing to add.

Appeal allowed, judgment of the registrar restored.

Solicitors: *Bartlett, West & McLoughlin*, agents for *Stephens & Co.*, Southampton (for the defendants); *Richard Newton* (for the plaintiff). C

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

CONTRACT & TRADING CO. (SOUTHERN), LTD. v. BARBEY AND OTHERS. D

[HOUSE OF LORDS (Viscount Simonds, Lord Goddard, Lord Radcliffe, Lord Cohen and Lord Keith of Avonholm), October 28, November 30, 1959.] E

Currency—Control—Bill of exchange—Holder in due course—Resident outside scheduled territory—No Treasury permission obtained—Claim for recovery of amount due—Exchange Control Act, 1947 (10 & 11 Geo. 6 c. 14), s. 33 (1), Sch. 4, para. 4.

The respondents carried on business and were resident outside the "scheduled territories" as defined in the Exchange Control Act, 1947. They were holders in due course of three bills of exchange of which the appellants were acceptors and which were dishonoured on presentation. The appellants did not dispute that, apart from the effect of the Act of 1947, they would be liable to pay the amount due on the bills claimed by the respondents. No permission of the Treasury to make payment under s. 5 was obtained by the appellants. By s. 33 (3) of, and para. 4 (1) of Sch. 4 to, the Act, a claim for the recovery of a debt in a prescribed court might not be defeated "by reason only of the debt not being payable without the permission of the Treasury". By s. 33 (1) of the Act, it was an implied condition of any contract that a term of the contract should not be performed except in so far as Treasury permission was given or was not required. The respondents brought an action in the High Court (which was a prescribed court) for the amount of the bills, and the appellants contended that, by reason of the term implied in the bills by s. 33 (1), the bills were not due and payable since Treasury permission had not been given. F

Held (LORD KEITH OF AVONHOLM dissenting): the respondents were entitled to judgment since a debt under a bill of exchange was a debt to which para. 4 (1) of Sch. 4 applied and, therefore, its recovery in the High Court was not to be defeated by the fact that the Treasury's permission to pay had not been given. G

Decision of the COURT OF APPEAL (sub nom. *Barbey v. Contract & Trading Co. (Southern), Ltd.*) ([1959] 2 All E.R. 145) affirmed. H

[As to the necessity for Treasury permission for the performance of a contract by virtue of the Exchange Control Act, 1947, see 27 HALSBURY'S LAWS (3rd I

A Edn.) 141-143, paras. 226, 227; and for cases on the subject, see 17 DIGEST (Repl.) 457, 184.

For the Exchange Control Act, 1947, s. 33 and Sch. 4, see 16 HALSBURY'S STATUTES (2nd Edn.) 593, 606.]

Case referred to:

B *Cummings v. London Bullion Co., Ltd.*, [1952] 1 All E.R. 383; [1952] 1 K.B. 327; 17 Digest (Repl.) 457, 184.

Appeal.

Appeal by Contract & Trading Co. (Southern), Ltd. from an order of the Court of Appeal (LORD EVERSHED, M.R., and PEARCE, L.J.), dated Mar. 12, 1959, and reported sub nom. *Barbey v. Contract & Trading Co. (Southern), Ltd.*, [1959] 2 All E.R. 145, affirming an order of McNAIR, J., in chambers on Feb. 26, 1959, whereby he dismissed the appellants' appeal from an order of Master JACOB, dated May 23, 1958, and ordered that the appellants bring the sum of £8,700 into court within fourteen days. The respondents were Edmond Barbey, Georges Lombard, Richard Pictet, Jean Ernest Bonna, Raymond Barbey, Marcel Odier and Thierry Barbey, carrying on business as Lombard, Odier & Cie.

D The facts appear in the opinion of VISCOUNT SIMONDS.

P. M. O'Connor and R. I. Kidwell for the appellants.

N. C. Tapp for the respondents.

The House took time for consideration.

Nov. 30. The following opinions were read.

E VISCOUNT SIMONDS: My Lords, this appeal raises a short but by no means easy question on the meaning and effect of certain provisions of the Exchange Control Act, 1947.

The facts are not in dispute. The respondents carry on business and are resident at Geneva in Switzerland, a country not within the scheduled territories as defined by the Act that I have mentioned. As holders in due course of three

F bills of exchange for a total sum of £8,700, of which the appellants were acceptors and which were dishonoured on presentation, they brought the action out of which this appeal arises against the appellants in the Queen's Bench Division, claiming payment of the sum of £8,700. On their application under Ord. 14, r. 1, of the Rules of the Supreme Court to sign final judgment the appellants sought leave to defend the action on the ground (the only ground, as I understand, that was open to them) that the Act afforded them a good defence to the action. G It is this question which, having been determined adversely to the appellants by the master and the learned judge in chambers and by the Court of Appeal, has now reached your Lordships' House. It has conveniently throughout been treated as a question of law finally to be disposed of on an interlocutory application and I see no objection to this course.

H The Act, of which the long title is

“ An Act to confer powers, and impose duties and restrictions, in relation to gold, currency, payments, securities, debts, and the import, export, transfer and settlement of property, and for purposes connected with the matters aforesaid ”,

I was a far-reaching measure designed for the protection of the national economy. It is with one only of its many aspects that this case is concerned, namely, the making of a payment in the United Kingdom to or for the credit of a person resident outside the scheduled territories, which, as I have already said, do not include Switzerland. For this matter, special provision is made by s. 5, which falls within Part 2 of the Act, but there are general provisions covering this and other prohibited transactions to which it will be necessary to refer. The relevant part of s. 5 is as follows (I note that per incuriam s. 6, not s. 5, has been treated in the courts below as the material section, but nothing turns on this):

"Except with the permission of the Treasury, no person shall do any of the following things in the United Kingdom, that is to say—(a) make any payment to or for the credit of a person resident outside the scheduled territories; or (b) make any payment to or for the credit of a person resident in the scheduled territories by order or on behalf of a person resident outside the scheduled territories; or (c) place any sum to the credit of any person resident outside the scheduled territories."

It is common ground that Treasury permission for payment of the sum of £8,700 by the appellants to or for the credit of the respondents had not been given either at the date of presentation of the bills of exchange or at the date of the issue of the writ in the action. Therefore, said the appellants, the bills were not due and payable and no action lay on them. And this plea they reinforced by reference to s. 33 of the Act, to which I refer. That section, which is in Part 6 of the Act entitled "Supplemental", provides as follows:

"(1) It shall be an implied condition in any contract that, where, by virtue of this Act, the permission or consent of the Treasury is at the time of the contract required for the performance of any term thereof, that term shall not be performed except in so far as the permission or consent is given or is not required: Provided that this subsection shall not apply in so far as it is shown to be inconsistent with the intention of the parties that it should apply, whether by reason of their having contemplated the performance of that term in despite of the provisions of this Act or for any other reason.

"(2) Notwithstanding anything in the Bills of Exchange Act, 1882, neither the provisions of this Act, nor any condition, whether express or to be implied having regard to those provisions, that any payment shall not be made without the permission of the Treasury under this Act, shall be deemed to prevent any instrument being a bill of exchange or promissory note.

"(3) The provisions of Sch. 4 to this Act shall have effect with respect to legal proceedings, arbitrations, bankruptcy proceedings, the administration of the estates of deceased persons, the winding-up of companies, and proceedings under deeds of arrangement or trust deeds for behoof of creditors."

I pause to note that this section shows on its face that the contractual obligation of payment created by a bill of exchange is a term for the performance of which Treasury permission is required. And I would also observe how attractively simple at this stage is the argument presented by the appellants. Write out, they say, the condition implied by the statute and you get a promise to pay on the due date or on the date when Treasury permission is given, whichever is the later date. It is on that date and not before it that the bill becomes due and actionable. My Lords, I might, while wondering that the legislature had thought fit to deprive of their apparent rights creditors, whose only fault lay in residence outside the scheduled territories, without making any countervailing provision for their protection, I might, I say, have been compelled to an unwilling acquiescence in this argument if the Act had ended with sub-s. (2) of s. 33. But sub-s. (3) of the same section and Sch. 4 to which it refers justify and demand a different interpretation to be put on s. 5 read in conjunction with s. 33 (1) and (2).

Schedule 4 provides, by para. 1, that the provisions of Part 2 of the Act shall apply to sums required to be paid by any judgment or order of any court or by any award as they apply in relation to other sums, with the implication that such sums are not to be paid except with the permission of the Treasury, by para. 2 that nothing in the Act shall be construed as preventing the payment by any person of any sum into any court in the United Kingdom but that the provisions of Part 2 should apply to the payment of any sum out of court, whether under an order of the court or otherwise, to or for the credit of any person resident outside the scheduled territories, by para. 3 for the making of rules of court in regard to payment into court and other matters. Paragraph 4 is of vital importance. It is as follows:

A “(1) In any proceedings in a prescribed court and in any arbitration proceedings, a claim for the recovery of any debt shall not be defeated by reason only of the debt not being payable without the permission of the Treasury and of that permission not having been given or having been revoked.

B “(2) No court shall be prescribed for the purpose of this paragraph unless the Treasury are satisfied that adequate provision has been made therefor by rules of court for the purposes specified under the last preceding paragraph ”

(i.e., inter alia, for payment into court).

The High Court of Justice is such a prescribed court. Paragraph 5 and para. 6 may also be mentioned, for their provisions, though not directly in point, undoubtedly fit better into the scheme of the Act for which the respondents contend. C The former paragraph provides that in any bankruptcy, winding-up of any company or administration of the estate of any deceased person as therein mentioned, a claim for a sum not payable without the permission of the Treasury shall, notwithstanding that the permission has not been given or has been revoked, be admitted as if it had been given and had not been revoked, and D para. 6 provides that a debt for the payment of which the permission of the Treasury is required shall, if in other respects it complies with the requirements therein mentioned, be allowed to be a good petitioning creditor's debt, notwithstanding the said requirement, if and to the extent that the debt can be satisfied either by a payment into court or by a payment to a blocked account. This tenderness being shown to creditors in the cases to which para. 5 and para. 6 E apply, it might well be thought strange if other creditors resident outside scheduled territories were left without remedy or protection.

I turn, then, to see whether some other meaning cannot be given to the relevant sections. It appears to me, my Lords, that, without doing any violence to the language of s. 5 and s. 33, a meaning can be given to these sections which will F harmonise them with the provisions of Sch. 4 and make the scheme of the Act consistent and intelligible. I do not doubt that para. 4 of Sch. 4 has material on which it can operate even if it does not apply to cases covered by s. 33 (1). But this does not conclude the matter. For the language of that paragraph “In any proceedings . . . a claim for the recovery of any debt . . . ” is apt to include as well an obligation arising under a bill of exchange as any other monetary obligation, and such an obligation can only be excluded if it is held that there is no G “debt ” until Treasury permission has been given. But that is just what the paragraph, which must be read with s. 33 (1), appears to deny. There is a debt but it must not be paid without permission. It does not for that reason cease to be a debt. It may be said, perhaps, that it is a debt unlike any other debt in that it is not payable until some condition is satisfied. But that is what the statute provides and by the very language of para. 4 recognises. I conclude, therefore, H without difficulty, that a debt arising under a bill of exchange is a debt to which para. 4 applies, and that a claim for its recovery is not to be defeated by the fact that Treasury permission to pay it has not been given. It was a point fairly made by learned counsel for the appellants in their able arguments that there is no provision enabling a debtor in such a case to pay money into court in satisfaction of the debt except in proceedings commenced by his creditor I and that, if such proceedings are commenced, he may be mulcted in some costs or at any rate put to some expenditure. This is so, but para. 3 and the latter part of para. 4 clearly contemplate the payment into court of all debts to which the first part of para. 4 applies, and I do not think that a possible gap in the machinery for carrying out the purposes of the Act can alter its plain meaning.

The only previous case in which the construction of this Part of the Act has been considered by the courts is *Cummings v. London Bullion Co., Ltd.* (1).

In that case it was not, perhaps, necessary for the court to determine the precise question that now arises, but I am happy to find that SOMERVELL, L.J., did think fit to consider it and used language with which I am in agreement. He says (2):

"The person entitled to the payment issues a writ. The fact that permission has not been obtained is not a defence to the action. On the one hand, the plaintiff can obtain judgment, the money due under the judgment being subject to Part 2 of the Act and the rules to which I have referred. The defendant, assuming that he is admitting liability, apart from the provisions of the Act, can make a payment into court. The Act is not to be used to enable the defendant to retain the money in his pocket, but to control its reaching its destination, namely the plaintiff."

I cannot express more succinctly my own views in regard to the present case. The appeal must, in my opinion, be dismissed with costs.

LORD GODDARD: My Lords, the question argued in this appeal was, to quote from the Printed Case lodged by the parties jointly, whether the claim of the respondents, as holders of the bills to which s. 33 of the Exchange Control Act, 1947, applies, is defeated by reason of the fact that, at the date of the issue of the writ, Treasury permission for payment had not been granted. Had s. 33 consisted only of its first two subsections, in my opinion the appellants' contention might have prevailed. But, by sub-s. (3), the provisions of Sch. 4 to the Act are to have effect with respect to legal proceedings brought in respect of contracts to which the section applies, that is, to contracts where, by virtue of the Act, the permission of the Treasury is, at the time of the contract, required for the performance of any term thereof. There is no provision in the Act prohibiting legal proceedings being brought at any time in respect of such contracts. An allegation that the usage of the bills has been extended by the provisions of the Act is setting up a matter of defence. But para. 4 of Sch. 4 states in terms that in any proceedings in a prescribed court, and the High Court is such a court, a claim for the recovery of a debt shall not be defeated by reason only of the debt not being payable without Treasury permission. It was argued by the appellants that there was no debt due because a condition must be implied that payment was not to be made until permission had been obtained. No debt can be sued for before the time of payment has arrived, and, if the appellants' contention was right, it appears to me that no debt due to a person living outside the scheduled territories to which s. 33 applies, could ever give cause of action. The provisions of para. 4 would then appear to me to be meaningless. The schedule contains elaborate provisions for the payment into court of the moneys recovered by action the proceeds of which cannot be paid to creditors until permission is granted, and expressly deprives the person sued from setting up the defence that the implied condition as to Treasury permission postpones the payment. That the Act does not provide a moratorium for debtors but only controls the immediate destination of the payments they make is also shown, I think, by para. 5 and para. 6 of the schedule under which these bills could have been admitted to proof had the acceptors become bankrupt, or would have constituted a good petitioning creditor's debt had the debtors committed an available act of bankruptcy.

I am, therefore, of opinion that the appeal fails.

LORD RADCLIFFE: My Lords, I agree that this appeal must fail. My reason for thinking so is that I regard para. 4 (1) of Sch. 4 to the Exchange Control Act, 1947, as precluding the only defence which the appellants have raised against the respondents' claim. This is not to deny that the proposition which the appellants have brought to this House is a plausible one, having regard to the way in which s. 33 of the Act is expressed. The Act, of course, deals with a much wider range of operations than just payments of money; but within that more

- A limited range its general object, as expressed in s. 5 and s. 6, is to forbid sterling being paid to or placed at the disposition of a person not resident within the sterling area unless Treasury consent has been first obtained. Section 33 (which incorporates the provisions of Sch. 4) is part of the scheme for implementing this control. It is not plain to me exactly why s. 33 (1) was thought to be needed in this context, nor does it explain itself. I think that probably the main reason for its introduction was to protect the general run of obligees from being met with a defence by his obligor to the effect that a contract involving Treasury consent for its performance was void in its inception for impossibility or illegality. However that may be, it seems clear that the condition imported into contracts by s. 33 (1) applies to the promise that the acceptor of a bill of exchange makes to its drawer or holder. If so, say the appellants, our obligation to pay to the present holders on due presentation was subject to the condition that we were not to pay if Treasury consent had not then been given; it had not been given; what, then, are we being sued for by this writ, since we were not in default at the date when it was issued, and no money was at that date payable by us to the respondents? I am not sure that, if s. 33 (1) stood alone, there would be any logical answer to this dilemma, of which the appellants are entitled to make all that they can.
- D I do not find anything in the judgments of the Court of Appeal in *Cummings v. London Bullion Co., Ltd.* (3) which resolves it. But then, s. 33 (1) does not stand alone; there are the provisions of Sch. 4 with regard to "legal proceedings" to be taken account of, and I think that it is possible to see, when those provisions are attended to, that the Act has a definite plan that governs legal proceedings for all debts affected by a condition about Treasury consent whether express or implied. Before approaching the provisions, I think that it is useful to recall that s. 33 (1) is not so expressed as to alter "the fixed or determinable future time" of payment of a bill or to postpone that date to another date. What it imports into the contract is that, when the due date of payment arrives, performance is not to be called for except so far as Treasury consent is not required. Schedule 4 establishes a scheme for regulating legal proceedings and other legal actions on debts so far as they are affected by the requirements of exchange control. These provisions are not subsidiary to s. 33 (1) or other provisions of the Act; they are substantive enactments in their own right. When, therefore, para. 4 (1) of this schedule says:
- F

- G "In any proceedings in a prescribed court and in any arbitration proceedings, a claim for the recovery of any debt shall not be defeated by reason only of the debt not being payable without the permission of the Treasury and of that permission not having been given or having been revoked",

- I read the words "any debt" as being as extensive in meaning as they appear to be and not as confined to those debts—and, no doubt, there can be some—which arise from contracts not touched by s. 33 (1). The sub-paragraph confers statutory authority to sue on debts if the only obstacle to their payment is lack of Treasury consent. It cannot be denied that there are debts owing on these bills, even though payment to the then holder could not be demanded at the date of the writ. If so, there is nothing in law or statute to prevent the holders presenting them for payment or starting legal proceedings on their not being honoured. Then para. 4 (1) comes into play and expressly deprives the debtor of any ground of defence based on Treasury consent being required and not forthcoming which would otherwise protect him if s. 33 (1) stood alone without Sch. 4. Such a liberty conceded to the creditor would, indeed, be a very odd result but for the other provisions of this schedule, since the judgment would give him an independent right to payment of sterling which it is the purpose of the Act to allow only with consent. But this is all taken care of by para. 1 to para. 3 of the same schedule. Judgments for payment of money are subjected to similar conditions requiring Treasury consent before payment; in effect, the hand of control is

shifted from the contract to the right arising under the judgment. Moneys due under judgments or orders can be paid into court, thus discharging the debtor, and the fund itself still remains out of the control of the creditor until consent has been obtained. All this explains why it is only in a "prescribed court", that is to say a court which is found to have made satisfactory rules for payment of judgment sums into its care under Treasury control, that the defence which would otherwise arise under s. 33 (1) is denied to the debtor. A

My Lords, I think that this conclusion is in accordance with the general purpose and scheme of the Exchange Control Act, 1947, and I do not regret it. I do feel, however, that the scheme, as so interpreted, has this unsatisfactory feature that the acceptor of a bill in the position of the appellants is left in a singularly helpless position if he cannot obtain Treasury permission either to pay his creditor or to transfer the sterling to a blocked account. There is nothing that he can do except await the issue of a writ against him and submit to judgment. Happily, with the general relaxation of exchange control on current account transactions, difficulties of this kind may by now be of no more than historical interest. B

LORD COHEN: My Lords, I agree that this appeal must fail. C

LORD KEITH OF AVONHOLM: My Lords, this case is concerned with the payment of three bills of exchange accepted by the appellants and held by the respondents as holders in due course. These were dishonoured on presentation at the due dates. The respondents by specially indorsed writ have claimed payment of the total amount of these bills, viz., £8,700. The respondents are persons resident outside the scheduled territories as defined by the Exchange Control Act, 1947. The drawer of the bills at the date of drawing the bills and at all subsequent times was resident in France, which is also outside the scheduled territories as so defined. The question arises of the right of the respondents now to demand payment. D

This requires some consideration of the provisions of the Exchange Control Act, 1947, with regard to payment of debts to persons outside the scheduled territories. In this matter various situations may call for consideration under the Act. I find it sufficient to refer only to two. There is first a contract involving payment of a debt in which debtor and creditor at the date of making the contract are resident in the United Kingdom, but at the time of performance the creditor is resident outside the scheduled territories. In such case, the permission of the Treasury for payment is required under s. 5 of the Act. There is secondly the case where the creditor is resident outside the scheduled territories at the time of the making of the contract and remains so resident at the time of performance. This case comes under s. 33 (1) of the Act. Other cases may be envisaged owing to changes of residence of debtor, or creditor, or both, but these need not be considered. The present case comes within the terms of s. 33 (1). E

I understand that the view that commends itself to your Lordships is that, for all practical purposes, no difference in result arises under the Act in these two cases. I would willingly accept this view, if I could see my way to fit it into the framework of the statute. The view commends itself by its simplicity, but I am unable to convince myself that this is the intention of the statute. I can see good reasons for a distinction. Where there was no impediment to the performance of the contract at the time it was made there is no reason why the debtor should be advantaged, when the time of payment comes, by keeping the money in his pocket and the creditor possibly disadvantaged. Accordingly, under Sch. 4, provision is made for the money being paid into court. The creditor cannot get it without the permission of the Treasury, but at any rate he knows it is there waiting for him if and when consent is given. In the other case, the parties know when they make their contract that it cannot be performed as things are, without Treasury consent. It would seem perfectly reasonable that Parliament should say in that case to the creditor: "You must wait till the G

A Treasury gives consent before you can enforce any payment by your debtor." That, it seems to me, is exactly what the statute has done. It may be that s. 33 (1) was introduced also to prevent the contract failing for invalidity. But, if so, that is no reason for supposing that the creditor was being given all the facilities and advantages conferred by the statute on creditors in other cases.

I accordingly examine very briefly the material provisions of the statute. B Section 33 is a general section dealing, I think, with a number of matters not necessarily inter-related. Subsection (1) is a provision affecting contracts generally, not merely contracts for payment of money. It plainly enacts that, by the fiction of an implied condition, a term of a contract

"shall not be performed except in so far as the permission or consent is given or is not required."

C If, as I understand, payment into court under Sch. 4, in contracts for payment other than those falling under sub-s. (1) of s. 33 is regarded as performance, then in cases coming under the subsection no such performance can, I should have thought, be demanded, on the plain words of the subsection. I find this view reinforced by the words of sub-s. (2) of s. 33, which I set out at length:

D "Notwithstanding anything in the Bills of Exchange Act, 1882, neither the provisions of this Act, nor any condition, whether express or to be implied having regard to those provisions, that any payment shall not be made without the permission of the Treasury under this Act, shall be deemed to prevent any instrument being a bill of exchange or promissory note."

E I take this to mean that the parties might attach an express condition to acceptance of a bill of exchange by which the due date of the bill is made a date certain, or the date when Treasury consent to payment is given, whichever is the later. The subsection applies likewise to an implied condition and such an implied condition is introduced by sub-s. (1).

F On this construction of the statute I find no difficulty in the provisions of Sch. 4. There can be no maintainable proceedings for recovery of a debt if the debt is not yet due and, accordingly, para. 4 (1) does not apply. The language used is fully apt to cover cases other than those falling under s. 33 (1). I attach some importance to the words "shall not be defeated by reason *only* of the debt not being payable without the permission of the Treasury," etc. These are apt words for a case coming under s. 5, but not for a case under s. 33 (1). Paragraph 5 (1) of the schedule would, I think, apply as for ranking of a contingent debt.

G The paragraph does not require payment of the debt so ranked and the effect, I take it, is to compel the receiver or other administrator to conserve enough estate to meet the debt as ranked when Treasury permission is given. Paragraph 6 would not apply to the debt in suit here, for the reason that, in my view, it does not fall to be satisfied by payment into court and no arrangement has been made for payment to a blocked account. I regard the words "if and H to the extent that the debt can be satisfied either by a payment into court or by a payment to a blocked account" as significant. They indicate that there are some debts that cannot, under the intent of the Act, be satisfied by the expedient of the creditor taking proceedings that will result in the sum claimed being paid into court. If this is not one such, I am unable to see what debts are covered by these words.

For these reasons, I would allow the appeal.

Appeal dismissed.

Solicitors: *Lipton & Jefferies* (for the appellants); *Markby, Stewart & Wadesons* (for the respondents).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

HANIVER v. HANIVER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sachs, J.), November 9, 10, 11, 1959.]

Divorce—Judicial separation—Discretion—Whether the petition need include a prayer for the court's discretion—Whether a discretion statement need be lodged.

On a petition for judicial separation by a spouse who has committed adultery no prayer for the exercise of discretion by the court need be inserted in the petition, nor need a discretion statement be lodged, since the relevant rules (Matrimonial Causes Rules, 1957, r. 4 (4)* and r. 28 (1)*) refer only to discretion to grant a decree nisi which a decree for judicial separation is not.

[**Editorial Note.** This decision does not prejudice any power of the court to require a discretion statement in a particular case, or the obligation of a party to make disclosure (see the argument at p. 855, letter C, post).]

As to discretion in cases of judicial separation, see 12 HALSBURY'S LAWS (3rd Edn.) 311, para. 622; and for cases on the subject, see 27 DIGEST (Repl.) 427-431, 3582-3604.

For the Matrimonial Causes Act, 1950, s. 4, s. 14 (1), see 29 HALSBURY'S STATUTES (2nd Edn.) 394, 401.

For the Matrimonial Causes Rules, 1957, r. 4 (4), r. 28, see 10 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 221, 231.]

Case referred to:

Apted v. Apted and Bliss, [1930] P. 246; 99 L.J.P. 73; 143 L.T. 353; 27 Digest (Repl.) 428, 3588.

Petition and cross petition.

The husband, Patrick Haniver, by his petition sought a divorce on the ground of a single act of adultery committed in February, 1951, by the wife, Anne Haniver, resulting in the birth of a child in the following November. He alleged that the adultery had not been condoned and asked for the court's discretion in respect of his own admitted adultery. The wife, by her answer, sought a decree of judicial separation on the ground of the husband's adultery and admitted that she had given birth to a male child of which the husband was not the father but contended that on the occasion when the child was conceived she was not conscious so that the act was not hers. The parties were practising Roman Catholics and were married in the Irish Republic in 1945, there were two children of the marriage, both girls, born in 1945 and 1947 respectively. The case is reported only on the question whether a discretion statement is necessary in a decree of judicial separation, where a spouse seeking such a decree has denied adultery, yet has been found to have committed it.

R. J. A. Temple, Q.C., and *H. S. Law (J. A. P. Hazel with him)* for the husband.
J. Stirling, Q.C., and *D. A. McL. Kemp* for the wife.

* Matrimonial Causes Rules, 1957, r. 4, provides, so far as relevant: "(4) The petition shall conclude with . . . in appropriate cases, a prayer that the court will exercise its discretion to grant a decree nisi notwithstanding the adultery of the petitioner during the marriage."

Rule 28 (1) states: "Every party to a matrimonial cause praying that the court shall exercise its discretion to grant a decree nisi notwithstanding his adultery shall lodge in the Divorce Registry a statement (in this rule called 'a discretion statement') signed by him or his solicitor, stating that the court will be asked to exercise its discretion in his favour notwithstanding his adultery, and setting forth particulars of the acts of adultery committed and of the facts which it is material for the court to know for the purpose of the exercise of its discretion."

A **SACHS, J.**, having reviewed the evidence and having found condonation by the husband and accordingly having rejected the prayer in his petition, continued: I next turn to the answer. On the footing of the facts as I have found, counsel for the husband very properly said that there is at present an objection to there being a decree of judicial separation because there is no prayer for discretion and no discretion statement. On that matter I now propose to
B ask counsel for the wife for his comments.

D. A. McI. Kemp for the wife referred to s. 14 (1) of the Matrimonial Causes Act, 1950, and s. 4 of the same Act, defining the court's duty on a petition for judicial separation. He accepted that the petitioner, the wife, must ask the court at the hearing to exercise its discretion in her favour, and that she must
C make a full disclosure of all relevant matters to the court. Further, he accepted that if the court thought fit it could in its inherent jurisdiction require the wife in this case to file a discretion statement, but submitted that no statute or rule of court imposed a mandatory duty on the court to require the petition to be amended to include a prayer for the exercise of discretion or to require a discretion statement to be filed. If the court were satisfied that all the relevant
D material was before it and that this was a proper case for the exercise of its discretion, it could exercise its discretion without ordering the wife in this case to go through an unnecessary procedural formality. The only requirement for lodging a discretion statement prescribed by rules of court was contained in r. 28 (1) of the Matrimonial Causes Rules, 1957, and the only express requirement for including a prayer to exercise discretion was in r. 4 (4). There had been
E corresponding provisions in previous matrimonial causes rules. These requirements applied only where the petitioner sought a grant of a decree nisi, and as the decree for judicial separation was a final decree in the first instance, the rules did not apply. *RAYDEN ON DIVORCE* (7th Edn.), p. 244, note (c), supported this proposition, whereas *LATEY ON DIVORCE* (14th Edn.), p. 669, was against it. It was submitted that the reference in *LATEY* to s. 14 (1) of the
F Matrimonial Causes Act, 1950, was incorrect as the rules did not apply to a petition for judicial separation.

SACHS, J.: You have *RAYDEN* on your side and *LATEY* against you. These rules sprang into being as a result of *Apted v. Apted and Bliss* (1).

R. J. A. Temple, Q.C., for the husband, submitted that as s. 14 (1) of the
G Matrimonial Causes Act, 1950, said:

"... the foregoing provisions of this Act relating to the duty of the court on the presentation of a petition for divorce, and the circumstances in which such a petition shall or may be granted or dismissed, shall apply in like manner to a petition for judicial separation"

H it would seem proper to infer that the same rules should be applied in this respect on petition for judicial separation as would be applied on petition for divorce.

SACHS, J.: On this question whether a prayer for discretion in the pleadings and a discretion statement are here needed, there is a conflict between
I the two standard text-books, *RAYDEN ON DIVORCE* (7th Edn.), at p. 244, and *LATEY ON DIVORCE* (14th Edn.), at p. 669. The rules relating to the asking of discretion in a petition and the filing of a discretion statement appear to me to have been construed (if I may so put it) as they stand. When one looks at the wording of the Matrimonial Causes Rules, 1957, r. 4 (4) and r. 28 and its predecessors and notes that in each case the wording relates to a prayer "that the court shall exercise its discretion to grant a decree nisi", it seems to

me that the relevant rules cannot apply to prayers for a judicial separation. It accordingly follows that counsel for the wife is right in his submission. A

In those circumstances it is for me to come to a conclusion whether I will exercise my discretion without asking for the petition to be amended and without asking for a discretion statement to be filed. I have come to the conclusion that this is eminently a case where that discretion should be exercised and I grant a decree of judicial separation accordingly. B

Decree accordingly on the cross-prayer of the wife.

Solicitors: *Young, Jones & Co.* (for the husband); *Dollman & Pritchard* (for the wife).

[*Reported by N. P. METCALFE, Esq., Barrister-at-Law.*] C

Re J.S. (an infant). D

[CHANCERY DIVISION (Roxburgh, J.), November 17, 1959.]

Adoption—Appeal—Appeal from juvenile court—Practice—Note of evidence—Confidential reports to be supplied to judge—Adoption Act, 1958 (7 & 8 Eliz. 2 c. 5), s. 10—Adoption (Juvenile Court) Rules, 1959 (S.I. 1959 No. 504), r. 9 (2). E

Adoption—Court—Juvenile court—Constitution—Notice to justice to attend insufficient of itself to amount to ensuring attendance within Juvenile Courts (Constitution) Rules, 1954 (S.I. 1954 No. 1711), r. 11, cf. r. 12 (1) (3).

Joint applicants applied to a juvenile court for an adoption order. The court was composed of two male justices only; a woman justice had been given notice to attend but was not present. At the hearing one or both of the applicants was or were sworn and questioned. No notes of evidence were taken at the hearing. The applicants were not represented by a solicitor or counsel. The adoption order was refused. The applicants gave notice of appeal and asked for copies of the confidential reports on which one of the applicants had been questioned and on which the justices had based their refusal of the order. The applicants also asked for notes of evidence taken at the hearing. The clerk to the justices refused to supply copies of the reports as they were confidential. On the appeal there was no evidence of what circumstances caused the absence of the woman justice. F

Held: (i) merely to give notice to a justice to attend, without inquiring whether she could attend, was not "ensuring" her attendance within r. 11 of the Juvenile Courts (Constitution) Rules, 1954, and the proceedings were null and void. G

(ii) a new trial would be ordered because it was essential that the appellate court should have a note of the evidence of the applicants before the juvenile court, but there was no note by the justices' clerk and affidavit evidence by him of what happened would not have been acceptable. H

Per CURIAM: parties had no right to see the confidential reports made to the juvenile court pursuant to the Adoption (Juvenile Court) Rules, 1959, r. 9, save so far as the justices (or, on appeal, the judge) thought fit to disclose their contents at the hearing, but it was the duty of the justices to forward the reports to the judge's clerk for the information of the appellate court (see p. 859, letter B, post). I

Appeal allowed.

- A [As to applications for adoption orders, see 21 HALSBURY'S LAWS (3rd Edn.) 234, para. 507.

For the Adoption Act, 1958, s. 10, see 38 HALSBURY'S STATUTES (2nd Edn.) 549.]

Case referred to:

- B *R. v. City of Liverpool JJ., Ex p. W.*, [1959] 1 All E.R. 337; [1959] 1 W.L.R. 149.

Motion.

This was a motion of appeal adjourned into open court from the refusal of an adoption order by the justices of the petty sessional division of Lawford's Gate in the county of Gloucester sitting as a juvenile court on Aug. 26, 1959. The grounds of appeal were that the justices did not properly constitute a juvenile court in accordance with the provisions of r. 12 of the Juvenile Courts (Constitution) Rules, 1954, in that the court consisted only of two justices, neither of whom was a woman; and that on the facts proved or admitted the justices were not justified in refusing to make an order. The facts are set out in the judgment.

- D *R. C. Thompson* for the applicants (appellants).
S. R. Benson for the justices.
T. A. C. Burgess for the guardian ad litem.

ROXBURGH, J.: This is an appeal against the refusal of an adoption order by the justices of the petty sessional division of Lawford's Gate in the county of Gloucester, sitting on Aug. 26, 1959; and I adjourned it into court because it raises important questions of practice and procedure relating to appeals under the Adoption Act, 1958. In fact this is the first of such appeals.

On Aug. 29, 1959, the intending adopters, who were a husband and his wife, applied to the clerk of the justices in these terms:

- F "Dear Sir, As you are aware, on Wednesday last, the 26th inst., my wife and I applied jointly at your court to adopt the above named infant. That application was dismissed. As I intend forthwith to challenge this decision in the High Court I shall be glad if you will send me the following documents.

"(1) Copy of the reasons of your justices for dismissing the application.

"(2) Copy notes of evidence taken at the hearing.

- G "(3) Copy report of the guardian ad litem and of the report of the Gloucestershire welfare officer handed to the justices (so far I have had no opportunity of seeing or hearing what was contained in these documents).

"(4) The names of the two justices who constituted the court, they were both male, you will remember."

- H The clerk to the justices replied very promptly on Aug. 31, 1959, as follows:

"I have today received your letter of the 29th inst. and, no doubt, you or your solicitors will serve the necessary parties with formal notice of the appeal. [The names of the justices were given and the letter continued:] and a woman justice of the peace was given notice to attend but did not do so. The justices present considered it expedient in the interests of justice to hear the application. As regards the copies of the reports you require, these were confidential reports for the use of the court (see r. 9 (2) of Magistrates' Courts—Adoption (Juvenile Court) Rules, 1959, (1)). The justices questioned you on certain portions of the report. I am consulting the two justices and will obtain from them their reasons for dismissing your application. Notes were not taken on behalf of the justices at the hearing. I

I

will write you again when I have seen and consulted the justices but in the meantime no doubt you will serve your notices of intention to appeal.” A

On Sept. 4, 1959, the clerk replied to the solicitors then acting for the applicants giving the magistrates' reasons. While this is a confidential matter it is essential that I should make a reference to that. It begins:

“The court was not satisfied that the order, if made, would be for the welfare of the infant. In coming to this conclusion the court considered the confidential reports of the guardian ad litem and of the senior child care officer of the children's department of the local authority, and also questioned the applicants upon certain portions of such reports.” B

Then they summarised what appeared from the reports—and that I do not propose to read. They then made comments on the attitude of the applicants and concluded: C

“Taking all facts into consideration the court concluded that there were good and sufficient reasons for refusing to make the order applied for, and to make the order would not be for the welfare of the infant.”

Four matters of importance arise on the correspondence which I have read. I will deal first of all with the constitution of the court, because though that is a matter of lesser importance it is a matter of some public interest. May I say before I go further how much I am indebted to all three counsel for the assistance they have given me. It is clear from the rules to which I will refer that it is quite proper for the justices to hear an adoption application in a juvenile court. There is no doubt about that. The provisions that regulate juvenile courts are to be found in the Juvenile Courts (Constitution) Rules, 1954, (2), and the relevant rules are 11 and 12, which I will read. D

“Rule 11. The justices to sit in each juvenile court shall be chosen from the panel, in such manner as the panel determine so as to ensure that para. (1) of r. 12 . . . of these rules can be complied with.”

“Rule 12 (1). Each juvenile court shall be constituted of not more than three justices and, subject to the following provisions of this rule, shall include a man and a woman.” E

“(3) If at any sitting of a juvenile court no man or no woman is available owing to circumstances unforeseen when the justices to sit were chosen under r. 11 of these rules, or if the only man or woman present cannot properly sit as a member of the court, and in any such case the other members of the panel present think it inexpedient in the interests of justice for there to be an adjournment, the court may be constituted without a man or, as the case may be, without a woman.” F

Now it is, of course, conceded that no woman sat at the hearing of this case. G

The word “ensure” is important in r. 11. We are not told whether the lady magistrate in question was unable to attend because of ill health or anything about her. Merely to give a woman justice notice to attend without making any inquiry whether she is able to attend is not “ensuring” and cannot be within the meaning of r. 11. Before justices can exercise the powers conferred on them by r. 12 (3) they have to be satisfied that the absence of any woman justice is owing to circumstances unforeseen when the justices to sit were chosen and there is no evidence what those circumstances were here and therefore a fortiori whether they were unforeseen. Therefore the condition precedent which has to be fulfilled before the justices are given the option to say it is inexpedient that there should be an adjournment was not fulfilled. Therefore on that ground the proceedings in that court were null and void. H

There is another and much more serious difficulty in the present case. The outstanding matters are the reports, the notes of evidence and the justices' I

A reasons. So far as the reports are concerned it is necessary to have regard to the Adoption (Juvenile Court) Rules, 1959, (3). Rule 8 provides for the appointment of a guardian ad litem of the infant and r. 9 provides that the guardian ad litem on completing his investigations shall make a confidential report in writing to the court. It seems to me quite plain that the parties have no right to see the reports except in so far as the justices or the judge think fit to disclose their contents at the hearing. On the other hand it must be the duty of the justices in the case of an appeal to forward to the judge's clerk the confidential reports for the information of the statutory court of appeal which exists for the hearing of these cases. Especially must that be so when, as in the present case, the justices' reasons were based mainly on those reports. The justices in my judgment were quite correct in refusing to forward copies to the appellants but they must send copies to the judge's clerk.

Now I come to the next matter, which is notes of evidence taken at the hearing. Under s. 10 (1) of the Adoption Act, 1958:

"Where, on an application made in England to a magistrates' court, the court makes or refuses to make an adoption order, an appeal shall lie to the High Court."

Rules have recently been made—in fact they are R.S.C. (No. 1), 1959, (4)—the relevant provisions of which are as follows:

"1. In Ord. 55A (which relates to proceedings under the Guardianship of Infants Acts, 1886 and 1925), after r. 8 there shall be added the following heading and new rule.

"Appeals under s. 10 of Adoption Act, 1958.

"9. An appeal under s. 10 of the Adoption Act, 1958, from the making or refusal of an adoption order by a magistrates' court shall lie to a single judge of the Chancery Division and the provisions of r. 4 and r. 6 of this order shall apply to the appeal as they apply to an appeal under the Act of 1886 or the Act of 1925."

It is plain that the justices asked some questions, at any rate of the male appellant and possibly of the female appellant and I have been told that the appellant or appellants were sworn before they answered the questions. I do not think that this makes any difference but as it is material on which the justices proceeded it is essential they should have had a note made of the questions and answers in order that the appellate court should have before it the whole of the material on which the justices acted. As regards notes of evidence there is not, so far as I know, any statute or rule which requires a note of evidence to be made. On the other hand it is not right to say that juvenile courts have some special dispensation. In fact r. 33 of the Adoption (Juvenile Court) Rules, 1959, provides that:

"Save in so far as special provision is made by these rules, proceedings on an application shall be regulated in the same manner as proceedings on complaint . . ."

It is plain on the rules that no differentiation may be drawn between proceedings on complaint and proceedings before juvenile courts under this Act. The question is: what is the procedure on a complaint? So far as I know, there is no statutory rule that on a complaint a note of the evidence should be taken. On the other hand, during the many years in which I have exercised jurisdiction in appeals under the Guardianship of Infants Acts I have never hitherto met a case where a note was not made and supplied to me. It is beyond my understanding how any appeal court can deal with any question which

is not purely a question of law (and most of the cases which come before A
appeal tribunals are questions of law or questions of mixed fact and law) unless
some record be kept of the evidence given.

It is true that by the combined operation of R.S.C., Ord. 55A, r. 6 (6) and
R.S.C., Ord. 59, r. 36, I have to apply to this type of appeal the rules not of
procedure in the Chancery Division but the rules of procedure in the Court B
of Appeal. Under R.S.C., Ord. 59, r. 35 (c) I find

“ if the notes of the judge of the inferior court are not produced, the
appeal may be heard and determined upon such other evidence of what
occurred in the inferior court as the High Court may deem sufficient.”

Now there is only one other possible source of evidence in a case such as I
am dealing with, because there was no counsel and the appellants had no solicitor, C
and that is an affidavit by the clerk to the justices. If the clerk had made a
note I should not need the affidavit because I should have the note. If he
did not make a note, how can I possibly accept his evidence of what happened?
If that were the right way to do it, he would be subject to cross-examination.
My duties here are governed by the rules applicable to the Court of Appeal. D
I have to consider, supposing there were a case in which there was no shorthand
writer and questions arose in the Court of Appeal as to what evidence was given
before me, whether it is conceivable that the Court of Appeal would order me
to make an affidavit as to what took place and then allow counsel to cross-examine
me before it. I leave the Court of Appeal to supply the answer but I suspect
it would be in the negative. If that is so, I should answer in the negative in E
this case because the analogy is complete.

It is quite clear that in proceedings for certiorari evidence of what happened
in the inferior court can be given by an affidavit of the clerk (*R. v. City of Liver-*
pool JJ., Ex p. W. (5)) but these proceedings are not for certiorari. They are
an appeal governed by quite a different set of rules. In my judgment it would
be a disaster if a practice were introduced under which a clerk was not bound F
to keep any notes of evidence but could make an affidavit as to what evidence
was given. Therefore, I say without hesitation that I should not deem an
affidavit by the clerk sufficient evidence under R.S.C., Ord. 59, r. 35 (c). What
then can I do? It seems to me that I can do nothing except order a new trial.

Subject to any overruling by the Court of Appeal, I shall decline to hear
appeals in adoption order cases in which there is no note of the evidence, if G
evidence has been given. There may be cases in which no evidence is given and
I will deal with a case of that sort when it first arises, but in the present case
evidence was given and in any case in which evidence is given I shall decline
to entertain the appeal, if there is no note of evidence, except for the purpose
of ordering a new trial as here.

There is one further matter, and that is the question of the reasons for the H
decision. I have now the reasons for the decision and, therefore, nothing turns
on that in the present case. There is no statutory requirement that the
“ reasons ” should be supplied to me either under the Adoption Act, 1958, or
under the Guardianship of Infants Acts. The question was raised some time
ago and, after appropriate consultation, I gave a practice direction (6), on which I
shall continue to act unless and until it is overruled or discharged. I

The position, then, is this. Before I can give the preliminary appointment
referred to in R.S.C., Ord. 55A, it is necessary for the justices to supply to my
clerk a note of the evidence, if there was any oral evidence, a statement of
the justices' reasons for the decision, and the confidential report or reports.
When I refer to my clerk, the normal method of supplying everything except

- A the confidential report is by the appellant's solicitors in due course sending those documents to my clerk. I do not mean to alter that practice by what I have just said. So far, however, as the confidential reports are concerned, they should not be supplied to the appellant or to his solicitor but should be transmitted direct to my clerk. They must be transmitted before I can give a preliminary appointment. The only other thing, apart from the merely ministerial function of fixing a day, which is dealt with at the preliminary appointment, is the question of adducing further evidence. It has become the habit for everybody to apply for leave to adduce further evidence, but no special costs have hitherto been awarded in respect of those applications which normally are declined. It is to be remembered that my duty in connexion with any further evidence is similar to the duty of the Court of Appeal in cases of appeals from the High Court, and my practice does not differ in any way from that of the Court of Appeal. The practice is invariably to allow further evidence to be adduced in regard to material matters which have occurred since the hearing before the justices, unless the matters are so fundamental that it seems to me on the face of it to be a case for a new trial. For the purposes of arriving at that sort of conclusion I read the justices' reasons and the notes of the evidence at or before the preliminary appointment. That is why I have to have these documents before I can give the preliminary appointment, and I may add the confidential reports if there is any question of that kind. Apart from subsequently occurring facts, special grounds for adducing further evidence have to be shown. That is clear from the rules. The special reasons which have to be adduced in order to justify the further evidence almost invariably point to the desirability of a new trial. Therefore, the matter necessarily goes over until the appeal is heard in court. I mention that in order to show how essential it is that I should have all the necessary documents before the preliminary appointment takes place.
- E

- So far as the present case is concerned, while it would be quite unfair to criticise the justices who were confronted with a novel situation because the Adoption Act, 1958, has only been in force a short time, I feel that I must order a new trial on the two grounds which I have already stated. One is that the court was not properly constituted and the second is that there is no note whatever of the evidence, without which I could not hear the appeal. The new trial will be before a proper bench of justices. The two justices who sat before may sit again, but a woman justice must also be in attendance.

- G The appeal is allowed.

Appeal allowed.

Solicitors: *Rider, Heaton, Meredith & Mills*, agents for *Bobbett Bros.*, Bristol (for the applicants); *Ridsdale & Son*, agents for *Latchams & Montague*, Chipping Sodbury (for the justices); *Field, Roscoe & Co.*, agents for *Clerk to Gloucestershire County Council* (for the guardian ad litem).

[*Reported by E. COCKBURN MILLAR, Barrister-at-Law.*]

PRACTICE DIRECTION.

PROBATE, DIVORCE AND ADMIRALTY DIVISION.

Divorce—Practice—Children—Judge not satisfied at hearing as to arrangements—Judge's summons to be issued by party in whose favour decree nisi pronounced.

The President has directed that if on pronouncing a decree nisi in a divorce suit the judge is not satisfied with the arrangements for the children and does not reserve the matter to himself by adjourning the case into chambers or otherwise, the party in whose favour the decree nisi is pronounced should issue a judge's summons, as if for a dispute about custody.

B. LONG,
Senior Registrar.

Nov. 30, 1959.

WILTSHIRE v. FELL.

[COURT OF APPEAL (Hodson and Ormerod, L.JJ.), November 16, 1959.]

Debt—Committal—Revocation of order—County court order—Whether county court judge has jurisdiction to revoke order—Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5.

County Court—Jurisdiction—Committal order for debt—Revocation of order—Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5.

A county court judge who has made an order of committal for debt under s. 5* of the Debtors Act, 1869, is functus officio and cannot revoke the committal order.

Evans v. Wills ((1876), 1 C.P.D. 229) applied.

Per HODSON, L.J.: that does not take away from the judge the power to vary the effect of the order, or to suspend its operation, or in any way remove his control of the case (see p. 865, letter B, post).

Appeal allowed.

[**Editorial Note.** As regards the dictum stated above, a court has jurisdiction under proviso (2) to s. 5 of the Debtors Act, 1869, to rescind or vary an order for payment by instalments (see p. 863, letter H, post; and, e.g., *Cockburn v. Cockburn*, [1957] 3 All E.R. 260 at p. 262), and a county court has jurisdiction to suspend the execution of an order for commitment (see C.C.R., G Ord. 25, r. 54 (2)).

As to the order on hearing of a judgment summons, see 2 HALSBURY'S LAWS (3rd Edn.) 646, para. 1281.

As to a county court judge's power to discharge persons imprisoned for debt, see 9 HALSBURY'S LAWS (3rd Edn.) 298, para. 719.

For the Debtors Act, 1869, s. 5, see 2 HALSBURY'S STATUTES (2nd Edn.) H 294.]

Case referred to:

Evans v. Wills, (1876), 1 C.P.D. 229; 45 L.J.Q.B. 420; 34 L.T. 679; 40 J.P. 552; 5 Digest 1042, 8513.

Interlocutory Appeal.

A judgment creditor appealed from an order of His Honour JUDGE ELDER-JONES made at Devizes County Court on July 13, 1959, revoking a committal order he had made under the Debtors Act, 1869, on Jan. 19, 1959. The facts are stated in the judgment of HODSON, L.J.

G. G. Macdonald for the judgment creditor.

The debtor did not appear and was not represented.

* The relevant parts of s. 5 are printed at p. 863, letters E to H, post.

- A HODSON, L.J.:** A judgment was obtained against the debtor on Feb. 14, 1955, for £24 13s. 7d. including costs. On that an instalment order was made under which the debtor was to pay 2s. 6d. a week. He made default in the instalment order, and on May 14, 1956, he was committed to prison for fourteen days in respect of £4 13s. 4d. accumulation of instalments. That order was suspended on the payment of 7s. 6d. per week. The debtor made certain payments but on Jan. 19, 1959, there was £19 2s. 6d. outstanding. An order for committal for seven days was made which was suspended so long as 2s. 6d. a week was paid. A warrant was issued on Mar. 25, 1959, but on 10s. being paid to the officer and an offer of 5s. a week being made the warrant was not executed. On July 13, 1959, the matter again came before the learned judge, who decided that, having regard to the genuine inability of the debtor to pay
- C** from time to time owing to the misfortune of his wife's mental condition, and to the fact that he was not trying to avoid his obligations, he would adopt the course of revoking the committal order. It is against that revocation that the creditor has appealed.

- There are several grounds of appeal, but the only ground of appeal which it is necessary to discuss is that the learned judge had no power to make the order
- D** for revocation. Imprisonment for debt now depends on the Debtors Act, 1869, which took the place of the old procedure for imprisonment. The old procedure involved the satisfaction of debt by imprisonment. By the Debtors Act, 1869, there could be no imprisonment under s. 5 to operate as a satisfaction or extinguishment of any debt, but the power to commit to prison was still retained, although the Act was intended to abolish imprisonment for debt and to punish
- E** fraudulent debtors and for other purposes. In s. 5 certain exceptions are set out which provide that the court

"may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent court."

- F** It is unnecessary to read the whole of that section, which provides (1) that the jurisdiction exercised under it shall be exercised in respect of a judgment in the county court by a judge or his deputy

- " . . . where it is proved to the satisfaction of the court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same.
- G**

"Proof of the means of the person making default may be given in such manner as the court thinks just; and for the purposes of such proof the debtor and any witnesses may be summoned and examined on oath, according to the prescribed rules . . .

- H** "For the purposes of this section any court may direct any debt due from any person in pursuance of any order or judgment of that or any other competent court to be paid by instalments, and may from time to time rescind or vary such order: "

The meaning of that last paragraph at first sight is not very clear, but it seems that the words "may from time to time rescind or vary such order" must relate back to the word "direct" in the first line of the paragraph, and those words enable the court to vary a direction as to any debt due from any person under any order or judgment. It does not seem to me that "such order" can relate back to the words "any order or judgment", as otherwise it would be doing the surprising thing of enabling the judge to vary a judgment which had previously been delivered. There are no other words in that section or elsewhere in the Act which enable a judge to revoke an order for committal to prison which he has made.

(1) These provisions are contained in s. 5 provisos (1) (c) and (2).

In contrast, there is s. 27 of the Administration of Justice Act, 1956, which provides for penalties in the case of debtors failing to attend on the hearing of a judgment summons for examination as to their means. That section provides that a judge may in such a case make an order committing a debtor to prison for a period not exceeding fourteen days in respect of the failure or refusal—that is the failure to attend or the refusal to give evidence, having attended. Subsection (4) of s. 27 provides:

“The judge may at any time revoke an order committing a person to prison under this section and, if he is already in custody, order his discharge.”

There is therefore the omission from the Act of 1869 of any power such as that contained in the Act of 1956 to revoke an order made for committal to prison. There is furthermore some assistance to be derived in this matter from *Evans v. Wills* (2). It was held in that case that where the debtor has been committed on a judgment summons under the Debtors Act for non-payment of a debt a second warrant of commitment cannot be issued against him in respect of the same debt. It was pointed out that where the order or judgment makes the debt payable by instalments the debtor may be committed for the full period of six weeks for default in payment of the instalments.

ARCHIBALD, J., who delivered the second judgment following *COCKBURN, C.J.*, referred to the old law and the introduction of the Debtors Act, 1869, which now regulates the position of debtors. He read s. 5 and proceeded (3):

“The question is whether an order of commitment may be made more than once for the same debt. The proviso in s. 5 seems to me only to have altered the law to the extent that is expressed: it gives no authority to commit ‘from time to time’. I do not therefore think the judge had any power in this case to make the second order of commitment. He must exercise the authority given to him once for all. The second proviso in s. 5 imposes (amongst others) this restriction upon the judge’s power, viz., that ‘such jurisdiction shall only be exercised where it is proved to the satisfaction of the court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects to pay the same’. And it contains this further enactment, that, ‘for the purposes of this section, any court may direct any debt due from any person in pursuance of any order or judgment of that or any other competent court to be paid by instalments, and may from time to time rescind or vary such order’. Thus, there may be a fresh imprisonment for default in payment of each instalment.”

Then ARCHIBALD, J., set out the proviso (4) that no imprisonment should operate as a satisfaction of the debt, and continued: “But for that proviso, the imprisonment would have operated as a satisfaction of the debt, even as against the goods of the debtor.” *COCKBURN, C.J.*, in his judgment said (5): a judge

“... may make an order for the commitment of the debtor for six weeks, or any less period; but, having once done that, he is functus officio. We cannot give the judge a power which the legislature has not conferred upon him. And this is in analogy to the old law. When a man was once arrested on a ca. sa., he could not if let out be imprisoned a second time for the same debt. It is true that where, under this Act, an order is made for payment of the debt by instalments, each instalment becomes a separate debt for default in payment of which a separate order of commitment may be made. This, no doubt, is somewhat anomalous; for the debtor may thus be imprisoned under repeated commitments for a whole year.

(2) (1876), 1 C.P.D. 229.

(3) (1876), 1 C.P.D. at p. 235.

(4) This provision is contained in s. 5 proviso (2) of the Debtors Act, 1869; 2 HALSBURY'S STATUTES (2nd Edn.) 295.

(5) (1876), 1 C.P.D. at p. 234.

A But there is the enactment, and we must give effect to it. It does not, however, by any means follow that, where the debt is not ordered to be paid by instalments, there can be more than one commitment for the same default. I do not think the Act has given any such power."

B In my judgment, the position is that the Act having given no power to revoke a committal order, the committal order which has been made must stand and can only be revoked on appeal. That does not in any way take away from the learned judge the power to vary the effect of the order, or to suspend its operation, or in any way remove his control of the case.

C The difficulty in which the creditor is, if the order is revoked, is that he cannot obtain any further sanction in respect of the amount which was involved in the order of Jan. 19, 1959, in the future. For these reasons, I think that the appeal must be allowed and the order of the learned judge must be varied in so far as he has purported to revoke the order for commitment. He did, in fact, having revoked the order for commitment, make a different instalment order, which, I suppose, would operate, as a term of the suspension of the committal until the matter is further reviewed by the learned judge, at the rate of 5s. a week. All that this court is doing and all that it is asked to do, is to reverse the learned judge's revocation of the committal order itself.

ORMEROD, L.J.: I agree. The power which is given to a county court judge to commit a debtor to prison if he is in default in payment of a judgment is a statutory power and depends on s. 5 of the Debtors Act, 1869. That section sets out precisely the circumstances in which a judge has power to commit, and the maximum period for which he is empowered to commit, a debtor to prison, but the section makes no provision for the learned judge to revoke the order if, in the circumstances, he should think that a proper thing to do. As there is no power to revoke in s. 5 or in any other section, so far as I am aware, it would appear that the only means of having an order set aside is by appeal. Whether in fact the revoking of an order in this way would mean that a judgment creditor would be unable in future to obtain another judgment summons, and thereby be deprived of his sanction, as has been suggested in the argument, is a matter about which I am not entirely satisfied. It might be that the revoking of an order would have the effect that no order had in effect been made, and, therefore, another committal order could be made in respect of that money. However, that is not a matter involved in this appeal and I make no further comment on it.

G So far as the power of the learned judge to revoke an order which he has made under this section is concerned, I agree that he has not any such power. The matter is summed up as neatly as it can be summed up by the words of COCKBURN, C.J., in *Evans v. Wills* (6), which have just been read, where he said:

H "he may make an order for the commitment of the debtor for six weeks, or any less period; but, having once done that, he is functus officio."

I agree that this appeal should be allowed.

Appeal allowed; order of the county court judge revoking the committal order reversed.

Solicitors: *Vallance & Vallance*, agents for *Parry, Mackan & Hamilton*, Bristol (for the judgment creditor).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

FRENCH AND ANOTHER v. ELLIOTT.

[QUEEN'S BENCH DIVISION (Paull, J.), November 10, 11, 13, 1959.]

Agriculture—Agricultural holding—Notice to quit—Notice stating reasons—Two notices—Second notice stating same reason as first and a new reason—Arbitration application by tenant in regard to first notice before delivery of second notice—Arbitration not yet determined—Whether second notice to quit was good as one reason was good and the other was bad—Whether operation of second notice was suspended pending determination of arbitration under the first—Agricultural Holdings Act, 1948 (11 & 12 Geo. 6 c. 63), s. 24 (2) (d)—Agriculture (Control of Notices to Quit) Regulations, 1948 (S.I. 1948 No. 190), reg. 7.

Landlord and Tenant—Double value—"Wilfully" holding over after determination of the term—Landlord and Tenant Act, 1730 (4 Geo. 2 c. 28), s. 1.

A notice to quit an agricultural holding, being a notice in which a statement of the reason within s. 24 (2) of the Agricultural Holdings Act, 1948, has to be included, is not rendered invalid merely by stating in addition to a good reason a second reason that is bad (see p. 873, letter I, post).

On Sept. 10, 1956, landlords served on the tenant of a farm, whose tenancy came within the Agricultural Holdings Act, 1948, a notice (dated Sept. 8, 1956) to remedy alleged breaches of covenant within two months from the date of service of the notice on him. By a further notice dated Oct. 5, and served on Oct. 6, 1956, the landlords required the tenant to pay within two months from service of this notice on him one quarter's rent due in respect of the tenancy of the farm. By a notice to quit dated Nov. 13, 1956, the landlords required the tenant to give up possession of the farm on Mar. 25, 1958; the notice to quit stated that it was given in pursuance of s. 24 (2) (d) of the Agricultural Holdings Act, 1948, for the reason that the tenant had failed to comply with the notice of Sept. 8 requiring him to remedy the breaches of covenant. The tenant, as he was entitled to do under the Agriculture (Control of Notices to Quit) Regulations, 1948, regs. 4 and 5, then served a counter-notice on the landlords requiring that all questions arising out of the reason stated in the notice to quit of Nov. 13, should be determined by arbitration. The effect of this was (by reg. 7) to suspend the operation of the notice to quit pending the determination of the arbitration. Neither party took any further steps regarding arbitration. The tenant had not paid the rent required under the notice of Oct. 5 by 5.30 p.m. on Dec. 6, 1956, and the landlords therefore sent to him by post a second notice to quit, dated Dec. 6 and delivered on Dec. 7, 1956, stating in a letter accompanying the notice, that the notice to quit was given "by reason of the fact that your rent has not been received at the end of normal office hours, viz., 5.30 p.m.*, on this day". The notice to quit of Dec. 6 required the defendant to deliver possession on Mar. 25, 1958, and stated that it was given in pursuance of s. 24 (2) (d)† of the Act of 1948 for two reasons, viz., first, that at the date of the notice the tenant had failed to comply with the notice of Oct. 5 to pay rent and, second, that at the date of the giving of the notice he had failed to comply with the notice of Sept. 8 to remedy the breaches of covenant. In an action by the landlords for possession of the farm, mesne profits and double value as from Mar. 25, 1958,

* The two month period specified in the notice of Oct. 5, 1956, would have elapsed at midnight on Dec. 6, 1956.

† The effect of giving a notice to quit under s. 24 (2) (d) of the Agricultural Holdings Act, 1948, is that the tenant is thereby precluded from serving a counter-notice under s. 24 (1), the result of serving which would be that the notice would be ineffective unless the Minister should consent to its operation.

- A** **Held:** (i) the notice to quit of Dec. 6, 1956, was a valid notice entitling the plaintiffs to possession on Mar. 25, 1958, for the following reasons—
- (a) the validity of the reason of non-payment of rent given in the notice to quit must be considered at the time when the notice was delivered to the defendant, viz., Dec. 7, 1956, and at that time the reason was a good reason.
- B** (b) the notice to quit was valid for the reason of non-payment of rent that it stated, notwithstanding that the second reason contained in the notice was one in respect of which the notice could not be enforced until after the arbitration.
- (c) the operation of the notice to quit, based on the reason of non-payment of rent, was not suspended pending the determination of the arbitration on all questions under the notice to quit of Nov. 13, 1956, since, if two concurrent notices to quit were given for different reasons and arbitration was required in regard to one only of the notices the other remained an effective notice.
- C** (ii) in the circumstances the tenant's holding over after the determination of his tenancy on Mar. 25, 1958, was not done "wilfully" within the Landlord and Tenant Act, 1730, s. 1, and the claim for double value failed.
- D** [**Editorial Note.** The proposition stated at p. 866, letter C, ante, is a similar conclusion to that reached, in relation to a somewhat different type of notice between landlord and tenant, in *Silvester v. Ostrowska*, p. 642, ante, following (see at p. 651) a dictum of LORD BUCKMASTER, L.C., in *Fox v. Jolly* ([1916] 1 A.C. at p. 15) approving *Pannell v. City of London Brewery Co.* ([1900] 1 Ch. 496).
- E** As to the position where counter-notices in relation to notices to quit agricultural holdings are not available, see 1 HALSBURY'S LAWS (3rd Edn.) 284, 285, para. 601; and as to the right to arbitration, see *ibid.*, pp. 285, 286, para. 602. As to double value, see 23 HALSBURY'S LAWS (3rd Edn.) 707, para. 1448; and for cases on the subject, see 31 DIGEST (Repl.) 607, 608, 7222-7230.
- F** For the Agricultural Holdings Act, 1948, s. 24 (2), see 28 HALSBURY'S STATUTES (2nd Edn.) 46. For the Agriculture (Control of Notices to Quit) Regulations, 1948, paras. 4 and 5, see 1 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 98, 99. For the Landlord and Tenant Act, 1730, s. 1, see 13 HALSBURY'S STATUTES (2nd Edn.) 850.]
- G** Cases referred to:
- Budge v. Hicks*, [1951] 2 All E.R. 245; [1951] 2 K.B. 335; 2 Digest (Repl.) 15, 64.
- Coates v. Diment*, [1951] 1 All E.R. 890; 2 Digest (Repl.) 82, 463.
- Cowan v. Wrayford*, [1953] 2 All E.R. 1138; [1953] 1 W.L.R. 1340; 2 Digest (Repl.) 15, 65.
- H** *Jones v. Gates*, [1954] 1 All E.R. 158; [1954] 1 W.L.R. 222; 2 Digest (Repl.) 15, 67.
- Wright v. Smith*, (1805), 5 Esp. 203; 31 Digest (Repl.) 607, 7218.
- Action.**
- In this action the plaintiffs claimed possession of a farm from the defendant alleging that the defendant's tenancy of the farm had been duly determined on Mar. 25, 1958, by a notice to quit served by the plaintiffs on Dec. 7, 1956. The plaintiffs also claimed mesne profits from Mar. 25, 1958, and double rent from that date under the Landlord and Tenant Act, 1730. The defendant denied that his tenancy had been validly determined and relied on the Agricultural Holdings Act, 1948, s. 26 and the Agriculture (Control of Notices to Quit) Regulations, 1948, made under s. 26; he also alleged that the notice to quit was invalid because it was given before the expiration of two months from the date of a notice to pay rent, dated Oct. 5, 1956, which was given by the
- I**

plaintiffs to the defendant. The pleadings are more fully referred to and the facts are set out in the judgment. A

D. M. Scott for the plaintiffs.

H. Heathcote-Williams, Q.C. and *T. G. Field-Fisher* for the defendant.

Cur. adv. vult.

Nov. 13. **PAULL, J.**, read the following judgment: Thomas Reginald French and Caroline Ruby French are landlords of a farm known as Teignharvey, Stoke-in-Teignhead, Devonshire. At all material times Norman Cyril Eugene Elliott, the defendant, was the tenant of that farm under a lease dated Oct. 11, 1944, (1) made between the defendant and one John C. French, the predecessor in title of Thomas French and Caroline French. Thomas French and Caroline French in this action sue to recover possession of that farm, alleging that the defendant's tenancy was duly determined on Mar. 25, 1958, by a notice to quit served on the defendant on Dec. 7, 1956. In addition to claiming possession, the plaintiffs also claim mesne profits from Mar. 25, 1958, and double value from that date under 4 George II, c. 28, (2); that is to say, they allege that the defendant has wilfully refused to give possession. The tenancy of the farm is a tenancy which comes under the provisions of the Agricultural Holdings Act, 1948 (hereinafter called "the Act"). The Act has now been amended by the Agriculture Act, 1958, but the latter Act does not apply to this case and one has to look at the original provisions of the Act of 1948 and the regulations made thereunder. B C D

The original defence merely stated that the defendant admitted the service of the notice to quit referred to in the statement of claim, but denied that the tenancy was validly determined thereby. The defence added a plea that the defendant would rely on the provisions of the Act of 1948. Subsequently this pleading was amended by striking out the paragraph referring to the Act and adding a paragraph alleging that in so far as the notice to quit was given for reasons that the defendant had failed to comply with a notice to remedy breaches, those reasons were contained in a notice to quit served by the plaintiffs on the defendant dated Nov. 13, 1956. The defendant then alleges that he gave the plaintiffs notice that he required all questions arising out of those reasons to be determined by arbitration; that he had not waived the notice requiring arbitration and stated that he relied on s. 26 of the Act and the regulations made thereunder. A further plea was added that the notice to quit was bad in that it was given before the expiration of the period of two months after the date of a notice given by the plaintiffs and dated Oct. 5, 1956. E F G

The facts leading up to this litigation are as follows. There is no doubt but that for some time before the autumn of 1956 the plaintiffs and the defendant had not been on the best of terms. The plaintiffs had taken up the attitude that the defendant was neither paying his rent promptly nor fulfilling the covenants to repair contained in the lease. The defendant was taking up the attitude that the plaintiffs were requiring matters to be done which were not within the covenants of the lease and that they were trying to restrain him from doing certain thatching which he considered necessary and which under the lease he had to do but for which the plaintiffs were responsible for the payment of the labour. Each side, I have no doubt, were from the beginning prepared to take advantage of every possible technical point under the Act, and I look on this case as one in which it is unnecessary to have sympathy with the one side or the other and where I have simply to determine the matter by looking to see whether the provisions of the Act have been fulfilled by the plaintiffs, there being no doubt but that the notice to quit relied on would but for the provisions of the Act have been a perfectly good notice to quit at common law. H I

(1) The defendant's tenancy commenced on Mar. 25, 1945.

(2) Viz., double the yearly value of the land under the Landlord and Tenant Act, 1730.

- A The matter is practically wholly contained in the correspondence, the evidence given by Mr. Tomlinson, the plaintiffs' agent, merely proving formally some of the documents contained in the correspondence. In so far as his evidence went beyond that, I do not think that it assists me in my task. All through this judgment I shall disregard the fact that some letters were written by the agents for the parties and some by their solicitors and will refer to the documents all through as though they had been signed personally by the parties.

- B On Sept. 8, 1956, the plaintiffs served notice to remedy certain alleged breaches of covenant by the defendant. Those breaches were alleged to be in respect of covenants dealing with thatching and the cutting of weeds. The words of the notice (3) follow the provisions of s. 24 (2) (d) of the Agricultural Holdings Act, 1948. By s. 24 (1) where the landlord of an agricultural holding gives an ordinary common law notice to quit, the tenant may serve on the landlord a counter-notice requiring that sub-s. (1) shall apply to the notice, in which event the notice to quit does not have effect unless the Minister (4) consents. By sub-s. (2) of s. 24, sub-s. (1) does not apply in certain circumstances, one of those circumstances, set out in (d) of sub-s. (2), being that at the date when the notice to quit is given the tenant has failed to comply with a notice in writing requiring him within two months from the service of that notice to pay any rent due, or within a reasonable time or within such reasonable period as is specified in the notice to remedy any breach of covenant by the tenant that is capable of being remedied. The notice served, therefore, was clearly a notice intended to be preliminary to a notice to quit. It stated a period of two months as the reasonable period and followed generally the wording of sub-s. (2) (d). That notice was posted on Sept. 8, 1956, and was delivered to the defendant on Sept. 10.
- C
- D
- E

- By notice dated Oct. 5, 1956, the plaintiffs gave a further notice which clearly was intended to be another notice under the same paragraph of s. 24 (2). That notice required the defendant to pay within two months from the service of the notice the sum of £115 which had become due on Sept. 29, 1956. That notice was posted on Oct. 5 and was received by the defendant on Oct. 6. Clearly by Nov. 13, 1956, the period of two months stated in the notice dated Sept. 8 had elapsed, and the plaintiffs took the view that the defendant had not remedied the breaches. In consequence, by a notice to quit dated Nov. 13, 1956, the plaintiffs required the defendant to deliver up possession of the farm on Mar. 25, 1958; that is, twelve months after Mar. 25, 1957 (5). Had the notice stopped there it would clearly have been an ordinary common law notice to quit and would come within s. 24 (1) of the Act. The notice, however, went on to state that it was given "on and for the following ground and reason and in pursuance of" s. 24 (2) (d) of the Act. The reason given by that notice was that the defendant had failed to comply with the notice of Sept. 8.
- F
- G

- H The Agricultural Holdings Act, 1948, itself, curiously enough, does not in s. 24 or in another section directly state what shall happen if a landlord serves such a notice to quit. Clearly the tenant cannot serve a counter-notice requiring sub-s. (1) of s. 24 to apply, because sub-s. (1) does not and cannot apply to such a notice to quit. That was admitted by both sides in this action. The situation is governed in a rather roundabout way by the fact that under s. 26 (1) (a)

- I (3) The notice dated Sept. 8, 1956, read: "... I hereby give you notice to remedy within a period of two months from the date of service of this notice upon you the breaches which are capable of being remedied of the terms and conditions of your tenancy (being not inconsistent with the fulfilment of your responsibilities to farm in accordance with the rules of good husbandry) as set out in the schedule hereto ..."; there then followed particulars of the breaches of covenant.

(4) Viz., the Minister of Agriculture, Fisheries and Food.

(5) The defendant's tenancy commenced on Mar. 25, 1945. Under s. 23 of the Agricultural Holdings Act, 1948, the landlords were required to give twelve months' notice to quit from the end of the current year of the tenancy, viz., twelve months from Mar. 25, 1957.

the Minister may make regulations for requiring any question arising under s. 24 (2) of the Act to be determined by arbitration under the Act and for limiting the time for which any such arbitration may be required or proceedings taken. Clearly whether the tenant had complied with the original notice would be a question arising under the subsection. The Minister, therefore, has made regulations, and the regulations which applied at the times material to this action were the Agriculture (Control of Notices to Quit) Regulations, 1948 (S.I. 1948 No. 190) (6). By regs. 4 and 5 of those regulations (7) it is open to the tenant (I stress the word "open") within one month from the giving of a notice to quit specifying that the tenant had failed to comply with a notice in writing under s. 24 (2) (d) to serve on the landlord a notice in writing requiring any question arising out of the reason stated in the notice to quit to be determined by arbitration under the Agricultural Holdings Act, 1923. The next step, therefore, that took place was that the defendant sent to the plaintiffs a notice, dated Nov. 23, 1956, stating that he required all the questions arising out of the reasons stated in the notice to quit of Nov. 13 to be determined by arbitration under the Act.

By s. 26 (1) (d) the Minister may make regulations suspending the operation of notices to quit until any arbitration such as that mentioned in the notice of Nov. 23 has been heard and determined, and by reg. 7 of the regulations to which I have referred the Minister made such a regulation. The consequence is that, so far as the notice to quit dated Nov. 13 is concerned, the operation of that notice was suspended until after the arbitration desired by the defendant had been heard and determined.

Nothing further was done by either party with regard to this arbitration. No doubt the defendant was perfectly content that the whole matter should remain in abeyance, and the plaintiffs no doubt had in mind that unless the defendant paid his rent in accordance with their notice dated Oct. 5 they would very shortly have another reason coming within s. 24 (2) (d); and that, if arbitration was desired with regard to that reason, it could be a short and simple arbitration merely determining whether rent had in fact been paid within the time limited by the notice. By 5.30 p.m. on Dec. 6, 1956, at which time the plaintiffs' agent, Mr. Tomlinson, closed his office in Exeter, no rent had been received by the plaintiffs in respect of the period covered by the plaintiffs' notice of Oct. 5. In consequence, Mr. Tomlinson, on Dec. 6, wrote a letter to the defendant stating that he was sending a further notice to quit by reason of the fact that the rent had not been received by the end of normal office hours, namely, 5.30 p.m. on Dec. 6. The notice itself is dated Dec. 6, 1956, and states that the notice is given "on or for the following grounds and reasons and in pursuance of . . . s. 24 (2) of the Act." It then sets out two grounds or reasons (8), each under para. (d) of s. 24 (2). The first is:

"At the date of the giving of this notice you have failed to comply with a notice in writing dated the 5th day of October, 1956 and served on you by me requiring you within two months of the service of such notice to pay rent due in respect of the above holding."

The second is:

"At the date of the giving of this notice you have failed to comply with a notice in writing dated the 8th day of September, 1956, and served on you by me requiring you within a reasonable time or within such reasonable time as was specified in the said notice to remedy all the breaches by you . . ."

(6) The regulations were revoked and replaced, subject to certain savings, as from Jan. 26, 1959, by the Agricultural Land Tribunals and Notices to Quit Order, 1959 (S.I. 1959 No. 81).

(7) See 1 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 98.

(8) The notice did not express these to be alternative grounds.

- A Then follow the words contained in sub-s. (2) (d). That notice to quit, therefore, was based on two quite separate grounds, one of which had already been covered by the earlier notice to quit, in respect of which there had been a notice requiring arbitration. The letter and the notice were posted on Dec. 6, presumably some time in the evening, and were delivered to the defendant on Dec. 7. At the time when the notice was delivered the defendant had not paid the rent in question. The rent was sent by the defendant by a letter which is dated Dec. 7, 1956, but which bears the postmark 1.30 a.m., Dec. 8. It was received by Mr. Tomlinson on the same day, Dec. 8.

- C One of the points taken by counsel for the defendant is that, quite apart from any effect arising from repeating the reasons contained in the notice to quit dated Nov. 13, the notice of Dec. 6 is a bad notice to quit because Mr. Tomlinson gave in the accompanying letter a reason for sending the notice to quit, that reason being that the rent had not been received by 5.30 p.m. on Dec. 6. Counsel for the defendant argued that by 5.30 p.m. on Dec. 6 the two months had not elapsed, and that, therefore, the notice is bad. He contended that s. 26 (1), together with the Regulations of 1948 made by the Minister, did not prevent the defendant from giving no notice of arbitration and then setting up as a defence to the action that the two months had not elapsed in respect of the payment of rent when the notice to quit was given. I was at first somewhat doubtful with regard to this. My attention, however, was drawn to *Budge v. Hicks* (9) and *Jones v. Gates* (10). Although the ratio decidendi in the latter case appears to have been based on the unfairness to the tenant which would have arisen in that particular case if he could not raise the question which arose under s. 24 (2) (b) in the courts without having given a notice of arbitration, I have come to the conclusion that that case, in any event, would bind me to hold that the effect of s. 26 and the regulations made under that section is not such as to shut out the tenant from raising the same point in an action for possession as he could raise under an arbitration by giving notice of a desire to arbitrate. However, that question is one which I feel is of no importance either in this case or generally. It is of no importance generally because after *Jones v. Gates* (10) the regulations were altered, and by the Agricultural Land Tribunals and Notices to Quit Order, 1959 (S.I. 1959 No. 81), art. 6, it is made obligatory on the tenant, who wishes to contest any reason under s. 24 (2) (b), (d) or (e) given in a notice to quit, to serve on the landlord within one month a notice in writing requiring arbitration. It is of no importance in this case because I hold that if the question of time can be taken before me, the defendant wholly fails to establish his argument. In the first place, the letter written by Mr. Tomlinson merely pointed out that he was sending the letter because the rent had not been received by 5.30 p.m. In other words, he was pointing out that it might be that the rent would be received by midnight on Dec. 6, in which event the notice could be disregarded, at any rate, so far as non-payment of rent was concerned. In any event, I cannot see why the letter should be brought into the matter at all. The notice itself fully sets out the grounds and the reasons, and the reason given in respect of the non-payment of rent was a perfectly good and proper reason by the time the notice was delivered to the defendant, which is in this case the time which I have got to accept as being the proper time for the purpose of considering whether the plaintiffs bring themselves within para. (d) of s. 24 (2). That ground of defence, therefore, disappears, and had the notice to quit only contained one reason and not the two reasons, in my judgment, the plaintiffs would plainly be entitled to succeed in this action.

Continuing the history, on Jan. 4, 1957, the defendant sent to the plaintiffs a counter-notice. That counter-notice states:

(9) [1951] 2 All E.R. 245; [1951] 2 K.B. 335.

(10) [1954] 1 All E.R. 158.

"I hereby give you notice that I require that sub-s. (1) of s. 24 of the [Agricultural Holdings Act, 1948] shall apply to your notice to quit . . . dated the 6th day of December, 1956."

That notice was based on a complete misunderstanding of the position under the Act. Such a notice could only have effect if the notice to quit dated Dec. 6 had been an ordinary common law notice to quit. I can, however, sympathise with those responsible for sending the notice, since, on the face of it, s. 24 does not contain any provision as to what should happen where the notice is a notice stating reasons given under sub-s. (2) of that section. Sympathy or no sympathy, that notice was what I may call mistake number one. In my judgment, the notice was null and void and was of no effect.

On Jan. 17 the plaintiffs sent to the Ministry of Agriculture, Fisheries and Food the notice to quit of Dec. 6 and a form of application for the appointment of an arbitrator duly filled in. That form starts with the words:

"The landlord and tenant having failed to agree as to the person to act as arbitrator",

and goes on after a few more words:

"I hereby apply to the Minister . . . to appoint an arbitrator for the purpose of settling the claims, differences or questions set forth below."

The only paragraph having any bearing on the question of the claim is para. 10, which requires the applicant to state the nature of the claim in respect of which arbitration is desired. The answer on the form was:

"Application by the tenant for arbitration on the reasons for service of notice to quit under s. 24 (2) (d)."

In my judgment, the form and the letter must be read together, and since the letter sent a copy of the notice to quit of Dec. 6, 1956, it must be taken that the plaintiffs were asking for an arbitrator to decide the question arising under that notice and no other. It is of some importance to decide that, since, on the face of the form itself, the application could be an application to determine the differences arising out of the notice to quit of Nov. 13. Prima facie that would be so, since it was only in respect of that notice to quit that the tenant had served the notice requiring arbitration. The notice served by the defendant in respect of the notice to quit dated Dec. 6, even if it had been valid, would not require arbitration, but would require the Minister to consider the matter and to say whether he consented to the notice to quit being effective.

Here then was mistake number two. The application for an arbitrator was not based on the tenant having fulfilled reg. 4 of the Agriculture (Control of Notices to Quit) Regulations, 1948. That being so, there having been no request for arbitration in respect of the terms of the notice to quit of Dec. 6, and the landlords and the tenant not having failed to agree as to a person to act as an arbitrator in that matter, nor agreed to ask the Minister to appoint an arbitrator, the act of the plaintiffs in asking for an arbitrator was an act which they were not entitled to do and was based on a complete misunderstanding of the position. In the same way as I sympathise with the agents of the defendant, so I sympathise with the agents of the plaintiffs. However clear the procedure may appear to be to a lawyer after a careful consideration of all the sections and regulations, nothing can be easier for a busy estate agent than to misunderstand the effect of the documents served on him. As I see it, however, that application for an arbitrator, like the notice given by the defendant, was null and void and was of no effect: although it may well be that if the defendant had subsequently agreed to an arbitrator being appointed under that application, it might be held that the arbitrator had authority to settle the questions in dispute between the parties under the notice to quit dated Dec. 6.

The defendant, however, took up quite a different attitude. Having received

- A a letter from the Ministry dated Jan. 25, 1957, stating that the Minister was proposing to appoint an arbitrator to decide all questions arising out of the reasons stated in the notice to quit dated Dec. 6, 1956, the defendant replied to the effect that, since the landlords had served two notices to quit and the tenant had served a counter-notice under the Regulations of 1948, under the first of the notices to quit only, the reference could only be a reference arising
- B out of the reasons stated in that notice and not arising out of the reasons stated in the notice of Dec. 6. In other words, the defendant was taking up the attitude that he was not prepared to allow an arbitrator to deal with the question whether the rent had been paid within the time limited by the notice dated Oct. 5, 1956. The letter from the defendant (in fact, from his solicitors) says in terms that the tenant had not served a counter-notice under the Regulations of 1948 in
- C respect of the second notice to quit and, therefore, there was no right on the part of the Minister to appoint an arbitrator. The Minister having replied that *prima facie* the appointment would appear to be valid, and that he was bound to proceed with the appointment, the defendant once more wrote back stating in terms that the application for the appointment of an arbitrator was *prima facie* invalid and that the Minister had no power to appoint one. Undeterred
- D by this, the Minister, by an appointment dated Feb. 21, 1957, appointed an arbitrator and stated that it would be the duty of the arbitrator to decide all questions arising out of the reasons stated in the notice to quit dated Dec. 6, 1956.

- By this time the plaintiffs had awakened to the fact that their application was based on a misunderstanding of the position, and by a letter dated Feb. 22,
- E 1957, they stated that it was their desire to withdraw the application for the appointment of an arbitrator. I am informed that there was a reply from the Ministry to that letter again stating that the Minister had no power to revoke his appointment. It seems to me that it was not a question whether the Minister had a power to revoke, but whether he had a power to appoint. As I have already indicated in my judgment, that appointment was null and void and was of no
- F effect.

- Apart from the fact that the defendant wrote a letter to the arbitrator to say that he had never made any request for arbitration, there the matter has remained, so far as arbitration is concerned. In my judgment, I am not only entitled to but must entirely disregard all these events which took place after the service of the notice to quit dated Dec. 6. In my judgment, they do not
- G in any way affect the legal rights of the parties. The question which I have to determine, therefore, is whether the fact that the defendant gave a notice requiring arbitration after the notice to quit dated Nov. 13 prevents the notice to quit dated Dec. 6 from being a valid notice to quit operating on Mar. 25, 1958, or alternatively prevents it operating unless the arbitration invoked in respect of the notice to quit dated Nov. 13 had by then been determined in
- H favour of the plaintiffs.

- It is admitted by counsel for the defendant that if the notice to quit dated Dec. 6 had stopped after the first reason, i.e., the non-payment of rent, that notice would clearly have been a good notice. I am told that there is no authority which throws any light on the problem whether the notice to quit of Dec. 6 is invalid because it added a bad reason to a good reason, or rather, added a
- I reason which the landlords could not pursue until after the arbitration had taken place with regard to the notice to quit dated Nov. 13. I therefore approach the problem by trying to make a simple analysis of the position. If a notice to quit has to give a good reason, and gives that good reason, I cannot see that it becomes a bad notice to quit because it gives in addition a bad reason. Counsel for the defendant urged that, at any rate, no notice to quit could be effective until the arbitration under the notice to quit of Nov. 13 had been held. I cannot see how that can be. If a new reason arises, I cannot see why the landlords cannot rely on that new reason and serve an entirely new notice to quit. Counsel

for the defendant relied on *Cowan v. Wrayford* (11). That case decided that if a landlord in fact chose to give a notice to quit based on s. 24 (2) of the Act rather than a common law notice to quit he could not treat such a notice to quit as a common law notice to quit if the reason which he gave under sub-s. (2) turned out to be a bad reason. It is quite true that in that case expressions were used by the lords justices with regard to a notice having to be clear and unambiguous, which is clearly right, whether the notice to quit is based on reasons contained in s. 24 (2) or is simply a common law notice to quit. This notice to quit of Dec. 6 seems to me quite clear and quite unambiguous. Its only fault (if it be a fault) is that of two reasons given one was a reason in respect of which there had been a requirement for arbitration and in respect of which, therefore, the notice could not be enforced until the arbitration had been held. It was quite open for the defendant to give a notice requiring arbitration under this notice to quit, and as no arbitrator had been appointed under the first notice to quit, one arbitrator could have been appointed by the Minister to deal with both matters had he been asked to do so by either party.

If I be right, and the notice to quit of Dec. 6 is a good notice, I can see no reason why its operation should be suspended until the arbitration under the notice of Nov. 13 has been determined. If two concurrent notices to quit are given for different reasons, and a request for arbitration is only made with regard to one of the notices, I cannot see why the other notice should not be an effective notice. It would be absurd to hold that a tenant could set a notice at naught by challenging quite a different notice, and that, it seems to me, would follow if the defendant's contention is right in this case. That argument also fails. I add that I do not see that *Coates v. Diment* (12) which counsel for the defendant cited to me has any effect on this point. The plaintiffs, therefore, are entitled to possession.

With regard to the plaintiffs' claim for double value, in my judgment, that fails. As I see it, the fact that the defendant was habitually late in paying his rent, or behaved badly while a tenant, has nothing to do with whether the plaintiffs are entitled to double value. The wording of the Landlord and Tenant Act, 1730 (13) is:

"In case any tenant . . . shall wilfully hold over any . . . tenements . . . after the determination of [his] term . . ."

It has been held that "wilfully" means "contumaceously" (14), but I can see no reason why the old English word "wilfully" does not exactly express the true meaning of the statute. The statute does not mean that a tenant is a contumacious tenant. It deals only with the moment of time when the tenancy comes to an end. At that moment of time a tenant may say: "I shall stay on. I think I have a right to do so." His staying on is not wilful. On the other hand, a tenant may say: "I will stay on, although I know I have no right to do so." That is wilful, and well illustrates the now sometimes forgotten distinction between "I shall" and the insistent "I will". In this case there was, in my judgment, a sufficient muddle on both sides to prevent the wilfulness arising, since the defendant may not unreasonably have thought that he could not be disturbed until the arbitration had taken place.

The result is that the plaintiffs are entitled to judgment for possession of Teigharvey Farm with mesne profits from Mar. 25, 1958, to possession and are entitled to the costs of this action.

Judgment for the plaintiffs.

Solicitors: *Ellis, Bickersteth, Aglionby & Hazel*, agents for *James Mason, Tucker & Son*, Newton Abbot (for the plaintiffs); *Kinch & Richardson*, agents for *Carter, Fisher & Co.*, Torquay (for the defendant.)

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

(11) [1953] 2 All E.R. 1138.

(12) [1951] 1 All E.R. 890.

(13) See 13 HALSBURY'S STATUTES (2nd Edn.) 850.

(14) See *Wright v. Smith* (1805), 5 Esp. 203.

A R. v. MORDANAM.

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Hilbery and Salmon, JJ.), December 1, 1959.]

Quarter Sessions—Committal of offender to quarter sessions for sentence—Sentences to less than twelve months' imprisonment on each of two charges, the sentences running consecutively—Whether the court has power to make an order under the Criminal Justice Act, 1948 (11 & 12 Geo. 6 c. 58), s. 22 (1), as amended by the Prison Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 52), s. 54 and Sch. 3.

B M. pleaded guilty to two charges of obtaining money by false pretences at a magistrates' court, and was sent to sessions for sentence under s. 29 of the Magistrates' Courts Act, 1952. The chairman of sessions, treating the hearing as a trial on indictment sentenced the appellant to nine months' imprisonment on each charge, the sentences to run consecutively. He also made an order under s. 22 (1)* of the Criminal Justice Act, 1948, requiring the appellant to be subject to the provisions of the section for a period of twelve months from the date of his next discharge from prison.

C **Held:** as the hearing at quarter sessions was treated as a trial on indictment and each sentence was for a period of less than twelve months, the case did not come within s. 22 (1) of the Criminal Justice Act, 1948, and no order could be made under that section.

D Appeal allowed in part.

[As to the procedure to be followed by quarter sessions on committal for sentence, see 25 HALSBURY'S LAWS (3rd Edn.) 229, para. 423.]

E For the Criminal Justice Act, 1948, s. 22, see 28 HALSBURY'S STATUTES (2nd Edn.) 373.]

Application and Appeal.

On June 11, 1959, the appellant, Rowe Mordanam, pleaded guilty at West London Magistrates' Court to two charges of obtaining money by false pretences, eleven other offences being taken into consideration. He was sent to London Sessions for sentence under s. 29 of the Magistrates' Courts Act, 1952, and there, on June 25, 1959, he was sentenced by the chairman, R. E. SEATON, Esq., to nine months' imprisonment on each charge, the two sentences to run consecutively (the hearing at sessions being treated as a trial on indictment). The court also made an order under s. 22 (1) of the Criminal Justice Act, 1948. On Dec. 1, 1959, Mordanam applied to the Court of Criminal Appeal for leave to appeal against sentence, and the court, granting leave, treated the application as a hearing of the appeal.

G The appellant did not appear, nor was he represented.

H **HILBERY, J.**, delivering the judgment of the court, after stating the facts set out above, continued: There were two charges and a number of cases that was taken into consideration. The appellant was sentenced to nine months in respect of each charge, that is, in respect of each charge there was a separate sentence of nine months. The question which emerges is: Had the court imposing those sentences power to make an order under s. 22 of the Criminal Justice Act, 1948. Section 22 (1) of the Act of 1948, as amended (1), is in these terms:

I "Where a person is convicted on indictment of an offence punishable with imprisonment for a term of two years or more and that person—(a) has been convicted on at least two previous occasions of offences for which he was sentenced to Borstal training or imprisonment; or (b) has been previously convicted of an offence for which he was sentenced to corrective training, the court, if it sentences him to a term of imprisonment of twelve

* The terms of s. 22 (1) of the Criminal Justice Act, 1948, as amended, are set out at letter I, supra.

(1) Section 22 (1) of the Act of 1948 was amended by the Prison Act, 1952, s. 54 and Sch. 3.

months or more, shall, unless having regard to the circumstances, including the character of the offender, it otherwise determines, order that he shall for a period of twelve months from his next discharge from prison be subject to the provisions of s. 29 of the Prison Act, 1952."

In the view of this court, the question which has to be determined here is whether the order made under s. 22 can stand. In the view of this court the sentence of nine months' imprisonment in respect of each of two charges does not bring the case within the ambit of s. 22 so as to require that the court shall order that for a period of twelve months from his next discharge from prison he shall be subject to the provisions of that section. It is true that when such a case as this is committed by a magistrates' court for sentence under s. 29 of the Magistrates' Courts Act, 1952, (2) to sessions, the hearing at sessions is treated as a trial on indictment, as has been stated in this court. But here, treating it as a trial on indictment, there was not a sentence in respect of an offence charged in the indictment which was one of imprisonment for twelve months or more. Each sentence was one of less than twelve months, and the consequence is that the case did not come within s. 22 as a case requiring the order to be made under that section. This court, therefore, varies the sentence in this case by eliminating from it the order under s. 22.

Appeal allowed in part. Sentence varied.

[Reported by N. P. METCALFE, ESQ., Barrister-at-Law.]

PATCH v. UNITED BRISTOL HOSPITALS BOARD.

[BRISTOL ASSIZES (Streatfeild, J.), June 23, 24, 25, 26, 29, 1959.]

Discovery—Production of documents—Privilege—Medical reports concerning hospital treatment resulting in injury—Written statements made by medical staff pursuant to administrative memorandum—Statements made before litigation pending—Whether statements privileged.

After undergoing a surgical operation in the defendants' hospital, the plaintiff developed gas gangrene in the area of the operational wound. Soon after the condition was discovered, and before there was any indication that the plaintiff intended to bring legal proceedings against the defendants, the surgeon who had operated and other members of the hospital staff concerned with the care of the plaintiff made written statements, in accordance with the recommendations in a Ministry of Health memorandum, and the statements were immediately sent to the defendants' solicitors. The plaintiff having subsequently brought an action against the defendants for damages for negligence, the defendants claimed that the statements were privileged from production on the ground that they were made for the purpose of enabling the defendants' solicitors to advise them in reference to anticipated litigation. This claim was resisted by the plaintiff on the ground that the statements were made before there was any suggestion of litigation.

Held: as the statements were made because something had gone wrong in the course of treatment, and were not made in the ordinary course of treatment, they were made in reasonable anticipation of litigation and, therefore, were privileged from discovery.

Seabrook v. British Transport Commission ([1959] 2 All E.R. 15) applied.

A [As to the privilege of documents prepared with a view to litigation, see 12 HALSBURY'S LAWS (3rd Edn.) 46, para. 63; and for cases on the subject, see 18 DIGEST (Repl.) 108-112, 919-951.]

As to the liability of hospital boards, see 27 HALSBURY'S LAWS (3rd Edn.) 521, 522, para. 1018, and 26 HALSBURY'S LAWS (3rd Edn.) 19, 20, para. 27.]

B Cases referred to:

Cassidy v. Ministry of Health, [1951] 1 All E.R. 574; [1951] 2 K.B. 343; 2nd Digest Supp.

Seabrook v. British Transport Commission, [1959] 2 All E.R. 15; [1959] 1 W.L.R. 509.

C Action.

In this action the plaintiff claimed damages against the defendants for negligence in the post-operational care given to him by doctors and nurses while he was a patient in a hospital managed and controlled by the defendants. The operation, which took place on Dec. 3, 1956, involved the amputation of a finger of the right hand. After the operation gas gangrene developed in the hand. Soon after it was discovered, medical staff concerned with the care of the plaintiff (and including the surgeon who performed the operation) made written statements, pursuant to recommendations in a Ministry of Health memorandum*, and these statements were immediately sent to the defendants' solicitors. At the hearing of the action, the defendants claimed that the statements were privileged from production on the ground that they came into existence wholly or mainly for the purpose of enabling the solicitors to advise the defendants in reference to anticipated litigation. The plaintiff contended that the statements were not privileged, since they were made before litigation was pending.

F The report is confined to the ruling of STREATFEILD, J., on the question of privilege.

N. J. Skelhorn, Q.C., and *C. M. Lavington* for the plaintiff.

R. F. G. Ormrod, Q.C., and *F. C. Williams* for the defendants.

G June 25. STREATFEILD, J.: *Seabrook v. British Transport Commission* (1), being a judgment of a court of contemporary jurisdiction, is not, of course, binding on me. At the same time, I have no reason whatever to differ from the judgment of HAVERS, J., in that case. In my respectful opinion, it is manifestly correct; and in that case the claim for privilege succeeded. I should have thought that this case was almost a fortiori, because, having regard to the decision of the Court of Appeal in *Cassidy v. Ministry of Health* (2), there is in such a case as the present a substantial onus on the hospital authority. When something goes wrong in medical or surgical treatment which may reasonably be expected to give rise to litigation, it seems to me that any statement which is then made by persons concerned with the patient in anticipation of the kind of claim which may be made is clearly privileged. It is not a document which

H I was made in the ordinary course of treatment, but it is made simply because something unfortunately has gone wrong, and in order to provide the legal advisers of the hospital authority with the necessary material to advise, if a claim should be made, these documents come into existence. I should have thought that these documents were even more privileged than the documents

* See Ministry of Health memoranda H.M. (54) 32 dated Mar. 29, 1954, 94101/2/37 dated Sept. 15, 1949.

(1) [1959] 2 All E.R. 15.

(2) [1951] 1 All E.R. 574; [1951] 2 K.B. 343.

in *Seabrook v. British Transport Commission* (3). Accordingly, I rule that this claim for privilege must be upheld.

Rule accordingly.

[At the conclusion of the hearing HIS LORDSHIP gave judgment for the defendants.]

Solicitors: *Cooke, Painter, Spofforth & Co.*, Bristol (for the plaintiff); *Clarke, Gwynn & Press*, Bristol (for the defendants).

[Reported by DEIRDRE McKINNEY, Barrister-at-Law.]

Ex parte ASSOCIATED NEWSPAPERS, LTD.

[COURT OF APPEAL (Morris, Romer and Willmer, L.J.J.), October 2, 1959.]

Court of Appeal—Jurisdiction—Ex parte application—No proceedings—Application to inspect document filed in central office—R.S.C., Ord. 61, r. 17.

Inspection—Document filed at central office—Order for injunction—Application by stranger to action—R.S.C., Ord. 61, r. 17.

Ex parte application.

In this case the applicants, Associated Newspapers, Ltd., by their solicitors, applied on Sept. 17, 1959, to the practice master, Master CLAYTON, pursuant to R.S.C., Ord. 61, r. 17*, for leave to search for an order of injunction obtained before a judge in chambers in an action. The practice master gave leave but when the solicitors sought to inspect the document at the central office a clerk refused to make it available saying that the solicitors for the defendant in the action had said that they did not want anybody to see the document. The applicants' solicitors returned to the practice master who then refused leave saying that he had a discretion in the matter. The applicants appealed to the judge in chambers, and on Sept. 18, 1959, WINN, J., upheld the master's refusal but gave the applicants leave to appeal. There being no proceedings and the applicants having no opponents the matter now came before the Court of Appeal as an *ex parte* application.

Neville Faulks, Q.C., and *David Hirst* for the applicants.

The COURT OF APPEAL, without deciding whether or not the applicants had a remedy by way of prerogative order, rejected the application on the ground that there was no jurisdiction to hear it.

Application dismissed.

Solicitors: *Sweepstone, Walsh & Son* (for the applicants).

[Reported by RICHARD HARTLEY, Esq. Barrister-at-Law.]

(3) [1959] 2 All E.R. 15.

* R.S.C., Ord. 61, r. 17, provides: "Proper indexes or calendars to the files or bundles of all documents filed at the central office shall be kept, so that the same may be conveniently referred to when required, and such indexes or calendars and documents shall, at all times during office hours, be accessible to the public on payment of the usual fee." Attention was drawn to this rule by leading counsel for the defendants in *Cadam v. Beaverbrook Newspapers, Ltd.* ([1959] 1 All E.R. 453), a case in which the defendants had published in their daily newspaper a statement that a writ had been issued. At that time the Practice Master's Rules, r. (23) stated: "... Depositions and all proceedings in the Queen's Bench Division are open to the inspection of parties or their solicitors only" (see ANNUAL PRACTICE (1959 Edn.), Part 3, at p. 2162). However, at a meeting of the Queen's Bench masters on Feb. 16, 1959, this part of the rule was revoked (see "The Times" newspaper, Feb. 20, 1959; and see now ANNUAL PRACTICE (1960 Edn.), Part 3, at p. 2162).

A PHILIPSON-STOW AND OTHERS v. INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Lord Evershed, M.R., Sellers and Harman, L.JJ.), October 22, 23, 26, 27, November 20, 1959.]

B *Estate Duty—Passing of property—Foreign property—Immovable property—English will—Trust for sale—Death of life tenant—Proper law of disposition—Finance Act, 1949 (12, 13 & 14 Geo. 6 c. 47), s. 28 (2).*

For the purposes of the exception from liability to estate duty created by s. 28 (2) of the Finance Act, 1949*, the proper law regulating dispositions by will of a testator domiciled in England, being effective dispositions of beneficial interests in the proceeds of sale of unsold foreign immovable property subjected by the will to a trust for sale, is the law which his will shows that he intended should govern the dispositions (see p. 885, letters A and B, post; cf., p. 889, letter A, and, contra, p. 891, letter B, post).

Duke of Marlborough v. A.-G. (No. 1) ([1945] 1 All E.R. 165) considered.

D A testator who made his will in 1898 and died in 1908 resident and domiciled in England, thereby declared that it was his wish and intention that his will should be construed and operate "as far as the case admits" according to the law of England. He devised and bequeathed his residuary real estate (which included land in South Africa) and his residuary personal estate to his trustees on trust for sale with full discretion to postpone sale, and, after usual administrative directions and some bequests, he provided that the ultimate residue should be held as if the moneys or investments representing the same were capital moneys arising under the Settled Land Acts, 1882 to 1890, from his "settled estates". His "settled estates" which comprised property in Sussex, were directed to be held, in the events which happened, on trust for the testator's widow for her life with remainder to the testator's son for life, and on his death for the testator's grandson for his life. The will contained wide powers for the trustees to manage and cultivate real, leasehold and immovable property whether in England or abroad. At the death of the testator's son, who had survived the widow and died in 1954, the testator's residuary estate included land in South Africa remaining unsold. The administration of the testator's estate had, however, long since been completed and the trustees had long been registered as owners of the land in South Africa. The income from the land in South Africa was being received by the trustees as owners and applied in accordance with the testator's will. The land was immovable property by South African law and by virtue of s. 28 (2) of the Finance Act, 1949, estate duty would not be leviable on the death of the testator's son unless the proper law regulating the disposition or devolution under which the property passed was English law.

H **Held** (HARMAN, L.J., dissenting): the passing of the enjoyment of the income of the land in South Africa on the death of the testator's son was regulated solely by the dispositions in the testator's will; the law governing those dispositions was English law and, therefore, s. 28 (2) of the Finance Act, 1949, did not except the property from liability to estate duty, which accordingly was leviable (see p. 886, letter F, and p. 888, letter F, post).

I *A.-G. v. Johnson* ([1907] 2 K.B. 885) applied.

Re Moses ([1908] 2 Ch. 235), *Re Miller* ([1914] 1 Ch. 511) and *Re Berchtold* ([1923] 1 Ch. 192) considered.

Decision of UPJOHN, J. ([1959] 1 All E.R. 583) affirmed.

[**Editorial Note.** The validity of a direct disposition of foreign immovable property is governed by the *lex situs* (see p. 886, letter E, post), and there is nothing in the present decision which conflicts with that. The essential distinction

* The terms of s. 28 (2) are printed at p. 882, letter G, post.

in the leading judgment rests on the fact that in the present case administration of the testator's estate had been completed long before the death of the life tenant, that the ownership of the foreign land had long since passed to the trustees, and that at the death of the life tenant the income of the foreign land was being enjoyed beneficially under the trusts established by the testator's will.

As to the law governing wills of foreign immovables, see 7 HALSBURY'S LAWS (3rd Edn.) 52, 53, para. 102.

As to estate duty and the test of liability in the case of foreign property, see 15 HALSBURY'S LAWS (3rd Edn.) 56, para. 111; and for cases on the subject, see 21 DIGEST 17, 89-96.]

Cases referred to:

A.-G. v. Belilios, [1927] All E.R. Rep. 723; [1928] 1 K.B. 798; 97 L.J.K.B. 139; 138 L.T. 294; Digest Supp.

A.-G. v. Campbell, (1872), L.R. 5 H.L. 524; 41 L.J.Ch. 611; 21 Digest 99, 719.

A.-G. v. Jewish Colonization Assn., [1901] 1 K.B. 123; 70 L.J.K.B. 101; 83 L.T. 561; 65 J.P. 21; 21 Digest 97, 714.

A.-G. v. Johnson, [1907] 2 K.B. 885; 76 L.J.K.B. 1150; 97 L.T. 720; 21 Digest 98, 718.

Berchtold, Re, Berchtold v. Capron, [1923] 1 Ch. 192; 92 L.J.Ch. 185; 128 L.T. 591; 11 Digest (Repl.) 366, 339.

Cigala's Settlement Trusts, Re, (1878), 7 Ch.D. 351; 47 L.J.Ch. 166; 38 L.T. 439; 21 Digest 101, 732.

Howe v. Dartmouth (Earl), Howe v. Aylesbury, (1802), 7 Ves. 137; 32 E.R. 56; 44 Digest 197, 265.

Marlborough (Duke) v. A.-G. (No. 1), [1945] 1 All E.R. 165; [1945] Ch. 78; 114 L.J.Ch. 83; 172 L.T. 21; 11 Digest (Repl.) 493, 1149.

Miller, Re, Bailie v. Miller, [1914] 1 Ch. 511; 83 L.J.Ch. 457; 110 L.T. 505; 11 Digest (Repl.) 391, 497.

Moses, Re, Moses v. Valentine, [1908] 2 Ch. 235; 77 L.J.Ch. 783; 99 L.T. 519; 11 Digest (Repl.) 393, 504.

Smyth, Re, Leach v. Leach, [1898] 1 Ch. 89; 67 L.J.Ch. 10; 77 L.T. 514; 21 Digest 122, 918.

Sudeley (Lord) v. A.-G., [1897] A.C. 11; 66 L.J.Q.B. 21; 75 L.T. 398; 61 J.P. 420; 21 Digest 122, 917.

Wallace v. A.-G., Jeves v. Shadwell, (1865), 1 Ch. App. 1; 35 L.J.Ch. 124; 13 L.T. 480; 21 Digest 63, 413.

White, Re, Skinner v. A.-G., [1938] 2 All E.R. 691; [1939] Ch. 131; *affd.* H.L., [1939] 3 All E.R. 787; [1940] A.C. 350; 108 L.J.Ch. 330; 161 L.T. 169; Digest Supp.

Appeal.

This was an appeal by the plaintiffs, the trustees of the will, dated Mar. 14, 1898, of the testator, Sir Frederic Samuel Philipson Philipson-Stow, deceased, from an order of UPJOHN, J., dated Feb. 10, 1959, and reported [1959] 1 All E.R. 583, made on an originating summons by which application was made for the following relief: that pursuant to s. 3 of the Administration of Justice (Miscellaneous Provisions) Act, 1933, it might be determined whether the seven-eighths undivided share in the property known as "Steenbokspan" situated in the Orange River Colony in the Union of South Africa (which undivided share formed part of the residuary estate of the testator) (i) ought to be treated for the purposes of estate duty as excluded by virtue of s. 28 (2) of the Finance Act, 1949, or otherwise from the property passing on the death of Sir Elliot Philipson Philipson-Stow deceased or (ii) ought to be treated for such purposes as passing on such death.

UPJOHN, J., held that the property ought not to be treated as excluded from the property passing and that it was liable to estate duty accordingly.

A *J. A. Plowman, Q.C., and R. Cozens-Hardy Horne* for the plaintiffs, the trustees.
John Pennycuik, Q.C., and E. Blanshard Stamp for the Crown.

Cur. adv. vult.

Nov. 20. The following judgments were read.

B **LORD EVERSHERD, M.R.:** The question raised in this case and on this appeal is whether, on the death of Sir Elliot Philipson-Stow in 1954, estate duty was payable in respect of certain property known as "Steenbokspan" in South Africa. Subject to the qualification which I shall presently state, the property belonged to Sir Elliot's father, Sir Frederic Philipson-Stow, who died in 1908. Sir Frederic by the terms of his will, dated in 1898, which I shall hereafter more fully recite, devised or purported to devise Steenbokspan, as part of his residuary estate, to his trustees on trust for sale and declared trusts of such proceeds whereunder, subject to a prior interest in favour of his wife, Sir Elliot was entitled to the income for his life, and after Sir Elliot's death his eldest son, the present baronet, Sir Frederic Lawrence Philipson-Stow then became entitled to the income for his life. Steenbokspan has not in fact been sold, but the income of the property was being enjoyed by Sir Elliot at his death and is now being paid to the present baronet. It is accordingly claimed by the Crown, by virtue of s. 28 (2) of the Finance Act, 1949, that Steenbokspan "passed" on the death of Sir Elliot and that estate duty is attracted in respect of it by virtue of the language of that subsection. The plaintiffs in the action are the present trustees of Sir Frederic's will and are, as such, the registered owners of the Steenbokspan property.

E The qualification to which I have alluded is this. At Sir Frederic's death his interest in Steenbokspan was a one-half (or five-tenths) undivided share. In 1916 the various persons entitled to undivided shares in the property entered into an arrangement by way of partition, in accordance with and effective by South African law, whereby the trustees of Sir Frederic's will became entitled to a seven-eighths undivided share in the property in lieu of their previous interest. F Counsel for the plaintiffs has disclaimed any argument based on the view that the interest of Sir Frederic's trustees is derived from the 1916 partition and has been content to argue the case on the footing that the trustees' present interest was that of which Sir Frederic purported to dispose by his will. It has also been conceded that an undivided interest in South African land must be regarded as immovable property situate in South Africa.

G I first recite the relevant paragraphs of Sir Frederic's will. By para. 2 he declared

"that inasmuch as I have an English domicile it is my wish and intention that this my will and any codicil I may make shall be construed and operate as far as the case admits according to the law of England."

H He then appointed executors and trustees and devised his lands known as the Blackdown Estate to his wife and the co-trustee for their use and "upon the trusts and subject to the powers and provisions hereinafter declared and contained concerning the same", that is to say, the use for his wife during her life without impeachment of waste with remainder to the trustees for a term of one hundred years, and subject to that direction,

I "from and after the determination of the said term and in the meantime subject thereto and to the trusts thereof to the use of my eldest son Elliot Philipson Philipson-Stow during his life without impeachment of waste with remainder to the use of the first and every other son of the said Elliot Philipson Philipson-Stow successively in remainder one after the other according to their respective seniorities in tail male",

with divers remainders over. By para. 5 the estate tail of anybody living at the date of the testator's death is cut down to a life interest, and that, of course, affected the interest of Sir Frederic Lawrence Philipson-Stow, the present

baronet. I can pass over a great many of the dispositions. By para. 16 the testator declared that his trustees should be trustees of the will and every compound settlement consisting of the will and any other instrument for the purpose of the Settled Land Acts. By para. 25 he devised and bequeathed A

"all my real and personal estate whatsoever wheresoever and whether situate or being in the United Kingdom or in South Africa or elsewhere (except such real and personal estate and effects hereinbefore or by any codicil to this my will otherwise disposed of)" B

for the use of his trustees on trust for sale with an extensive power of postponement and the usual directions for payment of funeral and testamentary expenses and investment of the proceeds. There were then considerable trusts in favour of daughters and the like, and the final and relevant disposition is to be found in para. 37: C

"The ultimate residue of the said investments representing my said residuary estate . . . shall be held by my trustees upon the trusts following (that is to say) upon trust after providing thereout if need be for such keeping up and repair of my said mansion house and settled estates [that is a reference to Blackdown Estate] to pay the annual income thereof to my said wife during her life she maintaining and educating and keeping a home for my sons and daughters and after her death such ultimate residue shall be held by my trustees as if the moneys or investments representing the same were capital moneys arising under the Settled Land Acts 1882 to 1890 from my said settled estates." D

There was a substantial power of investment of capital money in para. 39 which extended to investment not only in the United Kingdom but the Colonies of the Cape of Good Hope, Natal, Dominion of Canada or Australasia or in the Orange Free State or Transvaal Republic, etc. I think I can pass to a reference in para. 41 to the direction that all net rents, profits and income arising from the residuary estate until the sale, calling in and conversion should be treated as income arising from the proceeds of sale. By para. 42 extensive powers of management, including management of immovable property abroad, were conferred on the trustees, who had also powers to appoint agents for that purpose and powers of delegation. That, I think, concludes the necessary references to the will. The only relevance of the testator's codicil is that he thereby substituted his son as a trustee in the place of one, named in the will, who was a South African resident in South Africa. E

The Finance Act, 1949, s. 28 (2), is in the following terms so far as relevant: F

"As respects property passing on the death of a person dying after the commencement of this Part of this Act, sub-s. (2) of s. 2 of the Finance Act, 1894 (which exempts from estate duty property situate abroad and not chargeable with . . . succession duty) . . . shall not have effect; but that property shall be deemed for the purposes of estate duty not to include any property passing on the death which is situate out of Great Britain if it is shown that the proper law regulating the devolution of the property so situate, or the disposition under or by reason of which it passes, is the law neither of England nor of Scotland and that one at least of the following conditions is satisfied, namely . . . (c) that the property so situate is, by the law of the country in which it is situate, immovable property . . ." G

As I have already intimated, it is conceded that the trustees' interest in Steenbokspan is immovable property by the law of South Africa so as to satisfy for present purposes the terms of para. (c) of the subsection. H

I can now re-state the question posed for our decision in terms of the subsection: it is whether the Steenbokspan property which passed (as counsel for the plaintiffs has not disputed) on Sir Elliot's death, is exempt from duty on the ground that the proper law regulating the devolution of the property or the I

A "disposition under or by reason of which" the property passed was the law not of England but of South Africa.

We were very properly referred to a number of cases during the argument, but none was a direct authority on the question with which we are concerned. I propose, therefore, to express my conclusion on that question as a matter of the meaning of the language used in the section, treating that question as *res integra*; and later to say something on the cases cited. But, like UPJOHN, J.,

B I look first at the relevant statutory provisions as they would have affected such a problem as the present prior to the passing of the Finance Act, 1949. By s. 2 (2) of the Finance Act, 1894, immovable property passing on the death of the deceased, when situate out of the United Kingdom, was only liable to be charged with estate duty if succession duty was payable in respect thereof (or would have been so payable but for the relationship of the person to whom the property passed). Liability for succession duty in such a case depended in turn on s. 2 of the Succession Duty Act, 1853, which, so far as relevant, was in the following terms:

D "Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act . . . and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a 'succession'; and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote the settlor . . . testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived."

F The scope of the last-mentioned section was qualified by LORD CRANWORTH in 1865 in a case (1) to which I shall revert when I later deal with the authorities. For present purposes it is to be noted that the section distinguished between a present or future disposition of property, on the one hand, and on the other, a devolution by law of any beneficial interest in property. Succession duty was abolished by the Finance Act, 1949, and it cannot be doubted that s. 28 (2) of that Act was designed to impose a criterion for liability for estate duty of (inter alia) immovable property situate out of the United Kingdom in substitution to that formerly contained in s. 2 (2) of the Finance Act, 1894. It is, I think, no less clear (and was not disputed before us) that the distinction between devolution and disposition contained in the Act of 1949 reproduced the similar distinction in s. 2 of the Succession Duty Act, 1853, which I have read. In other words, it is in my opinion not in doubt that whereas devolution was introduced to cover the passing of property on intestacy or other process of law, by disposition was meant some instrument or the effect of some instrument (e.g., a will or settlement) conferring or purporting to confer beneficial interests in property. So far, therefore, as the present case is concerned, "devolution" can be disregarded and the relevant "disposition" is that contained in or conferred by Sir Frederic's will. But the question remains, what, within the terms of the section, is the "proper law regulating" that disposition? So stated the problem posed is a short one; and so, in the end, I think it to be. But its difficulty is, to my mind, created in the present case by the formula used, "proper law". The words "proper law" are well understood when applied to a contract. In such a context they mean the law which the contracting parties intend to govern their contractual obligations, wherever performed; but they have a less natural significance where applied to a will. In *Duke of Marlborough v. A.-G. (No. 1)* (2),

(1) *Wallace v. A.-G.*, (1865), 1 Ch. App. 1.

(2) [1945] 1 All E.R. 165; [1945] Ch. 78.

the phrase was applied by LORD GREENE, M.R., to a marriage settlement of personal property as meaning the law governing (i.e., intended by the parties to the settlement to govern) the settlement. LORD GREENE, M.R., said (3):

“Counsel for the appellant and for the Crown were in agreement in submitting that in the case of a marriage settlement the question whether succession duty is payable under the Succession Duty Act, 1853, s. 2, is to be answered by reference to the law governing the settlement—in other words, the proper law of the settlement.”

It seems likely enough that Parliament, when enacting the Finance Act, 1949, was intending to use the words in a similar sense. But whether or not that is so, I think it is inescapable that the words must be treated as having a sense analogous to that given by LORD GREENE, M.R.

The solution of the difficulty, however, is not thereby far advanced when the formula has to be applied to immovable property outside the United Kingdom of which a testator has purported to dispose by will. The argument of counsel for the plaintiffs has been founded on the principle (enshrined in r. 85 in DICEY'S *CONFLICT OF LAWS* (7th Edn.), at p. 512) that all rights over or in relation to immovable property must in general be governed by the law of the country where the immovable is situate (i.e., the *lex situs*). Thus, according to counsel for the plaintiffs' argument, whatever “disposition” the testator may purport to make as regards foreign immovables, the effect or the efficacy of those dispositions must depend on and be controlled by the *lex situs*. In the case of a direct devise of a foreign immovable to A absolutely, counsel for the Crown did not dispute that the law regulating or controlling the devise must be the *lex situs*; since the devise (like a transfer out and out *inter vivos*) could only take effect in accordance with, and as permitted by, the local law. So it would follow that the devise of Steenbokspan by Sir Frederic to his executors would be governed or controlled by South African law. It was, however, the argument of counsel for the Crown that the conclusion is or may be otherwise when you find that the original devise to the executors has taken full effect according to the local law (as the evidence in the case showed), that the administration of the estate in South Africa has been completed, and that at the relevant date (i.e., Sir Elliot's death), the position was that the income of the property was being received by Sir Frederic's trustees and applied by them, under the terms of the will, as part of the general trust income; for when that stage is reached, then, according to the ordinary sense of the subsection, the property or the right to the enjoyment of the income of the property passed by reason only of the dispositions contained in Sir Frederic's will; and the law governing or regulating those dispositions was, at that stage, the law which Sir Frederic intended, according to the terms and context of his will, should govern or regulate them, viz., English law.

The difficulty, to my mind, of accepting the argument of counsel for the plaintiffs is that the consequence of its acceptance must be that in every case of a disposition by will or settlement of a foreign immovable, the proper law regulating the disposition must always be the *lex situs*. Counsel did not indeed shirk the consequence which he said was inevitable. But the conclusion seems to me to render futile the obvious and apparent intention of the subsection and is, therefore, one in my judgment which the court should not accept unless no other solution is possible; and like UPJOHN, J., I do not think that the court is under such compulsion. It is no doubt true that if and to the extent that a testator's or settlor's disposition of or in regard to foreign immovables (or the income or proceeds thereof) comes into conflict with the *lex situs*, the latter must prevail; and it is in that sense (according to counsel for the Crown) that DICEY'S r. 85 must be read. But to the extent that no such conflict arises, or where (as here)

A there is no conflict and the relative rights of the persons now entitled to the enjoyment of the property or its income are determined exclusively by reference to the testator's will, then it is true to say, within the meaning of the subsection, that the proper law regulating the beneficiaries' rights is that which the testator intended, i.e., English law. In my judgment sensible effect can and should be given to the subsection in the way for which counsel for the Crown contends;

B and, as a matter of construction of the subsection without reference to the authorities cited, it is shown that on Sir Elliot's death, the South African property passed by reason, and by reason only, of the dispositions in Sir Frederic's will relating to his general trust estate and that the "proper law" regulating those dispositions was the law which he intended by the terms of his will (including cl. 2) to regulate or govern them, that is, English law.

C The evidence to which I have above referred is contained in the joint affidavit of the plaintiffs and, more particularly, in the letter to the plaintiffs' solicitors from the general manager of the Colonial Orphan Chamber and Trust Co. dated Aug. 30, 1955. In that letter it is, among other things, said:

D "Although the property is registered in the individual names of the trustees, they hold purely as trustees and, therefore, subject to the terms of the late Sir Frederic Philipson-Stow's will from which they derive their appointment, a copy of which will be filed in the office of the Registrar of Deeds."

E I turn then to the question whether the conclusion which I have stated as a matter of construction of the subsection of the Finance Act, 1949, is inconsistent with or supported by the authorities cited to us, none of which, as I have stated, is an authority directly on the subsection.

F Counsel for the plaintiffs particularly relied on three cases (which were cited also before UPJOHN, J.), *Re Moses, Moses v. Valentine* (4), *Re Miller, Bailie v. Miller* (5), and *Re Berchtold, Berchtold v. Capron* (6). The testator in *Re Moses* (4) had given, devised and bequeathed his real and personal estate, which included a leasehold property in South Africa, to his wife for life, and, subject thereto, in favour of other beneficiaries. The testator was a domiciled Englishman and his will was in English form. The question then arose whether the rule in *Howe v. Earl of Dartmouth* (7) was applicable as regards the South African leasehold; but it was held by SWINFEN EADY, J., that since that rule was (according to uncontradicted evidence) not recognised or applied in South Africa, the right of the widow as respects the South African immovable property (i.e., the leasehold) must be governed by South African law, with the result that she was entitled to the enjoyment of that property for her life notwithstanding its wasting character. The learned judge's judgment was a short one and depended, as I read it, on the propositions that the validity of a testamentary disposition of a foreign immovable must be governed by the *lex situs*; and that, according to that *lex*, the gift of a life interest in the South African leasehold took effect according to its terms, i.e., so that the usufructuary was entitled to enjoy the rents in specie during her life without giving any security as to the value on her death and with the right to obtain an interdict against the executors (sic) if they attempted a sale.

H *Re Miller* (5) was concerned with the will of a domiciled Scotsman so far as it affected an English immovable, viz., real property in Park Lane, London. The will was in Scottish form, but also executed in manner required by English law, and disposed of a Scottish immovable, as well as the Park Lane property, by a gift of them in favour of A "and the heirs of his body in fee". It was proved, as a matter of Scots law, that the addition of the words "in fee" following the phrase "heirs of his body" had the effect of giving to the beneficiary, in addition

(4) [1908] 2 Ch. 235.

(5) [1914] 1 Ch. 511.
(7) (1802), 7 Ves. 137.

(6) [1923] 1 Ch. 192.

to an estate tail (or its equivalent), certain rights of disposition. It was, accordingly, argued that in the will of a domiciled Scotsman expressed in Scottish form some similar effect should, by some appropriate means, be given to the words as they affected the Park Lane property. But WARRINGTON, J., rejected this view, holding that the effect of the devise of an English immovable must be determined by the *lex situs*, viz., English law, with the result that the use of the words "in fee" had no special significance and could not limit or qualify the estate tail which was conferred effectively by the devise in favour of "the heirs of the body". The learned judge said (8):

"... the incidents of the estate which can be created in English land must be determined by the law of the country where the land is situated and not by the law of the country where the testator is domiciled or where the will is made."

Re Moses (9) and *Re Miller* (10) are undoubtedly authority for the proposition that any purported disposition by will (or by transfer or other means *inter vivos*) of immovable property in another country must be subject to the control of the *lex situs* in the sense that that *lex* will govern and determine the effectiveness of the (purported) disposition. But that proposition is, in my judgment, insufficient for the purposes of counsel for the plaintiffs. We are here concerned with the meaning of the statutory formula which imposed liability for estate duty on "property passing" on a death if (so far as concerns the present case) the property passed by reason of a disposition of which the proper law was English. As I have earlier said, the argument of counsel for the plaintiffs appears inevitably to involve the result that all immovable property abroad, of which an English testator may in some sense "dispose", is, while unsold, exempt on any passing from duty—a result which, if intended, could have been very simply stated. It is not in doubt (and the Crown have conceded) that as regards a direct disposition by will of foreign immovables (e.g., to the testator's executors) the *lex situs* will govern and must prevail. But the question here relates to a case where the administration of the testator's estate in South Africa, having long since been concluded, the income of that estate is, and has since before the date of the relevant death been, received by the trustees in England of the testator's will and applied by them as part of the general income of the estate. As such the enjoyment of the income of the South African property passed on the death of Sir Elliot to the present tenant for life; and it did so (as I think) by reason, and by reason only, of the disposition to that effect contained in the testator's will, which disposition was and is governed by the English law—for there is no suggestion of any conflict in this respect between South African and English law or that South African law provided any impediment or qualification to the effectiveness of the English testamentary disposition or, indeed, that South African law, at that stage, came into the matter at all.

I do not forget that in certain circumstances the law of country A may apply the law of country B and that in such circumstances it is the law of country A which nevertheless governs. But no such considerations appear to apply here. As I understand the evidence, the trustees of Sir Frederic's will have long since been registered, according to South African law, as owners of the Steenbokspan property and all their administrative duties have long since been performed. Since a date prior to Sir Elliot's death, they have regularly received the income of the property as owners. Their application of that income as part of the general estate has been solely in accordance with the directions in Sir Frederic's will; and pursuant to those directions, the right to receive that income passed on Sir Elliot's death to the present tenant for life.

The facts of *Re Berchtold* (11) were somewhat complex, but for present purposes it is sufficient to state that a domiciled Hungarian had by an effective

(8) [1914] 1 Ch. at p. 519.

(9) [1908] 2 Ch. 235.

(10) [1914] 1 Ch. 511.

(11) [1923] 1 Ch. 192.

- A English will disposed of immovable property in England, viz., a freehold estate in Birmingham, to trustees on trust for sale. The beneficial interest in the proceeds of sale under the will belonged at his death to a second Hungarian national, who had, however, died intestate. The question was whether the persons entitled on that intestacy to the English immovable (which was still unsold) were to be determined according to the law of Hungary or the law of
- B England. It was not in doubt that the question whether the Birmingham estate should be treated as immovable property or (by reason of the trust for sale) movable was to be determined by the *lex situs*, i.e., the law of England. If, according to that law, the property was immovable, then the devolution on intestacy would depend on *lex situs*, English law; but if the property were properly (by the *lex situs*) regarded as movable, then the devolution would
- C depend on the *lex domicilii*, i.e., the law of Hungary. RUSSELL, J., decided in favour of the former alternative. In my judgment since the case was concerned solely with the question of devolution on intestacy, it cannot assist towards the solution of the present case and is no authority for the view that for any purpose (including that of estate duty) the disposition by the will of the original testator had at the date of the intestate's death to be treated as governed by one law
- D rather than another.

- I conclude then that there is nothing in any of the authorities cited by counsel for the plaintiffs which is inconsistent with the view that I have formed on the meaning of s. 28 (2) of the Finance Act, 1949; and I turn to *A.-G. v. Johnson* (12), which, as later explained in this court, was much relied on by counsel for the Crown. The relevant facts of that case were that a testator domiciled in England had by his English will left his real and personal estate, which included a tea plantation in Assam, to trustees on trust for sale. He disposed of the proceeds of sale on trust to pay the surplus income after providing for annuities to eight persons and the survivors and survivor of them for the period of the life of the longest lived annuitant. The testator died in 1896. The question was whether on the
- E "passing" occasioned by the respective deaths in 1903 and 1905 of two of the
- F persons entitled to the surplus income, succession duty and, therefore, by virtue of s. 2 (2) of the Finance Act, 1894, estate duty, was payable in respect of the Assam immovable which remained unsold pursuant to the trustees' power to postpone the sale. BRAY, J., answered the question affirmatively. It was, however, stated by SIR WILFRID GREENE, M.R., in *Re White, Skinner v. A.-G.* (13), that the grounds for the decision were obscure, and in the present case the
- G Crown has not sought to rely on them as they appear from BRAY, J.'s judgment. In *A.-G. v. Belilios* (14), in this court the case was regarded as having been correctly decided. LORD HANWORTH, M.R., said (15) in the course of the argument that it appeared to be a very plain case. SARGANT, L.J., said of it (16):

- H "In *A.-G. v. Johnson* (12) the succession held taxable was in property in Assam remaining unsold, but the succession was created by an English will devising the property to English trustees upon trust to sell and hold for beneficiaries here. The law creating and governing the trust was English."

LAWRENCE, L.J., said (17):

- I " *Re Cigala's Settlement Trusts* (18) and *A.-G. v. Johnson* (12) are cases where the trusts were established by persons domiciled in England and were English settlements from the moment when they were made, therefore constituting dispositions under which the beneficiaries claimed title by virtue of the laws of England."

(12) [1907] 2 K.B. 885.

(13) [1938] 2 All E.R. 691; [1939] Ch. 131.

(14) [1927] All E.R. Rep. 723; [1928] 1 K.B. 798. (15) [1928] 1 K.B. at p. 809.

(16) [1927] All E.R. Rep. at pp. 728, 729; [1928] 1 K.B. at p. 821.

(17) [1927] All E.R. Rep. at p. 731; [1928] 1 K.B. at p. 827.

(18) (1878), 7 Ch.D. 351.

It is no doubt true, as counsel for the plaintiffs argued, that the observations of the court on *A.-G. v. Johnson* (19) were obiter; and it is, of course, also true that that case arose under the Succession Duty Act, 1853, and the Finance Act, 1894, and not under the Finance Act, 1949, with which we are presently concerned. Counsel for the plaintiffs further contended that the observations of this court already quoted were erroneous and should not now be followed. I should not wish to say—and it is not necessary to do so—that the language of SARGANT, L.J., and LAWRENCE, L.J., should be treated as involving the extreme propositions which that language, taken literally, might be said to justify. But the language is at least persuasive authority for the view that where (as in *A.-G. v. Johnson* (19) and as in the present case) the situation was that the income of a foreign immovable was being regularly received by trustees in this country as part of the general estate (i.e., after the testator's estate here and abroad had been fully administered) and was being applied by the trustees according to the dispositions of the English will, then on the death of one entitled to a share in that income, there was a succession which attracted duty under the Succession Duty Act, 1853, and a passing which attracted estate duty accordingly under s. 2 (2) of the Finance Act, 1894. It is to be noted, also, that the final words of the passage which I have cited from LAWRENCE, L.J., reflected the language of LORD CRANWORTH (which I anticipated at the beginning of this judgment) in *Wallace v. A.-G.* (20). That case is not relevant on its facts, but in the course of his judgment LORD CRANWORTH stated (21) that the apparently unqualified language of s. 2 of the Succession Duty Act must be treated as limited so as only to tax persons “who become entitled by virtue of the laws of this country”.

In the result, in my judgment, counsel for the Crown was entitled to say that prior to the abolition of succession duty and the coming into operation of the Finance Act, 1949, *A.-G. v. Johnson* (19) “held the field” and should be regarded as authority for liability for succession duty and, therefore, estate duty in respect of foreign immovables where, as in such a case as the present, the income of the immovable being received by trustees of an English will as part of their general estate and being applied by them in pursuance, and pursuance only, of the disposition of the English will, the successor on a predecessor's death “became entitled by virtue of the laws of England”. If this is right, then in my judgment it can further be said that on the enactment of s. 28 (2) of the Finance Act, 1949, and the substitution thereby of the new criterion for estate duty for that formerly contained in the Finance Act, 1894, it is reasonable to construe the language of the Act of 1949 consistently with the interpretation which had been given to the earlier legislation.

One final point was taken by counsel for the plaintiffs, viz., that by virtue of s. 78 of the Settled Land Act, 1925, when applied to the special terms of Sir Frederic's will, the Steenbokspan property was not, on Sir Elliott's death, held on any effective trust for sale. My short answer to this point is that it makes no difference for present purposes whether it was so or not; the essential fact being that, on and prior to Sir Elliott's death, the income of the property was in fact being received by the trustees as owners and being applied by them as part of the general income of the trust estate according to the directions in Sir Frederic's will.

In the result I think that the decision of UPJOHN, J., was correct and that the appeal should be dismissed.

SELLERS, L.J.: I agree with the judgment of LORD EVERSHED, M.R., that has just been delivered, which I have had an opportunity of reading beforehand, and I, too, would uphold the decision of UPJOHN, J., and would dismiss the appeal.

HARMAN, L.J.: I have the misfortune to dissent from the conclusions arrived at by my Lords.

- A The words to be construed are " the proper law regulating . . . the disposition ". I agree with LORD EVERSHED, M.R., in holding that the disposition here is the testator's will and I accept his views both as to the origin of the words " proper law " and the meaning to be attached to them. I feel no great difficulty in applying these words to a unilateral document such as a will, but as will be seen hereafter, they do not produce the same effect as when applied to contracts where the
- B proper law is to be determined once for all at the contract date. In the case of a will, the proper law may, and in the instant case does, change at a time after the testator's death, and cannot be settled on the happening of that event. The testator here has expressly declared that his will should operate according to the law of England " so far as the case admits ", and the question is whether in the case of foreign immovables the case does so admit. The words are an
- C acknowledgment that in many countries the law does not allow freedom of testamentary disposition. The law in South Africa apparently does allow it in this respect, but it is that law and not the English law which makes the disposition effective. It is conceded by the Crown that if the Finance Act, 1949, had been law before the testator's death, estate duty would not have been payable on the happening of that event, nor indeed on a devolution thereafter
- D so long as the administration of the estate in South Africa was not complete. This must be because the South African law was the law regulating the disposition at those stages. It is furthermore conceded that if there had been a direct devise of the property to Sir Elliot after his mother's death, no estate duty would have been payable when the property devolved on him because the proper law would still be that of South Africa. It is, however, argued that there comes a point
- E when there is a change in the proper law and, indeed, so far both parties agree. What is in dispute is the point at which this event occurs. The Crown argues, and LORD EVERSHED, M.R., agrees, that this point had been reached before Sir Elliot's death because the administration was complete and the former tenant for life at the time of his death was receiving the rents and profits by virtue of the English will. The taxpayer argues that this point will not come until the date
- F when, if ever, the trust for sale in the English will is carried into effect and the proceeds are transferred to this country.

- It seems to me cardinal that the existence of the trust for sale in the English will has not altered the quality of the property from an immovable to a movable asset. Authority for this is *Re Berchtold* (22), and it is, as I understand, not disputed by the Crown. The reason is that the law attaching to immovable
- G property is the *lex situs* and that in that law the equitable doctrine of conversion has no part. Clearly then to this extent the law regulating the disposition is the law of South Africa. Similarly in *Re Moses* (23) the English rule in *Howe v. Earl of Dartmouth* (24) was excluded by the *lex situs*. Again in *Re Miller* (25), the English law prevailed in its effect on the devise of an English immovable and prevailed over the law of Scotland where the will was made and where the testator
- H was domiciled.

- It seems to me that so long as the foreign immovable remains an immovable, it must in fact be controlled by the *lex situs*. The immediate reason why the present tenant for life is receiving the rents and profits is no doubt because of a direction in the English will, but that only takes effect because the South African law allows it to do so. If, for instance, that law did not recognise the provision
- I cutting down the interest of a tenant in tail living at the death of the testator to a life interest but conferred on him an absolute interest, that would undoubtedly prevail over the direction in the English will.

It is objected that to construe the statute in the way I have suggested is to nullify its effect in every case of foreign immovables and that it would have been much simpler, if that were the legislature's intention, to say so in so many words.

(22) [1923] 1 Ch. 192.
(24) (1802), 7 Ves. 137.

(23) [1908] 2 Ch. 235.
(25) [1914] 1 Ch. 511.

I do not feel the force of this. It is conceded by the taxpayer that once the asset arrives in England, or rather perhaps when it becomes a movable, then the beneficiaries take solely by virtue of English law and that becomes the proper law. *A.-G. v. Campbell* (26) is a good illustration of this, for there the foreign property had in fact been converted in obedience to the directions in the will and invested in England and, therefore, on the death of the annuitant an English succession arose, notwithstanding the fact that the testator was domiciled in Portugal and his property was originally situated there. In that case LORD WESTBURY in his speech said (27):

"Now, all this is an immediate consequence of the first principles of law, and the Master of the Rolls has been misled by language which was used by LORD CRANWORTH in the case of *Wallace v. A.-G.* (28) where the extraordinary conclusion was contended for, that under the will of a gentleman dying domiciled abroad the first legatee, though he was not liable to legacy duty, became liable to succession duty under the Act. It is quite clear that you cannot apply an English Act of Parliament to foreign property whilst it remains foreign property; but after the purposes of administration have been answered and distribution made, if a party taking this distributive part comes to this country and invests it upon trusts, it assumes the character of a British settlement and British property, and is no longer to be dealt with as if it was merely a portion of a foreign testator's estate to be received in the course of administration."

Similarly in *A.-G. v. Belilios* (29), the testator's property remained situate in Hong Kong and it was declared that no estate duty was payable under s. 2 (2) of the Finance Act, 1894. In *A.-G. v. Jewish Colonization Assocn.* (30), estate duty was held payable because the trustee under the relevant deed in whom the assets were vested was an English company and the trusts must be executed solely under English law.

This leaves *A.-G. v. Johnson* (31), which undoubtedly decided that though the foreign property was still unsold, estate duty was payable in England. In my judgment this decision was wrong and really depended on the view of the learned judge (32) that the trust for sale operated to convert the foreign property into movables. This is the explanation suggested by SIR WILFRID GREENE, M.R., in *Re White* (33). The decision was not criticised in *A.-G. v. Belilios* (29), but the point did not arise directly in that case and was not, I think, being considered by SARGANT and LAWRENCE, L.J.J., when they used the language which appears in the report (34). Moreover, the decision in *A.-G. v. Johnson* (31) has not much left to support it after the criticisms of SIR WILFRID GREENE, M.R., in *Re White* (35), and the concession which the Crown felt constrained to make here that it could not rely on the judge's view that the Assam property was an English chose in action.

I am further of opinion that the liability to estate duty under the section depends on the situation at the relevant time, which here is the death of Sir Elliot, of the property disposed of by the will and that DICEY's rule applies.

In my judgment the case does not depend on the forum in which the trusts of the will ought to be enforced. *Lord Sudeley v. A.-G.* (36) and *Re Smyth, Leach v. Leach* (37), seem to turn on the question of the forum of administration and on the view not now contended for that an English trust for sale of foreign immovables converted them into personal property and, therefore, into movables. True it is that the trusts of this will might be enforced against the trustees by a

(26) (1872), L.R. 5 H.L. 524.

(27) (1872), L.R. 5 H.L. at p. 530.

(28) (1865), 1 Ch. App. 1.

(29) [1927] All E.R. Rep. 723; [1928] 1 K.B. 798.

(30) [1901] 1 K.B. 123.

(31) [1907] 2 K.B. 885.

(32) [1907] 2 K.B. at p. 893.

(33) [1938] 2 All E.R. at p. 696; [1939] Ch. at p. 141.

(34) [1927] All E.R. Rep. at p. 728 and p. 731; [1928] 1 K.B. at p. 821 and p. 827.

(35) [1938] 2 All E.R. 691; [1939] Ch. 131.

(36) [1897] A.C. 11.

(37) [1898] 1 Ch. 89.

- A suit in England, but it could not be effective by obliging them to take proceedings in South Africa, and the ultimate sanction must lie there. Suppose, for instance, that the law of South Africa were to be altered so that the trusts of an English settlement were ordered to be disregarded so far as they related to land in South Africa, it could not be denied that South African law would prevail. It seems to me, therefore, that the law regulating the disposition remains in the last resort
- B the South African law and that law, therefore, so long as the property remains in South Africa, is the proper law of the disposition.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: Norton, Rose & Co. (for the plaintiffs); Solicitor of Inland Revenue.
[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

C

STIRLAND v. STIRLAND.

- D [PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Phillimore, J.), October 12, 1959.]

Magistrates—Husband and wife—Maintenance—Wilful neglect to maintain—Mental illness alleged—Refusal to undergo electrical shock treatment—Wife justified in withdrawing from cohabitation—Failure by husband to prove mental disability—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 4.

E

The husband had from time to time been in a mental hospital as a voluntary patient. In May, 1958, he discharged himself and went to live with his parents for the next seven months, during which time he was working regularly. In December, 1958, he resumed co-habitation with the wife but thereafter worked only irregularly on the ground that his back was hurting him. In March, 1959, the husband re-entered hospital for the fourth time as a voluntary patient. He was advised by the hospital to undergo electrical shock treatment, but he refused to do so and discharged himself on Apr. 10. The wife went to meet the husband at the hospital and on the way home she told him that unless he underwent the treatment advised by the doctors so that they could live happily together again, she could not live with him again. He refused, and the wife handed him the keys of the matrimonial home and left him. On a complaint by the wife that the husband had wilfully neglected to provide reasonable maintenance for her and the child, the husband contended that he was mentally ill and incapable of working and that the wife was in desertion. No medical evidence was called by either party. The magistrates found that there was no physical reason why the husband should be incapable of working, that he was not so mentally disordered as not to be responsible for his actions, that the wife was justified in withdrawing from cohabitation on the ground that his previous conduct towards her had made life intolerable for her, and that accordingly she was justified in imposing, as a condition of their living together, that he should first undergo the treatment advised. The magistrates accordingly made a maintenance order in favour of the wife. On

G

H

I

Held: the finding of the magistrates that the husband was guilty of wilful neglect to provide reasonable maintenance should stand since the husband had failed to establish that he was mentally incapable of working and the condition laid down by the wife that he should undergo the treatment advised did not show an intention to desert him but was consistent with an intention to preserve the marriage.

Appeal dismissed.

[As to a husband's liability to maintain his wife who withdraws from cohabitation, see 12 HALSBURY'S LAWS (3rd Edn.) 482, para. 1077, note (i), 483, para. 1078; and for cases on the subject, see 27 DIGEST (Repl.) 701-703, 6703-6719, 706, 6748.] A

Appeal.

The husband appealed against an order of the Nottingham county justices sitting at Nottingham dated July 1, 1959. B

In 1955 the husband suffered an accident in a pit in which he was working. Since then he had spent several periods as a voluntary patient in a mental hospital. In May, 1958, he left the hospital after one such period as a voluntary patient and went to live with his parents, and he failed to rejoin the wife and child. In August, 1958, the wife issued a summons alleging that he had wilfully neglected to provide reasonable maintenance for herself and the child. The husband offered to return to her and in December, 1958, the parties resumed cohabitation. On Mar. 26, 1959, the husband entered hospital for the fourth time as a voluntary patient. The hospital advised that he should undergo electrical shock treatment. The husband refused and discharged himself on Apr. 10. On that date the wife went to meet him at the hospital. On the way home the wife handed to the husband the key of the matrimonial home and told him that she could no longer live with him since he had refused to undergo the treatment prescribed for him. The wife thereupon left with the child and caused a summons to be issued against the husband on her complaint that on or before Apr. 10, 1959, he had wilfully neglected to provide reasonable maintenance for her and the child. On July 1, 1959, the complaint was heard by the justices. No medical evidence was called by either party. The justices found that the wife had proved her complaint. They, therefore, granted her the custody of the child and ordered the husband to pay £3 a week as maintenance for the wife and £1 10s. a week as maintenance for the child. The husband now appealed. C D E

I. C. R. McCullough for the husband.

R. D. Lymbery for the wife. F

LORD MERRIMAN, P.: The facts of the case are a little complicated. I rule out now from any further consideration the fact that historically the husband was in hospital for the fourth time, in circumstances which I will relate later, for between a fortnight and three weeks immediately preceding the date from which it is alleged that the wilful neglect dates retrospectively. I was inclined to think at one time that that period might be isolated from the rest of the case and dealt with as a separate issue. I think so no longer. It is clear that there is a general question of principle on which this case falls to be decided, and I do not think that that particular circumstance matters. G

The fundamental point in the present case is that on Apr. 10, 1959, the wife went to fetch the husband out of hospital, taking him his clothes. We do not know whether he had asked her to go with his clothes or whether she had merely gone on her own initiative. At any rate, he came out of hospital. As a voluntary patient he was entitled to discharge himself. In the course of the next hour or so, as they were on the way, ostensibly, back to the matrimonial home, she handed him the key and told him that she could no longer live with him, for the reason that he had refused to undergo the treatment for his ailment which the hospital had prescribed. I will come back to the detail of that presently, but I have said enough to show that the wife *prima facie* undertook the burden of establishing that she was entitled to maintenance, and that the husband had been wilfully neglectful in providing that maintenance to her as a separated wife, for it is clear that she remained in separation from the date on which he came out of hospital until the date on which the hearing took place, July 1. Actually the husband asserted positively that she was a deserter, but I still think that *prima facie* the burden on a wife who is living separate and apart is to H I

A justify that circumstance before she can convict her husband of wilful neglect to provide reasonable maintenance. The magistrates, let me say at once, have found that in the circumstances she was not in desertion.

The circumstances are these. For considerable periods, ever since about 1955, the husband had been in and out of a mental hospital in the neighbourhood of Nottingham as a voluntary patient. He had in 1955 suffered some accidental
B injury in the pit in which he was working. He had convinced himself that there was an injury to a knee which made it either difficult or even dangerous for him to work regularly in the pit, though it is common ground that he did some work spasmodically. He maintained this opinion about the knee in spite of, I think, four separate examinations by X-ray, which are said on the evidence to have disclosed that there was nothing whatever the matter with the knee. However,
C so far as I know, at all material times he maintained his own opinion. He added to that a further opinion about himself, that about eleven years ago, first of all, followed by some other unknown injury ten years ago, his back was broken, so that he was really completely incapacitated from any laborious work which involved lifting an iron ring, and other things of that sort, with which it was part of his duty to deal. No medical evidence was called to suggest that
D there was any such injury. On the contrary, he had evidently been repeatedly told by the doctors that there was no such injury, and having, as I have already said, on three previous occasions been admitted to this mental hospital as a voluntary patient, he was admitted again on Mar. 26, 1959, for the fourth time, discharging himself, as I have also already said, on Apr. 10.

Now, on this occasion the hospital prescribed electrical shock treatment.
E There are no two opinions but that the husband positively refused to submit to it, and I think that the only possible inference from his own evidence, and, indeed, from what can be gleaned from the wife's evidence about it, is that he refused it because he was satisfied that there was nothing wrong with his head, and was equally satisfied that shock treatment to his brain would not do any good to his broken back. At least, that is what he professed to say was the
F reason. So, it is a case in which the magistrates have found that the married life to which the husband had reduced the wife before he went into hospital on this last occasion was intolerable, and that it was making her ill, and that she was abundantly justified in not resuming cohabitation when the husband was openly refusing the treatment which was prescribed as likely to put him right. In saying that the wife would not resume cohabitation until she and her husband
G could do so happily and in better circumstances, as they would or at any rate might have done if he had undergone the treatment, the magistrates found, to put it at the lowest, that as she was plainly willing to try a resumption of cohabitation if this treatment had been undergone, she was not a deserter.

This matter, then, falls to be resolved in two stages. It is not a wholly easy case because I think that there are two distinct stages in which the onus is one
H way on the wife and the other way on the husband. The two stages are, that she had got to prove that notwithstanding her being a separated wife she was still entitled to maintenance and that he had wilfully neglected to provide it. Certainly he had not provided it. That issue I think the magistrates have decided in her favour, and I do not think that it is possible for this court, in the absence of seeing and hearing the witnesses, and in particular the evidence of the
I wife, which the magistrates preferred at every stage where the matter is controversial to the evidence of the husband, to say that in these rather peculiar circumstances the wife was not justified in temporarily refusing to resume cohabitation. I think that it is important to bear in mind that I can see no evidence whatever that she was taking up the position that she was entitled permanently to refuse to resume cohabitation; quite the contrary. So up to that point I think that the wife has plainly discharged the burden which *prima facie* was on her. But I am willing to assume, indeed, I think it is an obvious proposition, that if a man by some form of disablement is prevented from working and earning a

living, that is very much a matter to be borne in mind in considering whether failure in fact to provide maintenance can be described as wilful neglect. I should think that that was perfectly clear in a case, for example, where a man is in hospital with a broken limb, which physically prevents him from working. The position might, however, shift and the burden change if there were evidence that a perfectly simple operation would mend the limb and enable him to work with perfect safety. And just as I think that that would be true in the case of a physical disablement, so I think that it might properly be held to be true in a case of mental disability. What, in substance, is said in this case and has been argued with great force, if I may say so, by counsel for the husband, is this: the husband refused to have this treatment because, in effect, he suffered from the delusion that the shock treatment was designed to put his back right, and he was satisfied that it would do no good to his back, and there was nothing whatever wrong with his head. If the delusion to that extent was proved to the satisfaction of the magistrates I am not prepared to say that so long as that delusion existed it might not have the same effect as the uncured injury to a limb. There is, however, no shadow of doubt, that in order to prove a position like that the burden, which was accepted by counsel for the husband, plainly would lie on the husband.

As things stand, the magistrates have found, and this is the highest at which they put it, that even though he is clearly mentally ill he did not appear to be so disordered as not to be responsible for his actions. I should be prepared to hold that a man who thought that this proposed shock treatment to his head was designed to put right an imaginary broken back could be said to be suffering from a delusion, which might, in a certain degree, make him irresponsible for his actions, but I am strongly of the opinion that to prove that state of things would require evidence of a very potent character on the part of the husband, and that evidence, manifestly, ought to come from some responsible witness from the mental hospital. Nobody was called to deal with this matter or to make any such suggestion, and it is suggested that we could spell all that out of the evidence of the wife. I do not think that is possible. I do not think that the evidence of the wife goes anywhere near establishing any such proposition as that, and it must be acknowledged, I think, that in the absence of any proper evidence about the husband's state of mind and the purpose for which the shock treatment was designed, and the probability of its success, and the rest of it, there is plainly the possibility, which I think is very much for the husband to rebut, if possible, that the whole thing savours of malingering. I do not want to impute any evil to the husband, but this, at any rate, is the fact, that the magistrates thought that it was significant that during the seven months of the preceding year, when the husband had been living with his parents, he had been able to work regularly, and on that basis, and after a very careful review of the evidence, they stated their conclusions.

Their first conclusion was in the following words:

"The husband was capable of working regularly and earning sufficient wages to maintain his wife and child properly, and had wilfully failed to do so."

Now, although that finding is challenged, it is a very long way from being challenged on the basis that the husband had even begun to establish that he was prevented from working and earning money by some mental delusion of the kind that I have indicated. Having come to that conclusion, the magistrates then hold that although the wife had refused to go back to her husband when he took his discharge from hospital, his previous conduct towards her had been such that she was fully justified in laying down the condition under which she would return, that is to say, that he would undergo the treatment which he had been advised to undergo with the avowed object of enabling them to settle down happily together. Then, underlining this aspect of the matter, the justices say:

- A "If the husband would show a genuine desire to change his conduct and maintain his wife and child, for example, by accepting the medical advice, then the wife would no longer be justified in refusing to return to him."

In my opinion the magistrates were right in saying—or, at any rate, we have no right to interfere with their saying—that in the circumstances found by them the wife could not be held to be a deserter. In so far as his case depends on his alleged mental disability it was for him to prove it, and in my opinion he has not begun to do so. That being so, I think that this appeal is misconceived, and must fail.

- PHILLIMORE, J.: I entirely agree. The case which counsel sought to make on behalf of the husband was this. First, he said that whilst it was no doubt true that the husband had failed to maintain his wife on Apr. 10 and preceding days, this was due to the fact that he was ill and was unable to do so, and secondly that, even if that were not the case, then the wife by deserting the husband when he came out of hospital disentitled herself to claim any maintenance against him.

- Taking, first, the failure to maintain on and before Apr. 10, it was for the wife to show that the husband had failed to maintain her and that his failure was wrongful and wilful. The ordinary assumption that the law makes is that a man is responsible for his actions, and if, as here, a husband desires to say "True, I failed to maintain you", then it is for him to show that he was not responsible at the time for his actions or was otherwise excused from his ordinary liability.

- The case put forward here is that the husband was mentally ill. In the course of the hearing the wife gave evidence and the husband gave evidence, but no medical evidence was called, and clearly, if a man is seeking to excuse himself from his normal legal liability on the ground of his mental state it is for him to call proper evidence to satisfy the court that it was due to his mental state that he failed in his obligation. He did not attempt to do so, and the magistrates, in those circumstances, had to deal with the case on the evidence before them, and they found in terms that the husband had made little effort to provide his wife with reasonable maintenance after they started to live together again at Christmas, 1958. They said:

- "We felt that there was no physical reason why he should not go to work regularly."
- Then, dealing with his mental condition, they found:

"Even though he is clearly mentally ill, he did not appear to be so disordered as not to be responsible for his actions. We think it is significant that while he was with his parents for some [seven] months of last year he appeared able to work regularly."

- Accordingly they reached this conclusion:

"The husband was capable of working regularly and earning sufficient wages to maintain his wife and child properly, and had wilfully failed to do so."

- In my judgment there was evidence before them on which they could properly so find, and, indeed, in the absence of medical evidence it would have been difficult for them to find that the husband was justified owing to his mental state in failing to maintain his wife. As I see it, that conclusion was warranted by the evidence, and it is not a conclusion with which, on the material before us, we could possibly quarrel. Of course, it may be said that the mere fact that this man was in hospital at all should be held to excuse him from maintaining his wife and child since it must be assumed that while he was in hospital he was there properly and necessarily. I do not know. Men have before now been guilty of malingering, and, as LORD MERRIMAN, P., has said, on the evidence that would be a possible

view, though I certainly do not say a necessary view, of this case. It would be a possible view, and if as a result of malingering a man is removed to hospital when he does not require to be there, clearly he cannot rely on the fact that he is there to protect him from his obligations. There was no sufficient evidence here to support the defence which the husband put forward that he was mentally unable to work and to support his wife and child. A

On the second point, the question of desertion, the magistrates accepted the wife's evidence. She told them that when the husband came out of hospital he said that he would not sign for the treatment in there. She also said: B

"He told me he was not going to have the treatment. He never signed for the treatment. He said there was nothing wrong with him. He said I was silly to take notice of other people and not him."

The treatment was this electrical shock treatment which the doctors had prescribed. The wife then told him that unless he would take the treatment which the hospital had suggested C

"so we could live happily again and try to forget the illness, the same as the doctors told him, I could not stand living with him again because it was such a worry."

In my judgment that statement of the wife's is inconsistent with an intention to desert her husband and bring their married life permanently to an end. The wife was saying in effect: "I am only too anxious to preserve the marriage, but if we are going to live happily together you must accept the advice of the doctors, because I cannot go on living in the sort of way in which we were living before". D

The magistrates had to consider that evidence, and they accepted it, and they considered it against the background that for at least three and a half years the husband had been constantly complaining of ailments which, as the doctors found, did not exist in reality. In May, 1958, when he came out of hospital, he failed to rejoin his wife and child. He went and lived with his parents, and then, apparently, when his wife took out the summons in August charging him with failure to maintain her, he offered to return to her. She had taken him back in December, and then, after having worked quite regularly for some seven months whilst living with his parents, he had begun to behave as he had before, namely, working for a day or so, then taking a few days off on the ground that his back was hurting him, and sitting by the fire smoking, or retiring to bed and allowing his wife to look after him. E F

The magistrates found that his conduct had been such as to make life intolerable for the wife, and a misery, and accordingly they came to the conclusion that, although the wife had refused to go back to her husband when he took his discharge from the hospital, his previous conduct towards her had been such that she was fully justified in laying down the conditions under which she would return, and therefore they found that she was not in a state of desertion. G

That finding, viewed against the background of this case and the sort of life with which the wife had had to put up, was really unassailable. Her statement to her husband was consistent only with a desire to preserve her marriage rather than destroy it, and it would be stretching language to describe her parting in those circumstances, when he refused her reasonable request, as desertion of her husband. Accordingly I think that the matters put forward by counsel for the husband fail, and in my judgment the appeal should be dismissed. H I

Appeal dismissed.

Solicitors: *S. C. Elphick*, agent for *Claytons*, Nottingham (for the husband); *Church, Adams, Tatham & Co.*, agents for *Healey & Smith*, Nottingham (for the wife).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

A

PRACTICE NOTE.

COURT OF PROTECTION.

B

Person of Unsound Mind—Variation of trusts by the court—Court of Protection—Application to determine question whether proposed arrangement beneficial to person of unsound mind—Practice under Variation of Trusts Act, 1958 (6 & 7 Eliz. 2 c. 53), s. 1 (3).

For the guidance of those who have reason to apply to the Court of Protection under s. 1 (3) of the Variation of Trusts Act, 1958*, the master has directed that the following notes on procedure shall be published:—

C

1. As soon as an originating summons under the Act to which a patient is a respondent has been issued in the Chancery Division, the Court of Protection should be notified and an authority sought for leave to enter appearance and to apply for or consent to the appointment of a guardian ad litem for the patient in those proceedings.

D

2. No formal application should be issued in the Court of Protection for relief under the Act until the originating summons has been issued in the Chancery Division and evidence filed in support thereof, but the master will in suitable cases authorise counsel to be instructed on behalf of the patient to look after the patient's interests during negotiations for an arrangement.

E

3. The formal application should only be entitled in the matter of the patient and the only respondent should be the patient unless the master otherwise directs. The master will direct whether the patient is to be served or service dispensed with, and where the master considers that the patient should be separately represented he may request the Official Solicitor to act as solicitor for the patient on the application.

F

4. A copy of the originating summons (or an office copy if the arrangement is to be found in the summons itself) and office copies of the evidence in support thereof, together with the exhibits, should be lodged with the application and an affidavit filed stating how the patient will be affected by the arrangement and whether it is considered to be for or against his benefit.

5. The master's order will make provision for subsequent approval of amendments which may be made to the arrangement after the date of the order.

Dec. 9, 1959.

E. F. ATKINSON,
Chief Clerk and Registrar.

* For the Variation of Trusts Act, 1958, s. 1 (3), see 38 HALSBURY'S STATUTES (2nd Edn.) 1131.

LESLIE v. LIVERPOOL CORPORATION AND ANOTHER.

[COURT OF APPEAL (Lord Evershed, M.R., Sellers and Harman, L.J.J.), November 13, 16, 25, 1959.]

County Court—Practice—Particulars of claim—Stating whether amount of claim exceeds £200—Whether claim should be expressly limited to £400—Whether claim for damages limited to £400 was claim in excess of £200 for purposes of appeal on fact—County Courts Act, 1955 (4 & 5 Eliz. 2 c. 8), s. 12 (2) (a) (i).

As a matter of general practice a prayer in particulars of claim in a county court action should state whether the claim exceeds or does not exceed £200 (see p. 900, letter C, post). If, however, it is reasonably apparent that, in spite of the terms of the prayer, the real claim cannot possibly amount to £200, so that the prayer has plainly been inserted solely to confer a right of appeal on fact, the defendant may make the appropriate application to the county court to amend the particulars of claim by striking out such part of it as is inappropriate to the true nature of the claim and designed merely for the purpose of conferring the right of appeal on fact (see p. 900, letter F, post).

In an action in the county court for damages for negligence arising out of a road accident, the plaintiff alleged that he had suffered personal injuries and shock and claimed special damage amounting to about £27. In his prayer he claimed "damages limited to £400." It was common ground that an award of £100 would compensate the plaintiff. The action was dismissed and the plaintiff appealed on questions of fact. On the preliminary question whether the claim was in excess of £200 and whether, therefore, under s. 12 of the County Courts Act, 1955, the plaintiff had a right to appeal on questions of fact,

Held: although a claim for damages limited to £400 was not necessarily a claim in excess of £200, yet, having regard to the nature of the case, the court would treat the plaintiff as having claimed more than £200 when the action started and, therefore, as being entitled to appeal on questions of fact.

Observations on the inclusion of words limiting the damages to £400 in particulars of claim (see p. 900, letter H, post).

[As to requirements of particulars of claim, see 9 HALSBURY'S LAWS (3rd Edn.) 182, para. 376; and for cases on the subject, see 13 DIGEST (Repl.) 424, 425, 502-505.]

As to appeals from the county court to the Court of Appeal, see 9 HALSBURY'S LAWS (3rd Edn.) 320, para. 780; and for cases on the subject, see 13 DIGEST (Repl.) 472-474, 956-974.

For the County Courts Act, 1955, s. 12 (2), see 35 HALSBURY'S STATUTES (2nd Edn.) 34.]

Case referred to:

Tideway Investment & Property Holdings, Ltd. v. Wellwood, Same v. Orton, Same v. Jones, Same v. Friedentag, Same v. Thornily, [1952] 2 All E.R. 514; [1952] Ch. 791; 3rd Digest Supp.

Appeal.

This was an appeal by the plaintiff from a decision of His Honour Judge BROWN, at Liverpool County Court, on Mar. 9, 1959, dismissing the plaintiff's action for damages for personal injury limited to £400. At the hearing of the appeal the question was raised whether his claim was in excess of £200 so that he was entitled to appeal on questions of fact, and the case is reported only on that preliminary issue.

- A *E. Somerset Jones* for the plaintiff.
E. E. Youds for the defendants.

Cur. adv. vult.

Nov. 25. The following judgments were read.

- B LORD EVERSHED, M.R.: These proceedings arose out of a road accident which occurred at 6 o'clock in the evening on Sept. 13, 1958, that is to say, when it was daylight. I shall presently have to describe in detail the scene of the accident, but it is first to be noted that, according to the agreed medical report, supplemented by the agreement of the learned counsel in the case, the total damage, including special damage, which the plaintiff suffered is to be taken at the sum of £100. That fact has a bearing on a question which
- C arose early in the case, namely, whether according to the terms of the statute this was a case in which an appeal lay at all to this court on matters of fact. Because we thought this question of some importance, we reserved our judgment and since the hearing of the case I have had an opportunity of consulting with my brethren presiding in the other divisions of this court, HODSON, L.J., and MORRIS, L.J.
- D The relevant terms of the statute, namely, the County Courts Act, 1955, are to be found in s. 12, which conferred for the first time a right of appeal on matters of fact from a county court to this court (1); but the right of appeal so conferred was limited by the later terms of the section. So far as is relevant in the present case, s. 12 (2) provides that the proceedings in which a right of appeal is conferred by the section are:
- E “(a) any action founded on contract or tort, or for money recoverable by statute, where . . . (i) the debt, demand or damage claimed exceeds £200.”
- Sub-section (3) in effect makes that provision applicable to a counterclaim.
- F In the present case the action was, of course, founded on tort, the tort of negligence. The particulars of claim, having stated the particulars of negligence of the motor driver in what one might call almost common form, proceeded to give particulars of the personal injuries (fractures of the fingers, physical and nervous shock) and special damage £27 0s. 7d. The claim concluded with the words “and the plaintiff claims damages limited to £400.” That limitation is inspired, of course, by the language of s. 40 of the County Courts Act, 1934,
- G as amended by s. 1 of the County Courts Act, 1955 (2), giving to a county court jurisdiction in matters of this kind where the claim is limited to £400. It was suggested, however, in the present case that having regard to the nature of the injuries as specified in the particulars of claim, reinforced by what had since appeared as plainly the upper limit of any monetary damages that could be recovered, the plaintiff had not brought himself within s. 12 (1) and (2)
- H and so had no right of appeal on matters of fact. On a plain use of the English language, it is, of course, manifest that a claim expressed thus, “and the plaintiff claims damages limited to £400,” is not the same thing as saying that he claims damages exceeding £200, nor does the former, as a matter of English, as far as I can see, include the latter. In all the circumstances of this case, which includes the general nature of the claim (an action for damages for negligence on the part of a bus driver), it has seemed to us that it would not
- I be right to say of this plaintiff that he was not claiming damages, when his proceedings started, exceeding £200, and we have, therefore, treated it as open to the plaintiff to appeal to this court on matters of fact.

The fact that the question arose and caused some debate seemed to make it desirable that we should consider whether in cases of this kind a plaintiff should not make it clear from the start whether he is or is not claiming damages more

(1) See now County Courts Act, 1959, s. 109.

(2) See now County Courts Act, 1959, s. 39.

than £200 in extent. From the language of the subsection which I have read, it is to my mind clear beyond peradventure that the question whether there is or is not a right of appeal depends on the claim that is made in the case and not on the award which may later be recovered, and that view is, I think, supported by other language in the relevant section. In many cases, especially where the claim is for money recoverable by statute and very often where the claim is founded on contract, it will be apparent from the language of the particulars of claim whether the amount which the plaintiff seeks to recover does or does not exceed £200. In other cases, however, and more especially in actions founded on tort where damages are, as it is said, at large, this very often may not be so. After speaking, as I have said, to my brethren, we think that as a matter of general practice a prayer in particulars of claim should state whether or not the claim does or does not exceed £200. I have said "as a matter of general practice" because there will be cases where such a result is obvious from the nature of the claim. Where it is not so clear, then I think it would be a proper practice that the prayer should make it clear. There are good reasons, as it seems to me, for such a view. In the first place, I do not think it right that a plaintiff, if he should be the unsuccessful party, should be in the position of getting the best of both possible worlds so that in matters relating to costs he might say afterwards: "Although I did not say so, obviously my claim was a very small one from the start." On the other hand, whatever the actual sum that the judge might say that he would have recovered had he succeeded, he might say: "My claim was always for more than £200." It is right and, perhaps, even more important that the defendant in such a case should know where he stands in this matter. In the present case if the plaintiff had recovered £100, it might well have been a hardship to tell the defendant that he had no right of appeal on fact because the claim had not in fact in terms stated a demand for more than £200. Nor do I think that the adoption of such a practice is likely to lead to any kind of abuse. In trivial cases to put in that the plaintiff's claim exceeds £200 obviously might involve him in having to pay, if he lost, on a scale of costs which was inappropriate to the claim. More than that, I think that the defendant would have a remedy if it was reasonably apparent that, in spite of the terms of the prayer, the real claim could not possibly be any figure as large as £200, so that the prayer had plainly been inserted solely to confer a right of appeal on fact. In such a case I should have thought a defendant could make the appropriate application to the county court to amend the particulars of claim by striking out such part of it as was, as I say, inappropriate to the true nature of the claim and designed merely for the purpose of conferring this right.

We, therefore, are of opinion that in this type of case as a general matter a plaintiff should state whether or not his claim exceeds £200. The present prayer does say that the claim does not exceed £400 in order to confer county court jurisdiction beyond a doubt. Whether that limitation should properly be inserted is a matter that was considered, incidentally, by this court in *Tideway Investment & Property Holdings, Ltd. v. Wellwood* (3). I am there reported (4) as declining to express a view whether the limitation ought to be expressed. I take the same view today and do not desire to say that it is necessary for such a limitation expressly to be put in. I understand, however, that as a matter of county court practice it commonly is put in, and if it is the practice, there is obviously no good ground for altering it; but I should not wish to say that it was necessary as a matter of right that such a limitation should expressly be put in in order that the county court might have jurisdiction.

[His Lordship dealt with the facts and concluded by saying:] I think that the plaintiff proved negligence against the defendants, but that he was at fault

(3) [1952] 2 All E.R. 514; [1952] Ch. 791.

(4) [1952] 2 All E.R. at p. 520; [1952] Ch. at p. 808.

A himself, and I would apportion the blame equally with the consequence that the plaintiff should be entitled to recover the sum of £50 and an order to that effect should be substituted for the order made by the learned judge.

SELLERS, L.J.: My Lord has expressed the opinion of the court on s. 12 of the County Courts Act, 1955, and I have nothing to add to that. [His LORDSHIP then dealt with the facts and found that the plaintiff and the defendants were equally to blame.]

HARMAN, L.J.: I agree and have nothing to add.

Appeal allowed.

Solicitors: *Donald A. Kershaw & Co.* (for the plaintiff); *Town clerk*, Liverpool (for the defendants).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

D STYLO SHOES, LTD. v. PRICES TAILORS, LTD.

[CHANCERY DIVISION (Wynn-Parry, J.), November 19, 20, 1959.]

Landlord and Tenant—New tenancy—Business premises—Notice to quit—Service—Registered letter addressed to tenants' former address forwarded to new address—Validity of service—Waiver of invalidity—Landlord and Tenant Act, 1927 (17 & 18 Geo. 5 c. 36), s. 23 (1)—Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2 c. 56), s. 66 (4).

E At the date of the lease of business premises granted to them, the tenants, a limited company, had their registered office and principal place of business at Nos. 15/17, Chancery Lane, Huddersfield. On Feb. 2, 1957, the tenants transferred their registered office and principal place of business to Leeds. On making the transfer, they notified the landlords of the change, and also they directed the postmaster of Huddersfield to re-address all correspondence to their new address at Leeds. On Nov. 25, 1958, the landlords sent a registered letter to the tenants addressed to the Huddersfield address enclosing a notice to determine the tenancy of the said business premises under the Landlord and Tenant Act, 1954, s. 25. The postmaster at Huddersfield re-directed the letter to the tenants at their new address in Leeds, and it was received there by them on Dec. 2, 1958. By letter on behalf of the tenants, dated Jan. 2, 1959, they informed the landlords that they would not be willing to give up possession on the date specified in the notice, and that they did not admit its validity. On Mar. 16, 1959, the tenants issued an originating summons for a new tenancy. No objection was taken to the form of the notice, but the tenants objected that the notice was not properly served in accordance with the Landlord and Tenant Act, 1927, s. 23 (1)* (which was applied by the Landlord and Tenant Act, 1954, s. 66 (4)), and was, therefore, ineffective.

H **Held:** the requirements of s. 23 (1) were satisfied because on the facts, the notice had been served "by leaving it for [the tenants] at [their] last known place of abode in England" within the meaning of that subsection; furthermore, the modes of service prescribed by s. 23 (1) were not exhaustive, and it was sufficient that the notice was sent to and received by the tenants, whether or not one of the methods mentioned in the subsection was employed.

Re Sharpley & Manby's Application ([1942] 1 All E.R. 66) applied.

I Per CURLIAM: the tenants had waived any invalidity in the service of the notice (see p. 906, letter C, post).

* Section 23 (1) is printed at p. 903, letter G, post.

[As to the service of notice to determine a tenancy under the Landlord and Tenant Act, 1927, see 23 HALSBURY'S LAWS (3rd Edn.) 875, para. 1690; and for cases on the subject, see 31 DIGEST (Repl.) 503-505, 6283-6302 and 3rd DIGEST Supp.]

For s. 23 (1) of the Landlord and Tenant Act, 1927, see 13 HALSBURY'S STATUTES (2nd Edn.) 909, and for s. 66 (4) of the Landlord and Tenant Act, 1954, see 34 HALSBURY'S STATUTES (2nd Edn.) 442.]

Cases referred to:

Department of Agriculture for Scotland v. Goodfellow, 1931 S.C. 556; 2 Digest (Repl.) 11, 32.

Morecambe & Heysham Corpn. v. Warwick, (1958), 56 L.G.R. 283; 3rd Digest Supp.

Sharpley & Manby's Application, Re, [1942] 1 All E.R. 66; sub nom. *Sharpley v. Manby*, [1942] 1 K.B. 217; 111 L.J.K.B. 182; 166 L.T. 44; 2 Digest (Repl.) 81, 460.

Tennant v. London County Council, (1957), 121 J.P. 428; 55 L.G.R. 421; 3rd Digest Supp.

Adjourned Summons.

The plaintiffs, Stylo Shoes, Ltd., who were tenants of business premises at No. 41, Market Street, Manchester, applied by originating summons dated July 13, 1959, for a declaration that a notice by the defendants as landlords to the plaintiffs as tenants to determine the plaintiffs' tenancy on Nov. 2, 1959, and sent through the post in a registered letter addressed to the secretary of the plaintiffs at a place not being the plaintiffs' principal office, nor their last known place of abode, nor their registered office, was not duly served on the plaintiffs pursuant to the Landlord and Tenant Act, 1954, s. 66 (4) and the Landlord and Tenant Act, 1927, s. 23 (1).

A. E. Holdsworth for the plaintiffs, the tenants.

J. T. Plume for the defendants, the landlords.

WYNN-PARRY, J.: This is a summons by Stylo Shoes, Ltd., who are tenants under the lease in question, against Prices Tailors, Ltd., who are the landlords, and it is brought under the Landlord and Tenant Acts, 1927 and 1954. [His LORDSHIP referred to the relief for which the summons asked, and continued:] During the hearing counsel for the plaintiffs asked that he be allowed to amend the relief by adding after the words "not being the plaintiffs' principal office" the words "nor their last known place of abode nor their registered office"; no objection was taken to that application, and I therefore allow that amendment.

The matter arises in this way. Pursuant to the Landlord and Tenant Act, 1954, s. 25 (1), notice to determine the tenancy was sought to be given by the landlords. Under the provisions of that Act the validity or otherwise of the service of the requisite notice is to be determined by reference to the Landlord and Tenant Act, 1927, s. 23, and it is to that Act that I shall have to refer in particular. At the date of the lease, which was Oct. 11, 1938, the tenants' registered office and principal place of business was Nos. 15/17, Chancery Lane, Huddersfield. On Feb. 2, 1957, the tenants transferred their registered office and principal office and place of business from Huddersfield to Conway Road, Harehills Lane, Leeds. They took the precaution on that occasion of sending out circulars not only to their customers, but also to the defendants as their landlords, giving notice that they had changed their registered office and principal place of business to Conway Road, Harehills Lane, Leeds; at any rate, that is the inference I draw from the form of the circular that was sent out. On Mar. 4, 1957, and annually thereafter, the tenants gave a written direction to the post-master of Huddersfield directing him to re-address all correspondence to their new address at Conway Road, Harehills Lane, Leeds.

- A On Nov. 25, 1958, the landlords addressed to the tenants at their old address at Huddersfield a letter enclosing a notice pursuant to the Landlord and Tenant Act, 1954, s. 25, to determine the tenancy. Nothing, as I understand it, turns on the form of the notice which was enclosed with that letter. As a result of the directions which had been given to the postmaster at Huddersfield, the letter, which was registered, was in fact received by the tenants at their Leeds address
- B on Dec. 2, 1958. Following on the receipt of that letter, on Jan. 2, 1959, the tenants wrote two letters, or caused two letters to be written by their solicitors, to the landlords. The first reads:

"Our clients [the tenants] have handed us a notice of termination of tenancy from you to them in respect of the above property dated Nov. 25, 1958. We hereby give you notice that our clients will not be willing to give up possession of the premises on the date specified in the notice."

- C That paragraph amounts to the counter-notice contemplated by the Act. The letter goes on:

"Our clients do not admit the validity of the notice served and this reply thereto is given without prejudice to any contention that our clients may hereafter raise respecting the validity of the notice."

- D The second letter which the tenants' solicitors wrote to the landlords says: "Our clients [the tenants] have handed us your notice requiring information", and the information which is required by the statute is then given.

- E On Mar. 16, 1959, the tenants issued an application in the Manchester County Court seeking a new tenancy. Paragraph 4 of that notice refers to the date, Nov. 25, 1958, of the giving of the notice the validity of which is now challenged. It was then realised that the Manchester County Court had no jurisdiction to deal with the matter because of the amount of the rateable value of the premises. Therefore, the tenants took the necessary step by way of application to have the matter transferred to the High Court. They took an appointment before the master on June 16, 1959, asking for directions as to filing evidence. The evidence
- F was not filed and, on July 15, the landlords restored the summons for hearing on July 28, 1959, two days before this originating summons was issued by the tenants for the first time raising in specific terms the reasons which they sought to advance for saying that the notice was not valid.

With that short recital of the facts, I can turn to the relevant section, which is s. 23 of the Landlord and Tenant Act, 1927. Section 23 (1) provides:

- G "Any notice, request, demand or other instrument under this Act shall be in writing and may be served on the person on whom it is to be served either personally, or by leaving it for him at his last known place of abode in England or Wales, or by sending it through the post in a registered letter addressed to him there, or, in the case of a local or public authority or a statutory or a public utility company, to the secretary or other proper officer
- H at the principal office of such authority or company, and in the case of a notice to a landlord, the person on whom it is to be served shall include any agent of the landlord duly authorised in that behalf."

The first observation which I would make is that there are four ways of effecting service: first, on the person on whom it is to be served personally;

I secondly, by leaving it for him at his last known place of abode in England or Wales; thirdly, by sending it through the post in a registered letter addressed to him at his last known place of abode in England or Wales; and the fourth, which is a special case, refers to the case of a local or public authority or a statutory or a public utility company.

I think that I can dispose of the fourth case by reference to s. 25, the definition section in the Act of 1927. It has been urged on me that I am not bound by the definition of "statutory company" in s. 25 (1), because s. 66 of the Landlord and Tenant Act, 1954, which makes provisions as to notice, causes only s. 23

of the Landlord and Tenant Act, 1927, to apply for the purposes of the later Act. A But the phrase "statutory company" is not a self-explanatory phrase, and it appears to me that on any question involving an interpretation of s. 23 I am necessarily bound to turn for help to the definition section, s. 25 in the Act of 1927. There the expression "statutory company" is given a very special meaning. It means

"any company constituted by or under an Act of Parliament to construct, B work or carry on any gas, water, electricity, tramway, hydraulic power, dock, canal or railway undertaking."

It is therefore a definition which effectively excludes this company from falling under the phrase "statutory company" for the purposes of this case. That means that the landlords had to effect the service otherwise than by the last method mentioned in s. 23 (1). As the tenants are a company incorporated under the Companies Act, 1929, the first method, viz., personal service, could not be followed. Therefore, one is left with the second and third methods, i.e., by leaving it for him at his last known place of abode, or by sending it through the post in a registered letter addressed to him there. C

The word "him" is used in both cases, but I entertain for myself no doubt that the word "person" in s. 23 (1) is to be taken to be wide enough to include a company incorporated under the Companies Act. A perusal of the Act shows one again and again that, while no express reference is made to a company incorporated under the Companies Act, such an artificial person (and, after all, a company is only an artificial person) is to have the benefits conferred by the Act and be subject to the obligations imposed by the Act on a tenant. Therefore, I regard s. 23 (1) as applying to a limited company. In this case the third method was not followed in the sense that, although the landlords sent the notice by registered letter, they did not address the letter to the correct address, viz., Conway Road, Harehills Lane. It is therefore argued that the provisions of s. 23 (1) were not complied with. If that argument is correct, then there is an air of utter unreality about this case, because it is conceded that the letter was in fact received by the tenants on Dec. 2, 1958. D E F

The matter is not free from authority. In *Re Sharpley & Manby's Application* (1), it was held that a rent audit notice, stating that an estate rent audit would be held at a certain time and place, and requesting a tenant then to pay the rent due from him, was a sufficient notice in writing to the tenant requiring him to pay the rent within s. 12 (1) (b) of the Agricultural Holdings Act, 1923, and if such a notice were sent to the tenant by the ordinary non-registered post and were delivered to and received by him, there would be a valid service of the notice on him under s. 53. Section 53 of the Agricultural Holdings Act, 1923, (2) is worth reading because it is for all practical purposes in the same terms as the material part of s. 23 (1) of the Landlord and Tenant Act, 1927. It provides: G

"Any notice . . . under this Act may be served on the person to whom it is to be given either personally or by leaving it for him at his last known place of abode in England, or by sending it through the post in a registered letter addressed to him there . . ."

The leading judgment in that case was given by MACKINNON, L.J., who said (3): H

"Whether the facts were ever gone into [by the arbitrator] I do not know . . . [the special case] seems to assume that the letters were duly delivered by ordinary post and received by the tenant. The whole argument must depend upon that assumption . . . The sole question is whether the tenant can argue that, because the ordinary post was used, and not registered post, I

(1) [1942] 1 K.B. 217; [1942] 1 All E.R. 66.

(2) Replaced by s. 92 of the Agricultural Holdings Act, 1948.

(3) [1942] 1 All E.R. at p. 68; [1942] 1 K.B. at p. 220.

- A the notice was not properly served. Some assistance seems to have been provided for the county court judge by reference to a case in Scotland under a totally different Act, *Department of Agriculture for Scotland v. Goodfellow* (4). There a notice had been served by ordinary post, but what was there concerned was a special provision of the Agricultural Holdings (Scotland) Act, 1923, which required written notice to be given either in the same manner as a notice under the Removal Terms (Scotland) Act, 1886, or in the form and manner prescribed in the Sheriff Courts (Scotland) Act, 1907.
- B Rule 113 of Sch. 1 to the latter Act provides that removal notices 'may be given' by any of three specified methods—namely (i) by a messenger at arms, (ii) by a sheriff officer, or (iii) by registered letter. It is quite clear that the provisions of that Act required a certain ceremonial service . . . If that ceremony was not complied with, then there had not been service within the requirements of the Act. However, s. 53 of this Act does not require any ceremonial at all. It provides that the notice shall be served upon the person to whom it is to be given personally or by leaving it for him at his last known place of abode. It adds as an alternative that the person who has to serve the notice may do so by sending it through the post in a registered letter. If he did that, no doubt he would get the additional advantage of being able easily to prove that he had served the notice by producing the receipt given to the postman. However, he can serve the notice personally or by leaving it at the tenant's last known place of abode. It seems to me impossible to say that under that section, if one uses the post at all . . . one has not complied with the ceremonial requirements of the Act. In the result, I think that the county court judge was wrong in that part of his decision . . ."
- C
- D
- E

It is to be observed from that reasoning that MAC KINNON, L.J., was apparently treating the act of sending a letter by ordinary post as equivalent to leaving it for the proposed recipient at his last known place of abode; and it appears to me that that, as I read it, being part of the reasoning running through his decision, is binding on me, and I am bound to interpret s. 23 (1) of the Landlord and Tenant Act, 1927, so far as the second mode of service is concerned as being satisfied if the ordinary post is used. It is true that the last known place of abode was not specified on the letter, but the words of MAC KINNON, L.J., appear to me to be wide enough to cover that, because he says if the ordinary post is used and the letter is delivered to and received by the person to whom the notice is to be given, the requirements of the Act are complied with. Here, as a result of the direction to the postmaster at Huddersfield given by the tenants themselves, the letter was in fact, to use the words of MAC KINNON, L.J., left at the tenant's last known place of abode. I am unable to accept the argument on that basis that the failure to specify the correct address is fatal to the landlords. The vital thing is that the letter was in fact delivered. The whole purpose of s. 23 is to see that a notice is given and actually received, and that happened in this case.

F

G

H

I would observe in passing that "place of abode" is the equivalent of "place of business", and that that is so appears from the authority of *Morecambe & Heysham Corpn. v. Warwick* (5). But there is another point which to my mind is fatal to the tenants in this case. On the reasoning of the members of the Court of Appeal in *Tennant v. London County Council* (6) I feel constrained to construe s. 23 (1) as being permissive so far as the mode of service is concerned. It is perfectly true, as was pointed out by counsel for the tenants, that the requirement that the notice etc. is to be in writing is imperative—"Any notice, request, demand or other instrument under this Act shall be in writing"; but then when the subsection goes on to deal with service the permissive verb "may" is used, and that is in clear contradistinction to the imperative "shall". I can see no canon of construction which would entitle me to qualify the nature of the verb

"may" by anything that has gone before in the subsection. It therefore follows that, although there are certain modes of giving notice set out in s. 23 (1), they are not to be regarded as being exhaustive. It therefore appears to me, apart from the reasoning in *Re Sharpley & Manby's Application* (7), that I am entitled to say, without praying in aid the second method, i.e., leaving it for him at his last known place of abode, that it is sufficient if the letter is sent to and received by the tenants. That in fact happened, and it matters not to my mind on this particular reasoning that the letter got to Leeds via Huddersfield, because I am now dealing with a method which is *ex hypothesi* outside the section. Clearly what in fact happened achieved the clear intention of the legislature, viz., that the notice should be received by the person intended to receive it. On that ground I find against the tenants on this summons. A

Another point was adumbrated, viz., that in the circumstances which I recited earlier in this judgment the tenants must be taken to have waived any invalidity in the service of the notice. It is not necessary for me to express any decided view on that matter having regard to the view which I have taken under s. 23; but in case the matter should go further and in case it should be of any assistance to the Court of Appeal, I will express the view that, on the facts which I have recited, the tenants must be taken to have waived any invalidity, had there been any invalidity, in the service of the notice. I think, on this part of the case that the reasoning of the Court of Appeal in *Tennant v. London County Council* (8) applies. B

For those reasons, I propose to dismiss this summons with costs. C

Summons dismissed.

Solicitors: *Ward, Bowie & Co.*, agents for *Joseph Wurzal & Co.*, Leeds (for the tenants); *Simmons & Simmons* (for the landlords). D

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*] E

COOK v. "X" CHAIR PATENTS CO., LTD. F

[CHANCERY DIVISION (Wynn-Parry, J.), November 17, December 1, 1959.]

Company—Winding-up—Proof—Damages for wrongful dismissal—Whether claimant can elect to proceed by action.

Practice—Stay of proceedings—Company in liquidation sued by employee of company for damages for wrongful dismissal by liquidator. G

In May, 1958, a limited company went into voluntary liquidation, being a members' voluntary liquidation. The plaintiff, who at that time was an employee of the company, had a service agreement with the company which would expire in 1964. The liquidator gave the plaintiff notice that the service agreement would be terminated at the end of August, 1958, and requested the plaintiff to formulate his claim for damages. This the plaintiff did, but no settlement was reached. In June, 1959, the liquidator required the plaintiff to put in a proof of his claim. At the end of August, 1959, the plaintiff brought an action against the company claiming damages for wrongful dismissal. That the company was liable in damages was not in dispute, but other questions arose, e.g., as to the likelihood of the plaintiff's obtaining other employment and what sum should be taken into account in respect of possible future remuneration from such employment. There was a substantial dispute between the parties to the action. H

Held: the plaintiff was entitled to choose the method of recovering the damages and the court would not interfere unless there was good reason for doing so, such as the saving of expense; in the present case oral evidence would probably be necessary and no advantage would be gained by staying the action, which accordingly would not be stayed. I

- A *Currie v. Consolidated Kent Collieries Corpn., Ltd.* ([1906] 1 K.B. 134) applied.

[As to staying proceedings after a resolution for voluntary winding-up, see 6 HALSBURY'S LAWS (3rd Edn.) 754, para. 1523; and for cases on the subject, see 10 DIGEST (Repl.) 1079, 1080, 7642-7477.]

- B Cases referred to:

Currie v. Consolidated Kent Collieries Corpn., Ltd., [1906] 1 K.B. 134; 75 L.J.K.B. 199; 94 L.T. 148; 10 Digest (Repl.) 1079, 7467.

Newman (R. S.), Ltd., Re, Raphael's Claim, [1916] 2 Ch. 309; 85 L.J.Ch. 625; 115 L.T. 134; 10 Digest (Repl.) 974, 6716.

Procedure Summons.

- C This was an application of the "X" Chair Patents Co., Ltd., in liquidation, by its liquidator by summons dated Oct. 1, 1959, for an order that all proceedings in an action brought by George Cook against the company be stayed on the footing that the plaintiff should be at liberty to prove his claim in the winding-up of the defendant company. On May 12, 1958, the defendant company passed a special resolution for voluntary winding-up. The winding-up was a members' voluntary winding-up and a liquidator was duly appointed. The plaintiff was at that time employed by the defendant company under a service agreement entitling him to a salary of £1,300 per annum plus commission at the rate of two and a half per cent. of the net annual profits. He was sixty years of age. The service agreement would expire at the end of August, 1964. The liquidator notified the plaintiff by letter in June, 1958, that his service agreement would be terminated at the end of August, 1958, and asked him to formulate his claim for compensation. The plaintiff claimed compensation on the basis of loss of six years' salary at £1,300 per annum and six years' commission at an average rate of £224 15s. per annum. His employment in fact continued after August, 1958. A settlement of the claim was not reached and on June 22, 1959, the liquidator served notice pursuant to r. 106 of the Companies (Winding-up) Rules, 1949, requiring the claim against the company to be proved by affidavit within fourteen days. On about Aug. 31, 1959, the plaintiff issued the writ in this action in which he claimed damages against the defendant company for wrongful dismissal.

G. B. Parker for the defendant company acting by the liquidator.

D. A. Thomas for the plaintiff.

- G WYNN-PARRY, J.: This is a summons by the liquidator in the members' voluntary liquidation of a company that all further proceedings in an action which has been brought against it by a late employee, Mr. George Cook, should be stayed, and that Mr. Cook should be left to pursue his remedy against the company by way of proving in the liquidation.

- H It is not disputed that the plaintiff had a service agreement with the company to the details of which I do not propose to refer, except to say that there was reserved to him a salary and commission on profits. The agreement had not run out by the date of the liquidation, and the liquidator has very properly admitted that the company is liable to the plaintiff in damages for the wrongful dismissal resulting from his dismissal as the result of the event of the liquidation of the company. The matter first came before me on Nov. 17, 1959, when I adjourned it because I wanted to see the correspondence which had taken place between the liquidator and his advisers and the plaintiff's advisers. That correspondence to my mind is most illuminating.

So far as the law is concerned, I think for all practical purposes it is contained in one case, viz., *Currie v. Consolidated Kent Collieries Corpn., Ltd.* (1). That was a strong case on the facts because there the liquidator denied any liability at all on the part of the company, and, in view of that denial, the employee

concerned put in an alternative plea that he was entitled to damages on the basis of a quantum meruit. In the course of the decision, COLLINS, M.R., enunciated the clearly established principle that in the case of a voluntary liquidation prima facie the employee pursuing his claim for damages for wrongful dismissal had a right to choose his tribunal; he could either prove in the liquidation, or he could take a separate action, and the court ought not to interfere with his decision unless it was satisfied that circumstances existed which justified the interference and the taking away from the employee of his choice of tribunal. COLLINS, M.R., said (2):

“The court had no doubt stayed the action in cases where the liquidator could show some sufficient reason for its not being decided in the ordinary way [i.e., by an ordinary action]. Where, for instance, the existence of a debt or liability was substantially admitted, though there might be some question of the exact amount due . . . the matter was treated as one which might properly, and ought to, be determined in the liquidation.”

ROMER, L.J., in a concurring judgment said (2):

“On an application of this kind the court undoubtedly has a discretion, and I think that it ought to exercise that discretion, even although the judge below did not exercise any discretion. Now, what are the circumstances of this case? Is it a case in which any good would be done, or expense saved, by staying an action which has been properly brought, and in effect sending the claim to be determined in the Chancery Division?”

He held that in the particular circumstances no advantage would be gained by so doing. I take those observations as my guide in deciding what I ought to do in this case. Bearing in mind those observations, I refer to the correspondence. One thing is perfectly clear, merely taking the correspondence by itself, that it is impossible to postulate in this case that, although the existence of the debt or liability has been admitted, there is only some question of the exact amount due. The parties on a reading of that correspondence will be found to be miles apart. It is true that certain deductions may well have to be made from the amount of £5,685 claimed by the plaintiff, Mr. Cook, in his action; it may well be that some deduction may have to be made in respect of the likelihood of his getting further employment; but counsel for the defendant, in a most ingenious argument, to my mind went too far. His client in the letter of Dec. 18, 1958, said with regard to the plaintiff's application:

“We think it cannot seriously be contested but that he [the plaintiff] will be able to obtain other suitable work. We appreciate that it may not be at the same salary, but over the remaining period of his contract it is felt that he should earn between £800 and £1,000 per annum.”

Taking the middle figure of £900 per annum, counsel sought to satisfy me that I should proceed on the basis that there should be a deduction at least of £5,400 from the amount claimed by the plaintiff. The plaintiff has made a deduction in respect of income tax. It is true that there may be a case for saying that there should be some further reduction because the payment will be a payment of a lump sum, and no doubt it is true, on the authority of *Re R. S. Newman, Ltd., Raphael's Claim* (3) that nothing is payable in respect of future commission; but the figure of £900 when examined is an entirely arbitrary figure. The whole of counsel's argument really depends on introducing that figure of £900 multiplied by six years, the amount of the period to run, and thus asking me to deduct £5,400 from the claim which is put forward in the action. Indeed, he goes so far as to say that when the other matters to which I have referred which he introduced are taken into consideration, the plaintiff is in all probability likely to get less than the amount of £1,300 which the liquidator has offered him.

- A In those circumstances, I am not prepared to say that this case is within that exception to which I have referred in the judgment of COLLINS, M.R., in *Currie v. Consolidated Kent Collieries Corpn., Ltd.* (4). But, further than that, I think there is great force in what counsel for the plaintiff said, i.e., that on such an issue as the question where a man of sixty is likely to get further employment he is entitled to give oral evidence. Counsel for the defendant said that he could
- B equally well give evidence by way of affidavit. Whichever way it is done, it is more than likely that there will have to be cross-examination. Further, the plaintiff, as it seems to me, is entitled, if he so desires, to bring the evidence of other people skilled in the matter to say what chance he has in the particular trade, or, having regard to what his accomplishments are, is likely to get by way of further employment and at what rate. The correspondence shows perfectly
- C clearly that there is a really substantial dispute between the parties. The matter having proceeded as far as it has by action, it seems to me that I should not properly be exercising my discretion in this case if I were to stop that action now and put the plaintiff to what will be new expense, that of putting in a proof which I am satisfied on the basis of the correspondence is in all likelihood (I put it no higher) to be rejected by the liquidator, in which case the matter will, in the
- D first place, have to go before the learned registrar in the company winding-up, and is quite likely from him to be taken to this court.

In those circumstances, it appears to me that I must pose to myself the question which was asked by ROMER, L.J. (4):

- E "Is it a case in which any good would be done, or expense saved, by staying an action which has been properly brought, and in effect sending the claim to be determined in the Chancery Division?"

Further, in my view, I must answer it in the words which ROMER, L.J., used in answering his own question: "In my opinion, no advantage would be gained by so doing".

For those reasons, in my opinion this application must fail.

Summons dismissed.

Solicitors: *George & George* (for the defendant company); *Bond & Banbury* (for the plaintiff).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

ABERFOYLE PLANTATIONS, LTD. v. CHENG.

[PRIVY COUNCIL (Lord Denning, Lord Jenkins and Mr. L. M. D. de Silva),
October 28, 29, December 1, 1959.]

Sale of Land—Contract—Conditional contract—Purchase conditional on vendor's obtaining renewal of leases—Time for performance of condition—Recovery of deposit.

Subject to the provisions of particular contracts, the following general propositions concerning the time for fulfilment of conditions of conditional contracts for the sale of land are warranted by authority: (i) where the contract fixes a date for the completion of the sale, then the condition must be fulfilled by that date; (ii) where the contract fixes no date for completion of the sale, then the condition must be fulfilled within a reasonable time; and (iii) where the contract fixes (whether specifically or by reference to the date fixed for completion) the date by which the condition is to be fulfilled, then the date so fixed must be strictly adhered to, and the time allowed is not to be extended by reference to equitable principles (see p. 914, letters D and E, post).

By an agreement in writing dated Nov. 8, 1955, the vendor agreed to sell to the purchaser the H. Estate, which consisted of rubber plantations, 182 acres of which were comprised in seven leases which had expired on June 19, 1950. Since that date negotiations for the renewal of the leases had been pursued but at the date of the agreement had achieved no conclusive result. In the meantime, the vendor, or its immediate predecessor in title, had remained in permissive occupation of the 182 acres. Clause 1 of the agreement provided that, subject to the condition contained in cl. 4, the vendor would sell and the purchaser would buy the H. Estate. Clause 2* provided that the purchaser would pay certain deposits at certain dates, and the balance on or before Apr. 30, 1956. Clause 4* provided that the purchase was conditional on the vendor obtaining a renewal of the seven leases so as to be able to transfer them to the purchaser and that if, for any cause whatsoever, the vendor were unable to fulfil this condition the agreement was to become null and void and the vendor was to refund the deposits already made, notwithstanding anything contained in cl. 10. Clause 9 provided that completion should take place on Apr. 30, 1956, and that on the purchaser paying the balance of the price the vendor should "as soon as possible thereafter" transfer the property to the purchaser. Clause 10* provided that if, for any cause (other than the vendor's default), the purchase were not completed on Apr. 30, 1956, the agreement was to become null and void and the deposits already made were to be forfeited. The purchaser paid the deposits required under cl. 2, but the vendor had not, by Apr. 30, 1956, fulfilled the condition stated in cl. 4 by obtaining a renewal of the seven leases. On May 4, 1956, the purchaser's solicitors wrote to the vendor's solicitors extending the time for obtaining renewal of the leases to May 31, 1956. The vendor had still on that date not obtained renewal of the leases and the purchaser claimed to recover the deposits he had paid under cl. 2 of the agreement, on the ground that the condition in cl. 4 had not been performed by the vendor within due time.

Held: the purchaser was entitled to recover the deposits paid under cl. 2 of the agreement because, on the true construction of the agreement, the condition in cl. 4 (viz., the obtaining of the renewal of the leases) had to be fulfilled at latest by the time fixed by the contract for completion (viz., Apr. 30, 1956, extended by consent to May 31, 1956), and the contract did

*The terms of cl. 2, cl. 4 and cl. 10 are set out at p. 912, letters H and I, and p. 913, letter E, post.

- A not allow the vendor a further reasonable time after that date in which to obtain renewal of the leases, though the words "as soon as possible thereafter" in cl. 9 allowed further reasonable time in which to transfer the leases if renewals had been obtained by the date fixed for completion.

Principles laid down in *Smith v. Butler* ([1900] 1 Q.B. 694) and *Re Sandwell Park Colliery Co.* ([1928] All E.R. Rep. 651) applied.

- B Appeal dismissed.

[As to the date for the completion of a contract for the sale of land, see 29 HALSBURY'S LAWS (2nd Edn.) 296, para. 390; and for cases on the subject, see 40 DIGEST (Repl.) 116-121, 905-949.]

- C Cases referred to:

Bellamy v. Debenham, [1891] 1 Ch. 412; 60 L.J.Ch. 166; 64 L.T. 478; 40 Digest (Repl.) 151, 1155.

Green v. Sevin, (1879), 13 Ch.D. 589; 49 L.J.Ch. 166; 41 L.T. 724; 44 J.P. 282; 40 Digest (Repl.) 120, 941.

Head's Trustees & Macdonald, Re, (1890), 45 Ch.D. 310; 59 L.J.Ch. 604; 63 L.T. 21; 40 Digest (Repl.) 169, 1325.

- D *Sandwell Park Colliery Co., Re, Field v. The Co.*, [1928] All E.R. Rep. 651; [1929] 1 Ch. 277; 98 L.J.Ch. 229; 140 L.T. 612; 10 Digest (Repl.) 824, 5389.

Smith v. Butler, [1900] 1 Q.B. 694; 69 L.J.Q.B. 521; 82 L.T. 281; 40 Digest (Repl.) 266, 2232.

- E *Smith v. Hamilton*, [1950] 2 All E.R. 928; [1951] Ch. 174; 40 Digest (Repl.) 243, 2042.

Stickney v. Keeble, [1915] A.C. 386; 84 L.J.Ch. 259; 112 L.T. 664; 40 Digest (Repl.) 120, 942.

Appeal.

- F Appeal by Aberfoyle Plantations, Ltd. from an order of the Court of Appeal of Malaya (THOMSON, C.J., SIR JOHN WHYATT, C.J. (Singapore), and BARAKBAH, J.), dated June 2, 1958, reversing an order of the High Court of the Federation of Malaya (GOOD, J.), dated Nov. 8, 1957, whereby he dismissed an action by the respondent Khaw Bian Cheng, for the return of deposits paid by him to the appellant under an agreement for the sale of a rubber estate. The facts are set out in the judgment of the Board.

- G *J. A. Plowman, Q.C.*, and *J. A. Wolfe* for the appellant.

Geoffrey Cross, Q.C., and *T. A. C. Burgess* for the respondent.

- H LORD JENKINS: The question in this case is whether, on the true construction of a conditional agreement dated Nov. 8, 1955, and made between the defendant (now appellant) Aberfoyle Plantations, Ltd. (hereinafter called "the vendor"), of the one part and the plaintiff (now respondent), Khaw Bian Cheng (hereinafter called the "purchaser"), of the other part, being an agreement providing, subject to the condition therein mentioned, for the sale by the vendor to the purchaser of a rubber estate in the State of Perak known as the Harewood Estate, and in the events which happened, the purchaser became entitled to the return of deposits amounting to \$100,000 paid by him to the vendor thereunder, on the ground that the condition in question had not been performed by the vendor within the time thereby limited for its performance. The case has given rise to a considerable difference of judicial opinion in the courts below. The action claiming the return of the deposits was brought by the purchaser in the High Court at Ipoh and heard by GOOD, J., who, by an order dated Nov. 8, 1957, dismissed it with costs. On appeal by the purchaser to the Court of Appeal for the Federation of Malaya (THOMSON, C.J., SIR JOHN

WHYATT, C.J. (Singapore), and BARAKBAH, J.), that court by a majority (SIR JOHN WHYATT, C.J., dissenting) allowed the appeal, the order to that effect being dated June 2, 1958. From that order, the vendor now appeals to this Board with the support of two of the four judicial opinions so far delivered. A

The Harewood Estate conditionally agreed to be sold under the agreement of Nov. 8, 1955, consisted of rubber plantations extending in round figures to a total area of some 1,336 acres. This area was made up of (a) some 1,154 acres held by the vendor's predecessor in title, Harewood Rubber Estates, Ltd., as registered proprietor under certificates of title or grants from the Ruler of Perak, as to which no question arises; and (b) some 182 acres comprised in seven leases from the Ruler to Harewood Rubber Estates, Ltd., which had in fact expired on June 19, 1950. The vendor had succeeded to Harewood Rubber Estates, Ltd.'s interests in 1951, as a result of an amalgamation under which the vendor acquired all the assets of Harewood Rubber Estates, Ltd., in exchange for shares. This meant that the vendor, as beneficial owner of the 1,154 odd acres, could readily procure the transfer of the legal title to the purchaser; and also that the vendor, as between itself and Harewood Rubber Estates, Ltd., would be entitled to the benefit of any renewal of the seven leases comprising the 182 odd acres if and when granted. But, unless and until new leases were granted, the vendor had no assignable interest in the 182 odd acres. Since the expiration of the leases in June, 1950, negotiations for their renewal, pursued over a matter of five years, had, by the date of the agreement of Nov. 8, 1955, achieved no conclusive result, the delay being largely due to protracted consideration by the state government of the policy to be pursued with regard to the granting of state leases. In the meantime, Harewood Rubber Estates, Ltd., or the vendor, had remained in permissive occupation of the land comprised in the expired leases; and so the matter stood when the agreement of Nov. 8, 1955, was entered into. The position thus was that, at the date of the agreement, the vendor had a good title to the 1,154 odd acres, but that its title to the 182 odd acres depended on the success of its negotiations for the grant of new leases; and it was to the latter title that the condition giving rise to the present litigation related. B C D E F

Their Lordships should next refer to the material provisions of the agreement of Nov. 8, 1955. Clause 1 provides that "Subject to the condition contained in cl. 4 the vendor will sell and the purchaser will buy" the property known as the Harewood Estate as described in the schedule to the agreement, which description includes the land comprised in the seven expired leases. Clause 2 states the price to be \$525,000, apportioned as therein mentioned between land and buildings and movable plant, machinery and utensils, and continues as follows: G

"To account of this sum of \$525,000 the purchaser shall pay to the vendor the sum of \$50,000 on the signing of this agreement, a further sum of \$50,000 on or before Feb. 1, 1956, and to pay the balance on or before Apr. 30, 1956. The purchaser shall only be entitled to enter into possession of the estate after the purchase money of \$525,000 has been paid in full, and all profits earned prior to that time shall belong to the company." H

Clause 4, which contains the condition, should be stated in full: I

"The purchase is conditional on the vendor obtaining at the vendor's expense a renewal of the seven (7) leases described in the schedule hereto so as to be in a position to transfer the same to the purchaser and if or any cause whatsoever the vendor is unable to fulfil this condition this agreement shall become null and void and the vendor shall refund to the purchaser the deposit or deposits already made under cl. 2 hereof notwithstanding anything contained in cl. 10 hereof."

A Clause 7 provides that "The purchaser shall take over, purchase and pay for at cost" the various items therein mentioned "as at midnight on the day immediately preceding the date of completion of sale". By cl. 8,

"All rubber harvested and on hand as at midnight on the day immediately preceding the date of completion of sale . . . shall belong to and remain the property of the vendor . . ."

B Clause 9 and cl. 10 are of importance. They are in these terms:

"9. Completion of the purchase shall take place at the offices of Messrs. Grumitt, Reid & Co., Ltd., on or before Apr. 30, 1956, and upon the purchaser paying the balance of the purchase price to the vendor, the vendor shall as soon as possible thereafter execute a proper transfer or transfers of the property to the purchaser or as he shall direct, such transfer or transfers to be prepared and perfected, save as to the execution thereof by the vendor, by and at the expense of the purchaser and in the meantime the vendor agrees to allow the purchaser to lodge a caveat against all the lands pending the execution of the said transfer or transfers. And the vendor shall if the purchaser so requires execute in favour of the purchaser an irrevocable power of attorney authorising the purchaser to execute all such transfers and documents as shall be necessary for effectually vesting in the purchaser the said mining leases."

D It is agreed that the reference to "the said mining leases" at the end of cl. 9. is intended as a reference to the seven new leases which the vendor was required to obtain under cl. 4 by way of renewal of the seven expired leases.

E "10. If from any cause (other than the vendor's default) the purchase shall not be completed on Apr. 30, 1956, or the second deposit of \$50,000 shall not be made on or before Feb. 1, 1956, as herebefore provided then this agreement shall become null and void and the deposit or deposits already made will be forfeited."

F Clause 11 provides that:

"Upon actual completion of the purchase the purchaser shall be entitled to possession of the property hereby agreed to be sold and shall as from that day be liable for all outgoings . . ."

G The same clause also provides that "The vendor shall not be liable for any deterioration of the property after the time fixed for completion". The two deposits of \$50,000 payable under cl. 2 were duly paid, but the vendor had not, by Apr. 30, 1956, fulfilled the condition stated in cl. 4 by obtaining a renewal of the seven leases. It is true that, by letter dated Apr. 25, 1956, the Collector of Land Revenue informed the vendor's solicitors that the Ruler in Council had approved the issue of fresh leases, and that the vendor's name would be recorded in the Roll of Approved Applications; but it is not suggested that the procuring of this approval and enrolment amounted to compliance with the condition, requiring as it did the obtaining by the vendor of "a renewal of the seven (7) leases . . . so as to be in a position to transfer the same to the purchaser".

H In these circumstances, the purchaser's solicitors wrote to the vendor's solicitors on May 4, 1956, a letter concluding with this paragraph:

I "We refer you to cl. 4 of the agreement under which our client is entitled to rescind the contract and claim back the deposit. But, before doing so, our client is prepared to give your clients time till May 31, 1956, by which date they should produce to us the issue documents of title in respect of all the lands contracted to be sold and satisfy us that they are in a position to make a good title and give a registrable transfer. It must be understood that the extension hereby granted is the utmost that our client agrees to and such time must be deemed to be of the essence of the contract.

If a good title to convey all the lands capable of registration is made out by May 31, 1956, our client will pay over the balance of purchase price and complete the transaction. Otherwise, the contract will stand cancelled and your clients must pay back the deposit with interest together with our client's costs of investigating the title."

The condition being admittedly still unfulfilled, the purchaser, by plaint dated June 11, 1956, began the action giving rise to the present appeal.

Their Lordships may now return to the question exhaustively debated before them and in the courts below:—Within what period of time did the agreement (read in conjunction with the purchaser's solicitors' letter of May 4, 1956) require the condition contained in cl. 4 to be performed? The answer to that question must plainly depend on the true construction of the agreement, or in other words on the intention of the parties as expressed in, or to be implied from, the language they have used. But, subject to this overriding consideration, their Lordships would adopt, as warranted by authority and manifestly reasonable in themselves, the following general principles:—(i) Where a conditional contract of sale fixes a date for the completion of the sale, then the condition must be fulfilled by that date; (ii) where a conditional contract of sale fixes no date for completion of the sale, then the condition must be fulfilled within a reasonable time; (iii) where a conditional contract of sale fixes (whether specifically or by reference to the date fixed for completion) the date by which the condition is to be fulfilled, then the date so fixed must be strictly adhered to, and the time allowed is not to be extended by reference to equitable principles. See *Smith v. Butler* (1), where the purchaser treated a conditional contract as at an end for non-fulfilment of the condition before the date fixed for completion, and it was held that the vendor had until the date fixed for completion to perform the condition; that the contract had, therefore, gone off through the default of the purchaser; and that he could not recover his deposit. ROMER, L.J., said this (2):

"To my mind it is reasonably clear that the vendor has until the time fixed for completion, or, if no time for completion is fixed, then a reasonable time, in which to procure the assent of the mortgagee to the acceptance of the purchaser as mortgagor",

such acceptance being the condition in question in that case.

In *Re Sandwell Park Colliery Co., Field v. The Co.* (3) MAUGHAM, J., held (following *Smith v. Butler* (1)) that where, in a debenture holder's action, the receiver contracted to sell property included in the debentures, subject to the contract being approved and sanctioned by the court, and no date was fixed for obtaining such approval, it had to be obtained before the date fixed for completion of the contract. MAUGHAM, J., after referring to *Smith v. Butler* (1) and quoting the passage from the judgment of ROMER, L.J., to which their Lordships have already referred, continued as follows (4):

"I think, taking the judgments as a whole, it is reasonably apparent that the court took the view that the date fixed for completion was the time by which the condition had to be performed, and considered that if that time had passed the purchaser might have recovered the deposit. *Re Head's Trustees & Macdonald* (5), and *Bellamy v. Debenham* (6), though not so closely in point, seem to me to support the view that a condition precedent to the validity of a contract for sale of land must, prima facie, in the absence of express provision, be fulfilled before the date fixed for completion."

(1) [1900] 1 Q.B. 694.

(3) [1928] All E.R. Rep. 651; [1929] 1 Ch. 277.

(4) [1928] All E.R. Rep. at p. 653; [1929] 1 Ch. at p. 283.

(5) (1890), 45 Ch.D. 310.

(2) [1900] 1 Q.B. at p. 699.

(6) [1891] 1 Ch. 412.

A Earlier in the judgment of MAUGHAM, J. (7), comes this important passage bearing particularly on the third of the propositions above stated:

B “Courts of equity, in dealing with actions for specific performance relating to land, have been accustomed to give effect to the real intention, rather than to the precise words, fixing the date for completion. The effect is that a clause fixing a date for completion is equivalent to a clause stating that completion shall be on that date or within a reasonable time thereafter. But there is no ground for a similar construction in the case of a condition upon which the validity of the contract as one for sale [sic: q. ‘one of sale’] depends. The distinction is obvious. In the first case, both parties are bound, and a moderate delay in completion is thought not to injure either. In the latter, the very existence of the mutual obligations is dependent on the performance of the condition. The purchasers do not know in the first instance if their purchase money will ever be required. In general, and in the present case, there is no promise or undertaking by the vendor that the condition will be fulfilled. Equity has, I think, never applied its liberal views as to time to such a condition. If a date is mentioned, the condition must be exactly complied with. If a date is not mentioned, the condition must be fulfilled within a reasonable time; there is no difference between the views of law and equity in considering what is a reasonable time, and the uncertain position of the purchasers must be borne in mind.”

E Before parting with these two authorities, their Lordships would observe that the reason for taking the date fixed for completion by a conditional contract of sale as the date by which the condition is to be fulfilled appears to their Lordships to be that, until the condition is fulfilled, there is no contract of sale to be completed, and, accordingly, that, by fixing a date for completion, the parties must by implication be regarded as having agreed that the contract must have become absolute through performance of the condition by that date at latest.

F Similar considerations are, in their Lordships’ judgment, applicable where a conditional contract of sale fixes no specific date for completion of the sale by the performance of both sides of the bargain, but does fix a date for the performance on the part of the purchaser of his part of the bargain by payment of the purchase money, even though no definite date is fixed for the performance on the part of the vendor of his part of the bargain by the transfer of the property. In such a case, it could hardly have been intended that the purchaser should on the date specified perform his part of the bargain unless by that date a binding contract had been brought into existence by fulfilment of the condition; for, unless that had happened by the date specified, there would on that date in truth be no contract for the purchaser to perform.

G Reverting to the present agreement with these general principles in mind, their Lordships ask themselves whether, on the true construction of this agreement, the condition stated in cl. 4 had (as the purchaser contends) to be fulfilled at latest by Apr. 30, 1956 (extended to May 31, 1956, by the purchaser’s solicitors’ letter of May 4), as the date fixed by the parties for the completion of the purchase, or at all events for the performance by the purchaser of his part of the bargain by payment of the balance of the purchase money; or only had to be fulfilled (as the vendor contends) within a reasonable time, on the footing that the agreement did not expressly or by implication fix any particular date by which it was to be fulfilled.

I Counsel’s argument for the vendor (as developed before their Lordships) was to this effect:—(i) Having regard to the surrounding circumstances in which the agreement was made it can hardly have been the intention of the parties that the condition (postulating as it did the bringing to a satisfactory conclusion of negotiations which had been dragging on for a matter of six years) must be fulfilled within so short a time as the period of just under six months from the

date of the agreement (i.e., Nov. 8, 1955) to Apr. 30, 1956; (ii) Their Lordships should, therefore, be predisposed in favour of a construction which would give the vendor a reasonable time within which to fulfil the condition; (iii) The agreement was well capable of being, and should be, construed as allowing a reasonable time for that purpose; (iv) In view of the absence of any express provision in the contract limiting the time for the fulfilment of the condition, an intention to allow a reasonable time was to be inferred, and the purchaser could only escape this conclusion on the footing that Apr. 30, 1956, was the date fixed for completion of the contract, so as to bring the case within the principle of *Smith v. Butler* (8) and *Re Sandwell Park Colliery Co.* (9); (v) Clause 9 showed that, although the parties themselves described Apr. 30, 1956, as the date on which the contract was to be completed, what was to take place on that day did not amount to completion, because on payment of the purchase money the vendor was only made liable under that clause to execute a proper transfer or transfers "as soon as possible thereafter", and this qualification of a vendor's ordinary obligation to convey against payment of the purchase price should be taken to have been advisedly inserted in cl. 9, so as to give the vendor a reasonable time to fulfil the condition if it had not already done so, the purchaser's position being protected in the meantime by the caveat and power of attorney therein mentioned. If he was right so far, counsel contended with force that, time not being originally of the essence of the contract, the purchaser could not make it so by serving the notice of May 4, 1956, because it could not then be said that the vendor had been guilty of any delay or default such as had to be shown in order to entitle the purchaser to serve such a notice, and he referred their Lordships to *FRY'S SPECIFIC PERFORMANCE OF CONTRACTS* (6th Edn.), p. 510, para. 1092, *Green v. Sevin* (10), *Stickney v. Keeble* (11), and *Smith v. Hamilton* (12). He also contended that, even if a case for the service of such a notice had been made out, the notice (given on May 4, 1956, to expire on May 31) was, in all the circumstances of the case, unreasonably short. Given acceptance of the contention that the vendor was entitled to a reasonable time to fulfil the condition, their Lordships would be disposed to agree. But the view which they have formed as regards the time for fulfilment of the condition makes it unnecessary to dwell further on this aspect of the case.

The argument presented by counsel on the purchaser's side, in favour of the view that the agreement demanded fulfilment of the condition at latest by Apr. 30, 1956 (extended by the letter of May 4 to May 31, 1956), appears to their Lordships to be far more convincing. This argument rightly stresses the fact that, at the very outset of the agreement, the vendor's obligation to sell and the purchaser's obligation to buy were, by cl. 1, expressed to be subject to the condition contained in cl. 4. It was thus made plain beyond argument that the condition was a condition precedent on the fulfilment of which the formation of a binding contract of sale between the parties was made to depend. Then, in cl. 4 itself, "the purchase" was made "conditional on" the vendor obtaining a renewal of the leases and, in the event of the vendor being "unable to fulfil this condition", the agreement was to "become null and void" and the vendor was to refund the deposit or deposits already made under cl. 2, notwithstanding anything contained in cl. 10. Reference back to cl. 2 shows that the first deposit was to be paid on the signing of the agreement, and the second on Feb. 1, 1956, while the balance of the purchase money was to be paid on Apr. 30, 1956. But cl. 4, in the event of the agreement becoming null and void, only required repayment of the deposit or deposits already made under cl. 2, without any such requirement as to the balance of the purchase money. This seems to their

(8) [1900] 1 Q.B. 694.

(9) [1928] All E.R. Rep. 651; [1929] 1 Ch. 277.

(10) (1879), 13 Ch.D. at p. 599.

(11) [1915] A.C. 386.

(12) [1950] 2 All E.R. 928; [1951] Ch. 174.

- A** Lordships to afford some indication that the condition was to be fulfilled (if at all) by the date fixed for the payment of the balance of the purchase money (viz., Apr. 30, 1956), for the case of avoidance of the agreement on any later date for non-fulfilment of the condition would demand a provision for repayment of the entire purchase money and not merely the deposit or deposits. It is next to be observed that cl. 9 and cl. 10 contained express provisions as to the completion
- B** of the purchase on Apr. 30, 1956. Clause 9 provided that the purchase should be completed at the offices of a named company on or before Apr. 30, 1956, going on to say:

“and upon the purchaser paying the balance of the purchase price to the vendor, the vendor shall as soon as possible thereafter execute a proper trans-

- C** fer or transfers to the purchaser or as he shall direct . . .”

This appears to their Lordships to amount to the fixing of Apr. 30, 1956, as the date for completion of the purchase for the purposes of the first of the principles deducible from *Smith v. Butler* (13) and *Re Sandwell Park Colliery Co.* (14), and at all events to be well within the extension of that principle above enunciated.

- D** On Apr. 30, 1956, the purchaser was to pay the balance of the purchase money. That would entitle him to possession of the premises (see cl. 2 and cl. 11) and make the vendor a bare trustee for him. The vendor on his part would become immediately bound to execute the transfers necessary to vest the legal estate in the purchaser, subject to such allowance of time within which to perform that duty as might be indicated by the words “as soon as possible”. The provision thus
- E** made for the contingency that it might not be possible for the vendor to produce the necessary transfers immediately on the payment of the balance of the purchase money did not, in their Lordships’ opinion, prevent the transaction described as completion of the purchase in cl. 9 from amounting for the present purpose to completion of the purchase, which is the description applied to it by the parties themselves. A provision in a sale agreement to the effect that the sale
- F** should be completed on such a date and at such a place, when the purchaser should pay the purchase price, and the vendor should thenceforth hold the property in trust for the purchaser, would, in their Lordships’ view, clearly amount to a provision for completion of the sale. At all events the purchaser, by paying the balance of the purchase money in accordance with cl. 9, would fully discharge
- G** his part of the bargain, which must, in their Lordships’ view, necessarily presuppose the existence of a binding agreement, of which he would be discharging his part. Clause 10 which requires completion of the purchase (i.e., by payment of the purchase money) on Apr. 30, 1956, on pain of forfeiture of the deposits, points in the same direction. The references in cl. 7 and cl. 8 to “the date of completion of sale” must, in their Lordships’ view, be taken for the present
- H** purpose as meaning Apr. 30, 1956, as the date agreed by the parties for completion, and, so construed, appear to their Lordships to support the purchaser’s contention.

- To take a broader view of the matter, it seems to their Lordships that the vendor’s contention as to the construction and effect of the agreement would
- I** produce results so unreasonable that the parties should not be taken to have intended them unless the language they have used clearly shows the contrary. The purchaser would have been obliged to perform his part of the bargain on or before Apr. 30, 1956, by paying the balance of the purchase money before there was any binding contract, and with no assurance that a binding contract would ever emerge. On the other hand, the vendor would have been under no effective

(13) [1900] 1 Q.B. 694.

(14) [1928] All E.R. Rep. 651; [1929] 1 Ch. 277.

obligation to procure the fulfilment of the condition within any foreseeable time or at all. Again, from the vendor's point of view, he would have been under an obligation on Apr. 30, 1956, to let the purchaser into possession or receipt of the rents and profits against payment of the purchase money, before it was known whether fulfilment of the condition would ever be procured. It is unnecessary to enlarge on the confusion which would thus have resulted in the event of the agreement ultimately being avoided for non-fulfilment of the condition. A

On the vendor's side, it was argued that the provision in cl. 9 to the effect that the vendor should "as soon as possible thereafter execute a proper transfer or transfers of the property to the purchaser" included the doing of what had to be done in order to fulfil the condition stated in cl. 4, and thus allowed the vendor a reasonable time after Apr. 30, 1956, within which to comply with the condition. Their Lordships cannot agree. Under cl. 4, what the vendor had to do was to obtain a renewal of the seven leases so as to be in a position to transfer the same to the purchaser. Under cl. 9, the vendor was to transfer the property sold (including the leases so renewed) "as soon as possible" after the payment by the purchaser on Apr. 30 of the balance of the purchase money. But he must by then have obtained the renewal of the leases so as to be in a position to transfer them, even though some delay in the actual execution of the transfer might be allowable by virtue of the words "as soon as possible". The provisions in cl. 9 regarding the lodging of a caveat and granting of a power of attorney appear to their Lordships to be (as counsel for the purchaser submitted) more appropriate to the protection and transfer of existing registered interests than to the procuring of interests yet to be obtained. B C D

Their Lordships can attach no importance to the vendor's argument based on surrounding circumstances. The parties chose to fix Apr. 30, 1956, by the agreement as the date for what they themselves described as "completion" and must be bound by that choice. E

It should also be placed on record that certain evidence as to an alteration made in cl. 4 of the draft of the agreement when the matter was in negotiation, which Good, J., appears to have admitted, was, in their Lordships' view, wholly inadmissible for the purpose of construing the agreement itself, and was by common consent excluded from consideration at the hearing before them. F

For the reasons above stated, which substantially accord with those expressed by the majority of the Court of Appeal, and also accord with the principles of *Smith v. Butler* (15) and *Re Sandwell Park Colliery Co.* (16), their Lordships are of opinion that the purchaser's appeal to that court was rightly allowed and that the present appeal by the vendor must fail. Their Lordships will, therefore, report to the Head of the Federation of Malaya as their opinion that this appeal ought to be dismissed and that the appellant ought to pay the costs of this appeal. G

Appeal dismissed.

Solicitors: *Shelton, Cobb & Co.* (for the appellant); *Peacock & Goddard* (for the respondent).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

(15) [1900] 1 Q.B. 694.

(16) [1928] All E.R. Rep. 651; [1929] 1 Ch. 277.

A

KEATS v. GRAHAM AND ANOTHER.

[COURT OF APPEAL (Lord Evershed, M.R., Sellers and Harman, L.J.J.), November 26, 27, 1959.]

B *Landlord and Tenant—Repair—Damages for failure to repair—Failure to deliver up in repair—Premises to be demolished—Premises erected pursuant to conditional development permission under Town and Country Planning Act, 1947—Condition that building should be removed by Apr. 1, 1956—Tenancy terminated on Mar. 28, 1957—Evidence—Landlord and Tenant Act, 1927 (17 & 18 Geo. 5 c. 36), s. 18 (1).*

C The plaintiff was the present landlord of certain premises* which were let to the defendants by the plaintiff's predecessor in title under a lease dated Aug. 25, 1952, for a term of three years from that date. After the three years the defendants held over on the terms of the lease, which contained, among other covenants on the part of the lessees, (a) a covenant to yield up the premises in good repair, and (b) a covenant to use the premises for no other business than that of "stove enamelling and spraying and metal finishing".

D Permission to erect the premises and to use them for storage purposes for a period of seven years ending on Apr. 1, 1956, had been given to the then landlord by the local authority on Mar. 23, 1949, under the Town and Country Planning Act, 1947, subject to the condition that the premises were removed at the end of the seven years and the permitted use was to be discontinued unless permission to retain them and to continue the use for a further period were granted. In June, 1953, the defendants were granted permission by the local authority to use the premises for stove enamelling until Apr. 1, 1956.

E On Feb. 15, 1954, an application by the plaintiff for permission to retain the premises after Apr. 1, 1956, and to continue to use it, after that date, for stove enamelling or any industrial use, was refused by the local authority.

F By a letter dated Oct. 17, 1956, the defendants were informed of the failure of an application which they had made to the Minister of Housing and Local Government for permission to continue the use of the premises for the purposes of their business. On Dec. 12, 1956, the local authority sent to the defendants a letter which may have been really intended for the plaintiff, but the plaintiff never saw it. In this letter the local authority referred to the letter of Feb. 15, 1954 (which was sent to the plaintiff's representative), and to the Minister's letter of Oct. 17, 1956, to the defendants, upholding the decision of the local authority, and requested a written assurance within the next fourteen days that the premises would be removed without delay. On Jan. 31, 1957, the defendants wrote to the plaintiff saying that they would be leaving the premises in about four to six weeks' time, and they terminated the tenancy on Mar. 28, 1957. No further steps had been taken by the local authority in regard to the removal of the premises. In May, 1957, the plaintiff let the premises to another tenant, and in November, 1957, he received permission from the local authority to retain the premises until Dec. 1, 1962, and to use them for storage and light industrial purposes. In an action by the plaintiff against the defendants for damages for breach of the covenant to yield up the premises in good repair, the defendants relied on

I s. 18 (1)† of the Landlord and Tenant Act, 1927.

Held: by virtue of s. 18 (1) of the Landlord and Tenant Act, 1927, damages were not recoverable for breach of the covenant to yield up the premises in good repair for the following reasons—

* See footnote (4) p. 922, post. For simplicity no differentiation is made in the headnote between the front part of the premises and the rear extension.

† The terms of the subsection are printed at p. 921, letter C, post.

(a) the date at which it had to be shown for the purposes of s. 18 (1) whether the premises would "at or shortly after the termination of the tenancy have been or be pulled down" was the date of the termination of the tenancy, viz., Mar. 28, 1957.

Salisbury v. Gilmore ([1942] 1 All E.R. 457) followed.

(b) on the evidence (including therein the letter of Dec. 12, 1956) the defendants had discharged the burden of proof that at Mar. 28, 1957, the premises would shortly thereafter be pulled down.

SEMBLE: the evidence of re-letting in May, 1957, and of the permission in November, 1957, which events were subsequent to the termination of the defendants' tenancy, was not strictly admissible, there being in the present case no such ambiguity as would require evidence of events subsequent to the termination of the tenancy to explain it (see p. 924, letter H, post).

Appeal allowed.

[As to damages for breach of a covenant to leave premises in repair, see 23 HALSBURY'S LAWS (3rd Edn.) 591, para. 1276; and for cases on the subject, see 31 DIGEST (Repl.) 378, 5069, 5070.]

For the Landlord and Tenant Act, 1927, s. 18 (1), see 13 HALSBURY'S STATUTES (2nd Edn.) 902.]

Case referred to:

Salisbury v. Gilmore, [1942] 1 All E.R. 457; [1942] 2 K.B. 38; 111 L.J.K.B. 593; 166 L.T. 329; 31 Digest (Repl.) 378, 5069.

Appeal.

This was an appeal by the first defendant, Barnett Graham, from a judgment given by His Honour JUDGE NICHOLAS at Shoreditch County Court on Apr. 10, 1959. The plaintiff, Gerald Keats, was the landlord of premises known as 30, Oldhill Place, Hackney, which had been let to the defendants (the first defendant and Richard Chesher, the second defendant) by the plaintiff's predecessor in title (Mrs. Yetta Keats) under a lease dated Aug. 25, 1952, for a term of three years from that date. The defendants held over at the expiration of the term and vacated the premises on Mar. 28, 1957. In an action against the defendants, the plaintiff alleged in his particulars of claim, that they were in breach of their covenant to yield up the premises in good repair and claimed damages for dilapidations. The second defendant took no part in the proceedings. By his defence the first defendant denied that there was any sum owing to the plaintiff in respect of dilapidations, and, alternatively, raised, in para. 7, a special plea based on s. 18 (1) of the Landlord and Tenant Act, 1927. By agreement between the parties, it was agreed that this special plea should be determined as a preliminary issue. The learned county court judge held that the special plea failed, and gave judgment for the plaintiff on the issue. The facts and para. 7 of the defence are set out in the judgment of LORD EVERSHERD, M.R.

Aron Owen for the first defendant.

P. A. W. Merriton for the plaintiff.

LORD EVERSHERD, M.R.: This is an action on a covenant in a lease to recover a sum for dilapidations. By his defence, however, the first defendant raised a special plea, which is set out in para. 7:

"... if, which is denied, the defendants are in breach of the ... covenant as alleged ... this defendant will submit that the single story building at the rear and forming part of the ... premises was, at the time of the termination of the defendant's tenancy in or about March, 1957, to have been pulled down and the plaintiff is not entitled to claim the alleged or any damages."

That is a reflection of certain language in s. 18 (1) of the Landlord and Tenant Act, 1927. Before the county court judge it was agreed by the two parties to

A the suit that the question raised in what I call that special plea should be determined as a preliminary issue, and the learned judge accordingly applied himself to do so.

B The premises consist of a front piece and a rear extension, the whole being known and described in the lease in question as "workshop and buildings . . . 30, Oldhill Place . . . Hackney". The lease was dated Aug. 25, 1952, and was for a three-year term; but the learned judge found that it terminated (for the purposes with which we are concerned) on Mar. 28, 1957, and no one in this court has challenged that part of the finding. The defendants must therefore be taken to have held over on the terms of the lease until that date.

I turn now to s. 18 (1) of the Landlord and Tenant Act, 1927:

C "Damages for a breach of a covenant . . . to leave . . . premises in repair at the termination of a lease . . . shall in no case exceed the amount (if any) by which the value of the reversion . . . in the premises is diminished owing to the breach . . . and in particular no damage shall be recovered for a breach of any such covenant . . . to leave . . . premises in repair at the termination of a lease, if it is shown that the premises, in whatever state of repair they might be, would at or shortly after the termination of the tenancy have been or be pulled down . . ."

D It is in respect of the last part of the subsection that the present question arises.

E The language which I have read was subjected to some critical consideration in this court in *Salisbury v. Gilmore* (1). LORD GREENE, M.R., for example, dealt (2) with the criticism of the language which had led the learned judge at first instance to come to the conclusion that the words, as they stood, could not be given any effective meaning. I need not take time by reading what LORD GREENE, M.R., said, because what it came to was that the formula that the premises "would at or shortly after the termination of the tenancy have been or be pulled down" meant (at any rate for the purposes of this case) that the premises were going at that date to be pulled down, then or shortly thereafter. Having referred to *Salisbury v. Gilmore* (1), I add this which is relevant about it: it was a case in which no one but the landlords (the plaintiffs) and the tenants were concerned, that is to say, it was a case in which no local authority had taken any part; but the landlords had indubitably intended, and made plans accordingly for, the pulling down and reconstruction of the premises. The lease terminated on Sept. 29, 1939, which was a little more than three weeks after the outbreak of the war, and the point arose because, war having broken out and certain regulations later having come into force, the landlords had had to abandon their intention; therefore they sought to say that, whatever might have been their intention prior to the outbreak of war, at the date of the action the fact was that they no longer intended to pull the premises down, because they could not have done so, however much they wanted to. The court, however, held that for determining the question raised by the formula in s. 18 (1) of the Act of 1927 one had to look at the date Sept. 29, 1939, when the tenants went out and the lease determined, and at that date the proper inference was that the original intention of the landlords still subsisted.

H One other matter of a little importance is also dealt with in the judgment of LORD GREENE, M.R. The formula which I have read could not be simply expressed by such a formula as "if it is shown that the landlords intended to pull down the premises", or some similar form of words, because, as LORD GREENE, M.R., observed (3), the formula had to cover the case where the pending destruction or pulling down depended, not on any intention of the landlords, but on the effect of some local authority activity such as a demolition order, or a compulsory purchase order under a town planning scheme.

(1) [1942] 1 All E.R. 457; [1942] 2 K.B. 38.

(2) [1942] 1 All E.R. at pp. 460, 461; [1942] 2 K.B. at p. 46.

(3) [1942] 1 All E.R. at p. 460; [1942] 2 K.B. at p. 45.

I now turn to the present case. I venture to put the problem posed by the preliminary issue and s. 18 (1) of the Act of 1927 in this form: What, at the termination of the tenancy, as a matter of fact, is the answer to the question, Were the premises (4) then going to be shortly pulled down? That question can only be answered by forming a view on all the material that was then available. The history of the premises, so far as is relevant, is contained in a bundle of correspondence which opens with a letter, dated Mar. 23, 1949, and addressed to the predecessor in title of the plaintiff by the architect to the London County Council. It is headed "Town and Country Planning Act, 1947. Permission for Development (conditional)". In that letter it is stated that the council thereby permit "the development referred to in the undermentioned schedule subject to the conditions set out therein..." In the schedule the development is thus described:

"The erection and retention for a limited period of a building at the rear of No. 30 Oldhill Place, Hackney, and to its use for storage purposes."

There follow the conditions, of which the first is the relevant one:

"The limited period for the retention of the building and the use being seven years from Apr. 1, 1949, at the expiration of which period the building shall be removed, and the use herein allowed shall be discontinued, without compensation, unless the council shall have previously approved retention of the building and continuance of the use for a further period."

The terms of that document reflect the provisions of the Town and Country Planning Act, 1947, by s. 12 of which it is provided that after the appointed day (5), which had then passed, permission under this Part of the Act (6) "shall be required in respect of any development of land". Section 14 of the Act indicates that permission may be conditionally granted. I emphasise the words "any development of land".

It therefore plainly appears that the plaintiff's predecessor then got permission to put up what I shall henceforth call "the extension", at the rear of 30, Oldhill Place, but on terms that it should be removed at the end of seven years, namely, on Apr. 1, 1956; permission was also given to use the extension, after its erection, for storage purposes. Undeterred by the limitation as to user, the plaintiff's predecessor granted to the defendants on Aug. 25, 1952, a lease which contained a covenant that the tenants would use the premises for no business other than that of "stove enamelling and spraying and metal finishing", which I understand to be classified as a "special industrial" use (7), and which certainly is not "storage". That, however, is not, in the present circumstances, particularly relevant, because there is no doubt that permission for the use for stove enamelling was subsequently obtained.

The story, as indicated in the correspondence, is that the two defendants, who carried on their business through the medium of a limited company which they formed and called General Enamelling Co., Ltd., received on Apr. 24, 1953, a letter from the architect to the London County Council drawing their attention to the fact that the use of the extension for stove enamelling was contrary to the permission which had been granted, and that, if they wanted to make it lawful, they would have to make an application to the council accordingly. That they did; and the result of their application was that on June 24, 1953,

(4) The premises consisted of a front portion and a rear extension. The rear extension only was threatened with being pulled down; but nothing turned on this difference between front and rear, as no issue in fact arose with regard to the front (see p. 926, letter H, post). Accordingly the "premises" are in substance the rear extension.

(5) July 1, 1948.

(6) Part 3, headed "Control of Development."

(7) See the Town and Country Planning (Use Classes for Third Schedule Purposes) Order, 1948 (S.I. 1948 No. 955), Schedule, Class 8 (Special Industrial Group C); 21 HALSBURY'S STATUTORY INSTRUMENTS 37.

- A they obtained leave to use the extension, for a limited period, for stove enamelling but for no other purpose; and again the limited period was until Apr. 1, 1956, when the use would have to be discontinued. In other words, at this time, 1953, the council said that during the life of the extension, notwithstanding what had previously been said, the special industrial use, stove enamelling, was permitted. The matter is made, I think, more clear by a paragraph in the letter of June 24,
- B 1953, addressed to the secretary of General Enamelling Co., Ltd., in which the architect says:

"I have to inform you that this permission is granted as a temporary measure to run concurrently with the permission granted Mar. 23, 1949, for the erection and retention of the building at rear until Apr. 1, 1956."

- C The next episode reported in the correspondence is, to my mind, one of considerable importance. I am not sure whether at this time the plaintiff was the landlord, but the document which I am about to read was addressed to someone who was acting for him, as I understand, and was his brother, a surveyor (8). In December, 1953, the landlord had made a further application; and the response is the letter dated Feb. 15, 1954, which I am about to read and which
- D is headed "Town and Country Planning Act, 1947. Refusal of permission to develop". The letter states that the council "hereby refuses to permit the development referred to in the undermentioned schedule..." That development is thus stated:

- E "The retention of the rear addition [the extension] and the continued use of No. 30 Oldhill Place, Hackney, for stove enamelling or any industrial use after Apr. 1, 1956."

The council, then, were at this stage making quite plain that they would adhere to the condition originally imposed, namely, that the retention of the extension could not continue after Apr. 1, 1956; and that the use of any part of the premises, 30, Oldhill Place, for any industrial purpose, and not only stove enamelling, similarly would come to an end on Apr. 1, 1956.

- F April 1, 1956, in due course came; and it appears that no step was taken by the local authority to enforce the condition which they had imposed. The defendants, who were concerned only to carry on their business, tried to get further permissive authority for doing so. Having failed to get any further help from the London County Council, they took the step, which they were entitled to
- G take under s. 16 of the Act of 1947, of appealing to the Minister of Housing and Local Government. The result of that appeal, unfortunately, from their point of view, was a failure; and the next document in the correspondence is a letter, dated Oct. 17, 1956, from the Ministry, so informing the defendants. It is quite plain, as counsel for the plaintiff observed, that this document is related only to the special industrial use in which alone the defendants were concerned:
- H it was their business. The plaintiff had, indeed, tried to help the defendants; and we understand that he gave evidence in their support at the inquiry. None the less it was a failure. The letter of Oct. 17, 1956, intimated the failure of the application, and the writer pointed out that the Minister took the view that "this special industrial use" was wrongly sited in the area: it was substantially
- I a residential area. That, therefore, was the end of the defendants' application.

The next document is another letter which is of considerable importance but which is not entirely unattended by mystery. It is again from the architect to the London County Council; it is dated Dec. 12, 1956, and is addressed to the secretary of General Enamelling Co., Ltd., opening, a little surprisingly, with the words "Dear Madam". The letter is headed by a reference "AR/TP.44172", and it says:

(8) This letter was addressed to "A. V. Keats, Esq."

"With reference to the council's letter dated Feb. 15, 1954, refusing the retention of the rear addition at the above-mentioned premises after Apr. 1, 1956, I would draw your attention to the Minister of Housing and Local Government's letter of Oct. 17, 1956, upholding the council's decision, and request your written assurance within the next fourteen days that the rear addition will be removed without delay."

I make no attempt to solve the mystery, but I suspect that there must have been some confusion in addressing this letter. The reference to the letter of Feb. 15, 1954, is a reference to the letter which I have already read (9) and which was addressed to Mr. Keats; and the two letters happen to contain the same reference at the top—"AR/TP.44172": moreover, originally, the landlord was a Mrs. Keats, a lady. On the other hand, it is true to say that the letter of Dec. 12, 1956, refers also to the Minister's letter, which had been addressed to General Enamelling Co., Ltd. (that is, for this purpose, the defendants, who were the appellants on that occasion); but, whether the letter was intended for the plaintiff or was correctly sent to the defendants, it is certainly the fact, on the material before us, that the plaintiff never saw it, or a copy of it. The effect of it on the defendants, when added to the failure of the appeal to the Minister, was not surprising. On Jan. 31, 1957, they wrote to the landlord saying that they would be leaving the premises in about four to six weeks, and on Mar. 27 they handed over the keys. There is no evidence that they replied to the architect's demand for an assurance about removing the extension. There is evidence that, a fortnight or so before they went, a representative of the council called on them, but there was no evidence of what he had said or what took place. The fact is, undoubtedly, that, although no assurance had been given, the council took no further steps at all by way of enforcing the condition which they had attached to the permission to erect the extension. So we arrive at the date of the termination of the tenancy on Mar. 28, 1957.

Before the learned judge, two other matters of fact were proved. The first was that in May, 1957, some six weeks after vacation by the defendants, the plaintiff let the premises again to another tenant, for use (on this occasion), not as a place for stove enamelling, but for the business of the "manufacture of glazing compounds and allied products". Next it was proved that in October, 1957, the plaintiff applied again to the London County Council for permission for development, and received on this occasion a conditional permission (10). The permission was to retain, for a limited period, the extension and to use the 30, Oldhill Place, premises, including the extension, for storage and light industrial purposes—the time limit imposed being Dec. 1, 1962. It has been debated before us whether these events, occurring after the termination of the tenancy, were really admissible at all. My own inclination, based on *Salisbury v. Gilmore* (11), is that, strictly speaking, they were not admissible. What the court is required by s. 18 (1) of the Act of 1927 to do is to reach a conclusion of fact: Aye or no, were these premises going to be pulled down as things were at the date of the termination of the tenancy? No doubt it may be said that, if some matter of fact is doubtful, later events may by reflection clarify and explain what had gone on before. But there is, to my mind, no such ambiguity in the present case. I will assume for the purposes of the rest of my judgment, however, that it was proper to receive this evidence, though what may be the weight of it is, in the present case, a very different matter.

The learned judge came to the conclusion that the first defendant had not discharged the onus which the section places on the tenant. He did undoubtedly attach some considerable weight to the circumstance that, as these later events

(9) See p. 923, letters C and D, ante, and footnote (8).

(10) The letter from the council's architect, saying that conditional permission was granted, was dated Nov. 19, 1957.

(11) [1942] 1 All E.R. 457; [1942] 2 K.B. 38.

- A showed, the extension had not been pulled down, and he inferred against the tenant that it was not right to say at the termination of the tenancy that the extension was "shortly going to be pulled down". With great respect to him, I have reached a different conclusion. It seems to me that, as s. 18 (1) requires, one has to form a conclusion as matters stood on Mar. 28, 1957, and, on the facts as presented, answer as best one can the question: Is it shown that the extension
- B was then going to be pulled down? The most, as it seems to me, that the later documents might do would be to reflect something that was apparently doubtful prior to Mar. 28: but, on the material, and as things stood on Mar. 28, it seems to me that the inevitable inference was that the extension was then shortly going to be pulled down.

- Let me summarise the reasons for that view. In the first place, the extension
- C had only been erected on the condition that it was pulled down on Apr. 1, 1956, and the landlord, unless he got some further permission, was plainly under obligation to perform the condition imposed. Not only so, but he had tried in 1954 to get a further extension and failed. He had been told in plain terms in that year by the document of Feb. 15 which I have already read (12) that permission for further development was refused, and that, therefore, the retention
- D of the extension after Apr. 1, 1956, would not be permitted. Finally, there is the letter of Dec. 12, 1956, which the architect of the London County Council sent to the defendants, and in which he called attention specifically to the council's refusal of permission in February, 1954, and asked for a written assurance within fourteen days that the rear addition would be removed without
- E delay (13). It is unfortunate, I think (or may be unfortunate, being wise after the event), that somebody from the council was not called who could have stated clearly what the council's then view was as to enforcing the condition. But the documents which I have mentioned—particularly the last one—seem to me, at any rate, to have thrown the onus on the plaintiff if he was going to say that the letter of Dec. 12, 1956, did not in truth reflect what was going to happen; and, in my judgment, what later did happen, when the application was made
- F in October, 1957, is not sufficient to discharge the onus so shifted. It seems to me (in other words) that on this material, anybody who had to answer the question, in March, 1957, "Is this extension shortly going to be pulled down?" would have had to say, on the evidence, "Well, yes, it is". It is quite true that no steps for enforcement had been taken; but it is well known that these matters do not always proceed with the greatest possible speed. None the less, there was
- G a building which could not have been erected without permission in the first instance, and had been erected pursuant to a permission which imposed the condition that it should be taken down in April, 1956.

- With all respect to the learned judge, I venture to think that he did not give the weight which he should have done to the two documents to which I attach importance, those of Feb. 15, 1954, and Dec. 12, 1956. Thus, he says in his
- H judgment, as regards the February letter:

"So in February, 1954, the London County Council were confirming that after Apr. 1, 1956, the retention and use of the premises for stove enamelling would not be permitted."

- That, as I have indicated, is not a correct interpretation or statement of the effect of the February letter. The February letter refused permission for the retention of the extension at all after Apr. 1, 1956, and, as regards the user of the premises as a whole, the refusal was not confined solely to stove enamelling but was to cover "any industrial use" (14). I venture to think that the view which the learned judge took of the February letter may have perhaps affected the significance that he gave to the letter of Dec. 12, 1956. He says as regards that letter:

(12) See p. 923, letters C and D, ante.

(13) See p. 924, letter A, ante.

(14) See p. 923, letter D, ante.

"By Dec. 12, 1956, neither owner nor occupier had any right to retain the extension or to use it for special industrial purposes."

Again, I interpolate that that is not correct. They had no right to use it for *any* industrial purpose.

"It was obviously the duty of the London County Council to discover what was the intention of the occupier. The letter of Dec. 12, 1956, was written to the defendants—if they went that would have been the end of the matter."

Again, with respect, that is not right, and proceeds on the assumption that all that was involved as between either the plaintiff or the defendants, on the one hand, and the London County Council, on the other, was the special industrial user. Finally, the learned judge was led to conclude:

"I do not agree that this letter can be taken as evidence of the intention of the London County Council to demolish or of a decision that the back addition should be demolished. It was to find out what the occupier intended to do. If [the council] were of the mind that, whatever application be made, it had to come down, I would have expected something like this sent to the owner and an enforcement notice would have followed. I do not draw the inference that in December, 1956, the premises had to be demolished. The [council] had decided that it was not to be used for the special industrial purpose for which it was used by the defendants. It seems likely that the defendants would have succeeded in an application for light industrial user such as existed in the immediate vicinity."

With respect, I am unable to agree with the basis of that part of the judgment. It seems to me that the learned judge has supposed that the only permission that was required would be for the special industrial use. I have already indicated that the letter of Feb. 15, 1954, had made it quite clear that any industrial use was prohibited after Apr. 1, 1956, and the letter of Dec. 12, 1956, in the plainest possible terms required the removal of the extension. It seems to me impossible to say that the second letter cannot be taken as any evidence of the intention of the London County Council that the condition as to removal should be enforced. I quite agree that no enforcement action had been taken; but still, in light of the terms of that letter and the whole history as I have tried to relate it, I conclude without hesitation that the right answer to the problem posed by s. 18 (1) of the Act of 1927, and incorporated in the last paragraph of the defence (15), is that at the relevant date, Mar. 28, 1957, the first defendant has shown that this extension was going shortly to be removed or taken down.

The only other point which I would add by way of clarification is that the plaintiff's claim originally extended to dilapidations both as regards what I have called the main or front portion of 30, Oldhill Place, and the extension; but we understand that no issue arises as to the front or main portion, and we are, therefore, confined to the question as it affects the extension. For the reasons which I have given, I think that the first defendant has shown that he is under no liability to pay damage for breach of the covenant to deliver up the extension in proper repair, and that the appeal, accordingly, should be allowed.

SELLERS, L.J.: I agree with my Lord's judgment. As the first defendant relied on s. 18 (1) of the Landlord and Tenant Act, 1927, there arises for consideration, as a preliminary point, under the second part of that subsection, the question whether the extension "would . . . shortly after the termination of the tenancy . . . be pulled down . . ." The termination of the tenancy was on Mar. 28, 1957, and the issue of fact was to be adjudged on the evidence whether that had been established by the defendants, who were the tenants. The important evidence on that issue, to which, it seems to me, the

(15) See para. 7 of the defence, p. 920, letter I, ante.

- A greatest weight should be given, was the fact that the extension itself was erected after March, 1949, on the basis of permission which had then been granted under the Town and Country Planning Act, 1947, by the London County Council, and the condition of its erection was that it was for a limited period, that period being seven years from Apr. 1, 1949. Therefore, at the outset it was erected as a temporary building and it was known that its life—although
- B there was provision for its retention if it was thought necessary or reasonable—might be no more than until Apr. 1, 1956.

In 1954 there was, I think, another indication of important evidence for consideration on the issue which arises. In their reasons for refusal to grant any use of the premises for “stove enamelling or any industrial use” at all after Apr. 1, 1956, the London County Council, through their appropriate officer,

- C said (16):

“Reasons for refusal: (i) The proposed uses are undesirable and inappropriate as a permanent measure, particularly having regard to the council’s development plan for the area, which envisages a residential use. (ii) The further extension of a non-conforming use in an area envisaged for residential use in the council’s development plan is inappropriate and undesirable.”

- D By the time when the tenancy had terminated or the lease was concluded, in March, 1957, it is true that the extension had remained up without any order for its demolition some twelve months after the time of the expiration of the seven years. But I do not think that that is evidence of the probability that it would continue. I should have thought that it was more likely to be regarded as
- E evidence that the time was approaching when the extension would have to be demolished. The complication in this case which, I think, has influenced the learned judge’s mind perhaps unduly and inappropriately is that there was introduced into the case evidence which arose after the material date. I am inclined to think that in the majority of cases evidence of events after the material date for consideration would be immaterial and, therefore, inadmissible.
- F Perhaps that ought to be qualified to this extent, that it may be that a future event may cast some light on an uncertain state of mind or an intention at a prior date. But that can very rarely happen. It would not be admissible, I think, to adduce evidence that at a later date than the material date for consideration the building was still standing, because that would not affect the issue for consideration: it would really be a statement as to what in fact had developed.
- G I think that that is clear from the nature of the inquiry stated in s. 18 (1), which has been illuminated by two authorities (17) to which we have been referred, and on this point particularly by *Salisbury v. Gilmore* (18), where LORD GREENE, M.R., dealt with this particular matter in this way—true on an admission of learned counsel:

- H “He [counsel for the plaintiff] admitted that, if the intention of the plaintiff to pull down the building still prevailed at the termination of the lease, the subsection would apply and that a change of intention at a later date would not assist him.”

If one is looking at evidence at a later date, it may well be that it indicates a change of intention and does very little, if anything, to assist the inquiry as to what were the probabilities at the time when the lease came to an end. I think

I that this issue has to be decided on the probabilities and in the light of the two matters which I have mentioned and in the light of the letter (19) which was sent, perhaps inadvertently, to the defendants saying that the rear addition

(16) In the letter dated Feb. 15, 1954; see p. 923, letters C and D, ante.

(17) *Salisbury v. Gilmore* ([1942] 1 All E.R. 457; [1942] 2 K.B. 38) and *Cunliffe v. Goodman* ([1950] 1 All E.R. 720; [1950] 2 K.B. 237).

(18) [1942] 1 All E.R. at p. 461; [1942] 2 K.B. at p. 47.

(19) The letter of Dec. 12, 1956; see p. 924, letter A, ante.

would have to be removed without delay, with a request for a written assurance within the next fourteen days that that would take place, and the fact that the defendants subsequent to that, in January, 1957, gave notice that they were going to leave the premises and eventually went in March, 1957. In those circumstances and on the probabilities, balanced with such evidence as could be set on the other side, balanced with the statement of the plaintiff that he had no intention of demolishing the extension—as far as he was concerned he would retain it as long as he could, which was of little effect if the authorities thought otherwise—I think that the learned county court judge took an erroneous view in deciding that the requirements of this limb of s. 18 (1) of the Act of 1927 had not been complied with. On the probabilities, I think that the evidence goes the other way. For those reasons, together with the more detailed reasons given by LORD EVERSHED, M.R., I also would allow the appeal.

HARMAN, L.J.: I too agree. The finding of the learned judge depended on the inference which he drew from the letter of the county council architect written in December, 1956. His position was quite logical. If the inference which he drew was right, namely, that the only purpose of that letter was to get the defendants out of the premises because their particular use was disliked by the county council, and that, if and when that end was achieved, there was not any real intention to order the demolition of the building at all, then of course the learned judge's conclusion followed. But I do not see any evidence which entitled the judge so to construe that letter or to draw such an inference in the absence of any oral testimony. I think that the proper inference was the other way, and the result would be that which my Lords have agreed that it is.

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: *Saunders, Sobell, Greenbury & Leigh* (for the first defendant); *Stanley de Leon, Lewison & Co.* (for the plaintiff).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]



